the party may be interdicted, but nothing of the kind is alleged here.

LORD MURE—The pursuer's argument has proceeded on a misapprehension of the principle laid down by Mr Bell. As I read the passage, I think the important words are "if not necessary." The words refer to common walls and passages, and the breaking out of a door may not be necessary, but the opening of a chimney in a gable is necessary, and is a fair and reasonable operation in itself.

The Court pronounced the following interlocutor:—

"Their Lordships having heard counsel on the reclaiming note for the pursuer Neil Lamont against Lord Curriehill's interlocutor, dated 4th January 1875, recall the said interlocutor in so far as it reserves to the pursuer any claim competent to him against the defender for payment of a part of the value of the said mutual gables, and in place thereof reserve to the pursuer any pecuniary claim competent to him against the defender in respect of his making use of the said mutual gable. *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming note; find the defender entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Rhind and Asher. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Defender—Solicitor-General (Watson), Q.C., and Brand. Agent—A. Kirk Mackie, S.S.C.

Tuesday, June 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

EARL OF BREADALBANE *v.* JAMIESON.

Statute 1592, *c.* 12—*Mines and Minerals—Precious Metals.*

Where mines and minerals were transferred by the Crown to the owner of the lands containing them, and a general conveyance (in which the mines were not excepted) was subsequently made of these lands by the owner—*Held* that the general conveyance carried with it the right to all the minerals contained in the lands conveyed.

This was an action of declarator and reduction at the instance of the Right Honourable Gavin Earl of Breadalbane and Holland against George Auldjo Jamieson, chartered accountant in Edinburgh, judicial factor on the trust-estate of the late Most Honourable John second Marquess of Breadalbane, to have certain deeds set aside, and to have it declared that the pursuer was proprietor of all the mines and minerals within his lands.

The facts of the case and the state of the titles are fully set forth in the note to the Lord Ordinary's interlocutor, as follows:—

"*Edinburgh*, 13*th February* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, productions, and whole process—Finds and declares that the pursuer has the sole and exclusive right to the mines of gold, silver, lead, copper, and tin, and of other metals and minerals within the lands and earldom of Breadalbane, and the other lands and estates formerly belonging to John Lord Glenorchy, afterwards third Earl of Breadalbane, and to possess and enjoy the same under and in virtue of his rights and titles to the said lands and earldom of Breadalbane and others, and decerns: Reduces, decerns, and declares in terms of the reductive conclusions of the summons, except in so far as the same are directed against the Crown charter in favour of the said John Lord Glenorchy, and his heirs therein mentioned, dated on or about 1st March 1742, and the sasine following thereon, being the writs first and second sought to be reduced, and, as regards these writs, dismisses the action, and decerns: Finds the defender George Auldjo Jamieson, as judicial-factor on the trust-estate of the late Most Honourable John second Marquis of Breadalbane, liable in expenses to the pursuer; appoints an account thereof to be lodged, and, when lodged, remits the same to the Auditor of Court to tax and to report.

"*Note.*—The Earl of Breadalbane, the pursuer of this action, is proprietor of the lands and earldom of Breadalbane. He succeeded to the estates on the death of his father, the sixth Earl, and made up titles thereto as heir of taillie and provision to his father, under an entail executed by the third Earl of Breadalbane in 1775. He recently disentailed the estates under the authority of the Court of Session, so that they now belong to him in fee-simple.

"The heir of entail in possession of the estates immediately before the pursuer's father was John fifth Earl and second Marquis of Breadalbane, who died in 1862, leaving a trust-disposition and settlement, dated 26th November 1847, by which he conveyed to trustees all and sundry lands, estates, mines, leases, and heritable subjects then belonging or which should belong to him in fee-simple at the time of his decease These trustees having all failed, from death, non-acceptance, or resignation, the defender Mr Auldjo Jamieson has been appointed by the Court to be judicial factor on the trust-estate of the Marquis. The lands and estates forming the earldom having been held by the Marquis under the fetters of a strict entail, these passed to the pursuer's father as the next heir of entail, and now belong to the pursuer as already explained but Mr Jamieson maintains that the mines and minerals within the said estates were not entailed, and that they form part of the fee-simple estates of the Marquis, now vested in him as factor, and he has accordingly intimated to the pursuer that he intends forthwith to enter upon the lands forming the original earldom of Breadalbane, and to open up and work the mines and minerals therein.

"The pursuer, on the other hand, maintains that the mines and minerals belong to him, as the proprietor of the estates, and he has raised the present action against Mr Jamieson as judicial factor, for reduction of the titles under which the defender claims the mines and minerals, and for declarator of his own right to these subjects.

"It is necessary carefully to examine the titles of the parties in order rightly to understand the questions which are now presented for decision.

"(1) In 1704 John, the first Earl of Breadalbane and Holland, executed a deed of entail of All and Haill the lands and earldom of Breadalbane, comprehending the lands, baronies, burghs of barony, teinds, rights of patronage, heritable offices, titles of honour and dignity, and others, particularly and generally as therein mentioned, in favour of his son John Lord Glenorchy, afterwards second Earl of Breadalbane, and his grandson John Master of Glenorchy, afterwards third Earl of Breadalbane, and the heirs-male of their bodies *successivè*, whom failing, to the other heirs of entail therein specified. That deed of entail was dated 13th December 1704, and was recorded in the Register of Taillies on 6th July 1705, and it proceeded upon the narrative that the entailer had resolved to make a full and final settlement of the right of his lands, earldom, baronies, teinds, rights of patronage, heritable offices, and generally of his whole estate thereinafter mentioned, as also of his titles of honour and dignity, for the weal and standing of his family.

"On the procuratory contained in the said deed of entail titles to the said lands and earldom were made up after the entailer's death in 1717, by Lord Glenorchy, as second Earl of Breadalbane, and his son John Lord Glenorchy, formerly the Master of Glenorchy, and afterwards the third Earl of Breadalbane, in liferent and fee respectively, and they were duly infeft accordingly.

"(2) It thus came to pass that in 1742 the last named John Lord Glenorchy—his father, the liferenter, being still alive—stood infeft in the fee of the whole lands and earldom embraced in the entail of 1704 and under the fetters of the entail. In the titles under which Lord Glenorchy so held the estates no mention whatever was made of the mines and minerals within the lands. They were, on the one hand, not expressly enumerated as part of estates, and, on the other hand, they were not excepted or reserved. In the year mentioned (1742) Lord Glenorchy obtained from the Crown a charter, dated 1st March, and written to the seal, and registered and sealed 3d July 1742, of the mines and minerals within his estate in Scotland. The charter proceeds upon the narrative of the Act of the Scottish Parliament, 1592, c. 31, '*For furthering of the Kingis comoditie be the mynes and metallis*,' and by it the Crown granted and perpetually confirmed 'Joanni Domino Glenorchy et hæredibus masculis ejus corporis quibus deficien. aliis hæredibus masculis talliæ et provisionis in juribus et infeofamentis ejus status content. et assignatis quibuscunq. hærie. et irreliter. omnes et singulas Fodinas auri argenti plumbi cupri stanni aliorumq. metallorum et mineralium quorumcunq. quæ sunt seu inveniri contingerent infra ejus dict. statum jacen. infra illam partem Uniti Regni Scotia vocat. cum potestate illi ejusq. prædict. inveiendi et ditegendi eruendi et operandi dict. metalla et mineralia et vendendi disponendi seu ffodinas earund. in assedationem seu ffeudifirmam ullius suis subtenentibus locandi sed cum consensu omni modo Baronum Curiæ Nostræ Scaccarii in Scotia pro tempore existen. Cum universis privilegiis libertatibus et immunitatibus quibuscunq. in dict. acto contentis.' . . . . 'Solvendo inde annuatim dict. Joannes Dominus Glenorchy ejusq. prædict. nobis nostrisq. regiis successoribus justam decimam partem totius et integri auri argenti cupri plumbi stanni aliorumq. mineralium quæ lucrari et inveniri contigerint annuatim infra bondas ejus dict. status super solum ubi eadem inveniri contigerint in tali metallo crudo (lie ore) et qualitate sicut de terra eruentur libere sine ullo deductione levand. recipiend. et colligend. de tempore tali modo et per eas personas quas nos et regii nostri sucessores constituemus.' And the charter farther contained a clause of dispensation, providing that sasine taken 'apud ffortalicium seu maneriei locum de ffinlarigg vel supra Solum ullius partis ejus terrarum et hæreditatum in Scotia nunc et omni tempore futuro capienda per deliberationem terræ et lapidis sive petiæ metalli crudi (lie ore) quarumcunq. dict. fodinarum mineralium et metallorum sine ullo alio symbolo tam valida et effectualis erit sasina pro dict. integris fodinis auri vel argenti plumbi cupri stanni et cæterorum metallorum et mineralium quæ sunt aut erint reperta infra dict. Domini ejus terras et hæreditates in Scotia ac si particularis sasina capta fuerit super unamquamq. partem et portionem earund. quamvis non jacent. contigue sed in diversis vicecomitatibus et jurisdictionibus et requirent diversa symbola.' Lord Glenorchy was infeft upon that charter conform to instrument of sasine dated 24th July, and recorded 12th August 1742, the sasine having been taken at the fortalice or manor-house of Finlarrigg, and the mines being described in the instrument exactly as in the Crown charter.

"(3) Whether a Crown grant was necessary to confer upon John Lord Glenorchy the right to the mines and minerals in the estates then belonging to him, is a question which is directly raised in this action, and which will be afterwards considered, as well as the further question, whether, if such a grant was necessary the charter and sasine of 1742 are expressed in terms habile to confer such a right? On the assumption, however, that the charter was both necessary and aptly expressed for that purpose, it is clear that from and after the date of that charter Lord Glenorchy was the proprietor not only of the lands and earldom of Breadalbane, contained in the entail of 1704, but also of the mines and metals therein, the whole being held under destinations to himself and his heirs-male of taillie and provision.

"(4) In 1752 John the second Earl died, and his son, Lord Glenorchy, succeeded to the title as third Earl. In addition to the entailed estate, he was proprietor of other lands and estates which he held, not under the entail of 1704, but under fee-simple titles, or taillied titles, containing power to alter the destination. The terms of the entail of 1704 show that the desire of the first Earl, the maker of the entail, and the grandfather of the third Earl, was, that the whole of the family possessions and honours should be merged in and secured to his grandson, who was then Master of Glenorchy, and the other heirs of entail.

"(5) In order to carry out these views of his grandfather, the Master, who had now become third Earl of Breadalbane, executed a new deed of entail, dated 5th May 1775, and recorded in the Register of Taillies on the 19th day of July 1782. The narrative of this new entail is of some importance. After setting forth the entail of 1704, it farther narrates that 'I, the said Earl of Breadalbane, am now the only heir living of the bodies of the said John first Earl of Breadalbane, the maker of the said entail' [of 1704], 'and of his son John Lord Glenorchy, afterwards the second Earl of Breadalbane, my father, whereby, in the

event of my decease without issue male of my body, the succession to the said estate under the entail above recited will fall and pertain to the next heir-male whatsoever of the said John first Earl of Breadalbane, my grandfather, and thereafter will descend to his other male heirs in their order whatsoever; and last of all, to the heirs whatsoever of his son John Lord Glenorchy, my father; and whereas the titles of Earls of Breadalbane and Holland, and the other honours and dignities of the family, will, by the patent and grants thereof from the Crown, devolve upon the same series of heirs, and it is my desire and purpose, agreeably to the general plan of my said grandfather's settlement, that the whole estate of which I am possessed shall, in all time coming descend to and continue inseparably with the heirs of the titles, honours, and dignities of the family, as expressed in the foresaid patent and grants thereof from the Crown, but it is proper that a new deed of entail should be executed supplementary of the former, and calling the same heirs under more special descriptions to the succession, as well of the whole lands and estate contained in the foresaid deed of entail as of all other lands and estates acquired by myself, or belonging to me in fee-simple, or at my disposal, and which for the well and standing of my family, and the better support thereof, and of the heirs that may succeed in the titles of Earls of Breadalbane and Holland, and the other honours and dignities before mentioned, I am desirous to settle and entail, in the same manner.' . . . 'Therefore, and for divers good and weighty causes and considerations me moving,' . . . ; 'and likewise for farther securing to my heirs of entail, hereafter specified, the right of succession in my whole lands and estate hereafter mentioned, as well the original entailed estate of the family as the lands and estates standing in my person in fee-simple and at my free disposal, as before and hereafter expressed, so that the same may always go alongst with the peerage and titles and honours of the family in the same line and to the same heirs inseparably and unalienably in all time coming, as said is, throughout the whole course of succession hereafter written.'

"A procuratory of resignation then follows, of 'All and sundry the lands, earldom, baronies, teinds, fishings, patronages, and other heritages particularly and generally underwritten, viz., 'All and Haill the lands and earldom of Breadalbane, and others,' . . . 'which lands, earldom, baronies, and others above written are all contained in the foresaid entail made and executed by the said deceased John Earl of Breadalbane, my grandfather, of the date above mentioned: And in like manner All and Haill—[*Here follow a number of different subjects belonging to the Earl*]—together with all right, title, interest, claim of right, property, and possession, petitor and possessor, which I, my predecessors and authors, our heirs and successors, had, have, or anywise may have, claim, or pretend to the lands, earldom, baronies, and other heritages before disponed, or to any part or portion thereof in time coming, in the hands of my immediate superiors of the same,' &c. &c.

"The deed of entail further contains the following very full clause of assignation to rents, writs, and evidents:—'And further, I, the said John Earl of Breadalbane, by these presents assign, transfer, and dispone, to and in favour of myself and the heirs-male of my body as aforesaid; whom failing, to the other heirs of taillie and substitution before mentioned, *successive*, in the order above expressed, but with and under the provisions, conditions, reservations, irritancies, resolutive clauses, faculties, restrictions, and limitations, above expressed, not only the haill feu-blench and teind duties, rents, maills, farms, kains, customs, casualties, profits and duties, of All and Sundry the foresaid lands, earldom, baronies, teinds, tenements, and other heritages above written and resigned, with the whole parts, pendicles, and pertinents thereof, now and in all time coming, but also All and Sundry contracts, dispositions, charters, infeftments, services, retours, procuratories and instruments of resignation, precepts and instrument of sasine, apprisings and adjudications, and grounds and warrands thereof, wadsets, reversions, assignations, translations, tacks, assedations, valuations, and all other writs, evidents, rights, titles, and securities whatsoever, made, granted, and conceived, or that may be anyways interpreted in favour of me, my predecessors or authors, of or concerning the haill lands, baronies, earldom, teinds, tenements, and other heritages particularly and generally above mentioned, hail parts, pendicles and pertinents thereof, or any annual rents or yearly duties upliftable out of the same,' &c. The only observation which it is at present necessary to make upon this entail is that, while the land and earldom of Breadalbane contained in the old entail are entailed of new, the mines and metals are not expressly mentioned in any part of it either as being conveyed by the deed or as being reserved from the conveyance.

"(6) Since 1775 titles to the estates entailed by this deed have been made up under the new entail by the heirs successively called to the possession thereof, viz., by the fourth Earl and first Marquis of Breadalbane in 1782, by the fifth Earl and second Marquis in 1834, by the petitioner's father the sixth Earl, who succeeded on the death of the second Marquis, in 1862, and last of all by the petitioner himself, the seventh Earl, in 1871, although he has now disentailed the estates under the authority of the Court.

"(7) Although the fourth Earl and first Marquis was heir of entail in possession of the estates for upwards of half a century, he made up no special title to the mines and metals of which John Lord Glenorchy, afterwards third Earl, had, in 1742, obtained the charter from the Crown, and it was not until 1845, many years after the succession of the fifth Earl and second Marquis, that that nobleman procured himself served as heir in special of John Lord Glenorchy, the third Earl, 'In omnibus et singulis fodinis auri argenti plumbi cupri stanni aliorumque metallorum et mineralium quorumcunque quae sunt inveniri contigerint infra ejus statum jacen. infra illam partem Uniti Regni Scotia vocat. cum potestate illi ejusque praedict. inveniendi,' &c. The retour, which is dated 17th October 1845, sets forth that these mines and metals were held by the said Lord Glenorchy under the Crown charter of 1742, and that he was infeft therein conform to the instrument of sasine in that year already mentioned. The service is as 'propinquior et legitimus hæres masculus talliæ et provisionis dict. quond. Joannis Domini Glenorchy postea tertii Comitis de Breadalbane pro nepotis fratris abavi sui qui obiit sine heredibus masculis

ejus Corpore in totis et integris dict. fodinis auri argenti plumbi,' &c. 'Secundum et in terminis amborum seu utrumque scriptorum sequen' viz., *primo*, the deed of entail of 1704, and, *secundo*, the deed of entail of 1775. The said fifth Earl and second Marquis was afterwards infeft in said mines and metals in virtue of precept from Chancery following on said retour, dated 7th May 1849, and instrument of sasine thereon recorded in the General Register of Sasines 11th May 1849.

"(8) In the title thus expede by the Marquis the mines and metals purported to be held by him as heir of entail under the Entails of 1704 and 1775, and to be destined to the heirs substituted to him by said entails. And with a view to alter that destination, and to make his title *ex facie* a fee-simple one, the Marquis resigned the said mines and metals in the hands of the Crown, and obtained a charter of resignation thereof in favour of himself and his own nearest heirs and disponees whomsoever, sealed 21st April 1851, upon which he was infeft on 13th May 1851.

"(9.) After his death, his trustees expede infeftment in said mines and metals by notarial instrument, recorded 3d August 1863, proceeding on his trust-settlement, dated 26th November 1847; and the defender Mr Jamieson, as judicial factor on the trust-estate, has also expede infeftment thereon in his own favour by notarial instrument, recorded 5th August 1870, proceeding on a decree of the Court, dated 12th April, and extracted 6th May 1870, authorising him to complete a title to, *inter alia*, the mines and metals in question.

"The foregoing narrative of the titles appears to me to embrace all the details necessary to bring clearly into view the various questions now to be decided.

"I. The first question to be considered is, whether and how far a proprietor of lands has right to the mines and metals within the same, apart from any express grant thereof from the Crown? The general rule of law is, that a grant of land confers upon the proprietor right to every thing in and upon and connected with the lands *a centro usque ad cœlum*. The rule, however, is subject to exceptions, and in all Crown grants of land certain royal rights, termed *regalia*, are presumed to be reserved by the Crown unless expressly conveyed. And among these royal rights, or *regalia minora*, mines of gold and silver are enumerated by all the institutional writers as being excepted. It is apparently owing to feudal custom that in other countries any right in the Crown to such subjects was ever recognised. But in Scotland the right seems to rest entirely upon statute. The Act 1424, c. 12, provides, 'gif any mine of gold or silver be founden in ony lordis landes of the realme, and it may be prooved that three halfe pennies of silver may be fined out of the pound of lead, the Lordis of Parliament consentis that sik mine be the kingis, as is usual of other realmes.' This statute, which is apparently the original Act of annexation of mines, does not expressly confer upon the Crown a right to any mines and metals except gold mines and mines of lead producing a certain quantity of silver; and it further seems to confine the royal right within those limits which custom had assigned to the sovereigns of other kingdoms.

"In 1592, however, another Act of the Scottish Parliament was passed with reference to mines and metals, which it is necessary to examine with some care; because, in consequence of it not having been printed, its existence appears to have been unknown to Craig, Lord Stair, and Sir George Mackenzie, all of whom comment upon the earlier statute.

"The Act 1592, c. 31, is of considerable length, and appears to have been passed mainly for the purpose of promoting the search for and working of the precious metals in Scotland, and of securing to the Crown the regular payment of the royal duty therefor. From the preamble of the Act it appears to have been the practice of the Crown to let to adventurers—for the most part foreigners—the whole mines and metals in the country, for payment to the Treasury of a tenth of the proceeds by way of rent. This was apparently found to be an unsatisfactory method of proceeding, and to tend rather to the discouragement than the promotion of mining in the country, and accordingly the Act of 1592 proceeds upon the subsumption that on the one hand an officer should be appointed, to be termed the Master of the Metals, part of whose duty should be to look after the working of the mines throughout the country, and to attend to His Majesty's interest, while, on the other hand, the mines and metals which had been previously part of the annexed property of the Crown, and therefore inalienable without the consent of Parliament, should be dissolved from the Crown and made alienable by way of feu-disposition to be granted by the Crown in favour of the heritors of the lands for payment of every tenth penny of the proceeds.

"The words of dissolution are as follows:—'And als oure souerane uilling that all his Maiesties liegis quha will tak on hand to discouer and work the saidis mynis may have reasonable proffite and recompence of their panis [and] a sufficient securitie maid to thame of thair awin mynis within thair awin landis. And als vnderstanding that the dewtie of the said mynis qlk baith of the comoun law and consuetude obseruit be vther foren princes properlie pertenis to the prince extendis onlie to the tent part fre thairfore or said souerane lord with auise of his estaittis in parliament hes dissolutt the saidis mynis and mettallis in sa far as thay war part of his propertie anext or ony wyis to the effect the same may be sett in feu for augmentation of oure said soueraine lordis rentall. And statutis and ordanis that it sal be lesum to his heines and his successouris w' auise of the thesaurare and of the said Mr of the Mettallis coniunctlie and for reasonable compositioun to sett in feu ferme to every Erle, Lord, Barroun, and vther fre halder w' in this realme all and quhatsumeuir mynis of gould, siluer, copper, leid, tin, and vther quhatsumeuir mettallis or mineralis qlk is or may be found within thair awin landis and heritages, with power to thame to seik and discouer laboure and work the saidis mettallis and minerallis and to sell, dispone, or sett the mynis thairof in takkis or feu w' consent alwyis of the said thesaurare and maister of the mettallis coiunctlie in maner foirsaid to vthers thair subtenants at thair pleasure as thair proper gudis and heretage.' . . . 'Payand thairfore zeirlie the saidis Erlis, Lordis, Barounis, and vtheris quha sall accept the saidis feuis as said is to oure souerane Lord and his thesaurare thair factouris and suitors in thair name the just tent part of all and haill the said gould, silver, copper, leid, tin,

and vtheris minerallis qlk salbe found and gottin zeirlie w' in thair saidis landis and heritageis vpoun the ground quhair the same salbe found in sic vre and qualitie as the sam sal be gottin out of the erth frelie but ony deductioun.'

"There is a farther provision in the Act that in case of any mines being sufficiently discovered to be within any of the lands pertaining to any subject of the realm, and the lord of the ground sufficiently advertised thereof, and lawfully required to work the same himself before a notary and four witnesses as effeirs, if he refuses or delays the space of three months thereafter, 'then and in that cace it salbe lesum to or said souerane lord to set the same in few or tak or utherwyis caus work the same or to mak right thairof to any uther persone at his grace pleasure, that be the wilfull refuiss or dealy of the awnar of the ground his grace and his cuntrie be not defraudit of the comoditie of the said myne, and oure souerane lord, wt. auise foirsaid of the Parliament, Declaris that this Act of dissolutioun salbe perpetuall to last for all tyme cuming.'

"The right and interest of the Scottish Crown in mines and metals thus depends entirely upon and is regulated by the Acts of 1424 and 1592. But as only the former of these statutes appears to have been known to the earlier institutional writers, this circumstance must not be lost sight of in considering the *dicta* of these writers upon this matter. Craig says, '*Argentariæ* potestas publica est, et a solo principe concedi potest; in qua publicam fidam necesse est aliquando sequi. . . . Ego tamen per argentariam argenti fodinas potius intelligo, et idem maxima pars feudistarum sentit, quos legerim.' 'Nam metallorum fodinas omnes ad principem pertinere certum est. Sunt tamen qui putant metallorum aliorum ab auro & argento fodinas non ad Regem pertinere, sed ad dominos fundi, præstando canonem pro eis; & nisi vox hæc de argenti fodinis intelligatur, nulla earum inter hæc Regalia erit mentio, quæ tamen omissa præsumi non potest. Nam omnium gentium omniumque ætatum consensu fodinas omnes auri argenti, æris, stanni, plumbi & similium publici juris esse & in patrimonio principis numerari comprobatur; neque vocis a prima significatione declinatio quempiam movere debet, cum sciamus neque semper eandem significationem, neque etymologiam, aut formationem, Latinis vocibus post corruptionem Latinæ linguæ mansisse. Quod si *argentaria* argenti fodinam significet idem & in reliquis metallicis fodinis intelligi debet, frequens enim est in jure, sub majoribus minora comprehendi.' And in a later part of his treatise he says, 'Auri, argenti, æris, plumbi fodinæ ad feudatarium non pertinent, sed ad Regem et inter Regalia neumerantur. Ferrifodinas privatorum esse censeo, quod rari ex iis sint fructus, neque sine maximo impendio colligantur.'

"Lord Stair, in treating of those things which the law reserves as *regalia*, says that 'the superior may have them from the king either expressly in a tenement holden of the king, or tacitly where lands are erected by the king to him in a barony or any higher dignity, whereby many of these *regalia* are comprehended, *baronia* being *nomen universitatis;* yet that will not comprehend all, as *first* mines and minerals of gold and silver, or lead of that fineness that three half-pennies of silver may be fined out of the pound of lead, which mines are declared to belong to the king wherever they can be found. (Parl. 1424, c. 12.) But mines of iron, copper, and lead of less fineness belong to the proprietor, and are not accounted with us regalia, though in some other countries they be.'

And Sir George Mackenzie observes, upon the Act 1424, c. 12, that 'it has been doubted whether lead, copper, or tin belong to the king or the heritor; but the king is in possession of disponing upon these also, and when he dispones them in a novodamus even to the heritor he reserves a tenth part to be paid into his Exchequer, and His Majesty has granted gifts of all copper mines.' He then refers to the passage from Craig already quoted (L. I. D. 2, sect. 36), and in commenting upon that he expresses his own opinion to be that a grant of gold and silver mines alone would not include copper and tin, all of which he seems inclined to regard as *regalia*.

"It appears to me that the definition given by Lord Stair of the right of the Crown to mines and metals under the Act 1424 is that which ought to be preferred. It does not extend the right beyond the limits expressed in the Act, and it has been substantially adopted by the more recent institutional writers, viz., Erskine and Bankton. Before these later authors wrote, however, the unprinted Act 1592 had become known, and both of them refer to it in treating of this matter.

"Mr Erskine, after referring to the Act 1424, says, 'It appears by an unprinted Act in 1592, mentioned in the list of unprinted Acts of that year, No. 12, that not only mines of gold and silver, but of tin, copper, and lead, had been formerly annexed to the Crown, and so not alienable without consent of Parliament, but they are by that statute dissolved from the Crown, and it is made lawful to the king to set in feu-farm, not to any of his subjects indiscriminately, but to the baron or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the king, without any deduction of charges, and in case the freeholder should refuse to work them, the king may then, and then only, either cause work them for his own use or feu them to others.'

"Bankton, in treating of the same matter, says, '*Regalia* that may be communicated to subjects, whether of old included in baronies and regalities or not, require a special grant from the Sovereign to transmit them;' and he then says, 'Mines of gold and silver are *inter regalia*, and were not comprehended in the erection of lands into a barony regality. These are esteemed silver mines where three half-pennies of silver can be fined out of the pound of lead. For the improvement of such mines the privilege is granted to the heritor of the ground to work them and take the profits to himself, paying a certain consideration to the king; and if he does not lay hold on the privilege the same encouragement may be granted to others, by feus or long leases from the Crown. The statute in this behalf is not contained among our Acts of Parliament, and was unprinted and little known till of late. The benefit is not only given to the vassals of the Crown but to all other heritors; so that the subject superior can claim no interest in it, but only the proprietor of the lands; and on his default any other to whom the king shall please to confer it.'

"Now, it appears to me, that if Stair's definition

of the interest of the Crown in mines and metals is, as I think it is, the soundest and most in accordance with the Act 1424, considerable aid may be thence derived in interpreting the Act of 1592. The object of the latter Act certainly was not to confer upon the Crown any new or higher right than it previously possessed; and if under the Act 1424, which has been shown to be the only title of the Crown to mines and metals in Scotland, the right was restricted to gold and siver mines, or, what is the same thing, to gold mines and lead mines capable of producing three half-pennies of silver out of the pound of lead, it seems to follow that although mines of copper, tin, and other metals are all mentioned in the Act 1592 as if they were in the same position as gold and silver mines, the right of the Crown was not thereby extended beyond the right given by the Act 1424. In short, I think that the Act 1592 should be read as simply dissolving from the Crown such mines and metals as had previously been validly annexed, and were therefore inalienable without the consent of Parliament. The result is that mines and metals other than gold and silver mines and lead mines containing the quantity of silver already mentioned, are not reserved to the Crown as regalia, but pass to the vassal with the grant of the lands as *partes soli*. In so far therefore as the estates of the pursuer the Earl of Breadalbane contain mines and metals other than gold and silver and fine lead, it is clear that the pursuer must prevail in this action, and that if the pursuer is not himself in right of the Crown charter of 1742 that charter, and in any view the subsequent titles founded on by the defender, must be set aside if, and in so far as, the same may be held to embrace anything not strictly falling under the head of regalia.

"II. This, however, is not sufficient to decide the whole questions raised in the present action, one of which relates to the extent to which a right to gold and silver mines is conferred upon the Crown by the Act 1424. The pursuer maintains that the King of Scotland was by that Act to have right to the mines and metals in the lands of the subject to the same extent as, but to no further extent than, the sovereigns of other countries had right to the mines and metals in the lands of their subjects. And he maintains that the extent of that right is clearly defined in the Act 1592, where it is said that the 'dewties of the said mynis qlk baith of the comoun law and consuetude obseruit be uther foren princes properlie pertenis to the prince extendis onlie to the tent part fre.'

"The pursuer contends that the only right which foreign sovereigns, and therefore the King of Scotland, had to mines and metals was a right to a tenth part of the produce, and that the mines and metals, under burthen of that tenth, belonged to the proprietor of the lands at common law as *partes soli*. I think, however, that this is not the sound construction of the statute. The passage just recited occurs as introductory to that part of the statute in which the mines and metals are dissolved from the property of the Crown and are allowed to be feued out; and the reference to the duty as being 'the tent part fre' was simply made for the purpose of fixing that as the fair and usual return which the king and other monarchs should receive from mines which instead of being wrought by themselves are granted in feu to their subjects. In short, gold and silver mines until so feued out are the property of the Crown, and when feued out the reddendo is to be a tenth part of the free produce.

"III. But another and much more important question remains behind, and that is, Whether, and how far the king, by granting to his subject the mines and metals within that subject's lands by a grant in feu-farm for payment of a feu-duty, reunited the mines and metals with the lands themselves so completely as to render it unnecessary for a separate title thereto being afterwards completed by the vassal to these subjects?

"This is a question of very great difficulty; and after the best consideration which I have been able to give to it I have come to be of opinion that such a grant does not necessarily or *ipso jure* effect the consolidation of the mines and metals with the lands themselves. On the contrary, they may remain *separata tenementa*, and held on separate titles, and for payment of a separate reddendo, and they may, therefore, be the subject of separate conveyance or transmission. It appears to me, however, that the question is to be solved mainly by ascertaining the intention of the vassal in taking the Crown grant. Such intention, if not expressed, may be gathered by implication. And if it shall appear in any case that the granter, by taking the charter, really intended to consolidate the mines and metals with his lands, and if he has not afterwards done anything to indicate any change of intention, I am inclined to think that his successors in taking the lands will be held as taking and as entitled to take the mines and metals also. I arrive at this result by considering (1) that but for the express provisions of the Act 1424, mines of gold and silver, and of fine lead, would all have passed in a grant of land from the Crown to the vassal as *partes soli*, although not expressed; and (2) that the Act 1592, besides declaring the dissolution to be perpetual, makes it lawful for the king to feu to every Lord, Baron, and other landholder, and to none other, all mines and metals, &c., within their own lands. This statute has been the subject of judicial decision, and it has been held—(1) That the Crown is not merely entitled, but is bound when required, to give to each subject a grant of the minerals within his own lands. (2) That the right to demand such a grant is not restricted to freeholders who are immediate vassals of the Crown, but extends and belongs to all proprietors of land, freeholders, though holding of subject superiors. And (3) That where such a grant has once been made, a subsequent adjudication of the lands, without mention of mines and metals, is held to carry the mines, &c., in preference to a subsequent adjudication of the lands, with express mention of the mines and metals. This is an instructive case. Sir Alexander Murray of Stanhope appears to have obtained from the Crown, in terms of the Act of 1592, grants of the mines and metals in his lands of Ardnamurchan and in Peeblesshire. The case of the Duke of Argyll, above mentioned, had reference to the mines in Ardnamurchan. The case of Ochterlony dealt with the mines in Peeblesshire. Several creditors of Sir Alexander adjudged his Peeblesshire estates. The first adjudger, the Earl of Selkirk, simply adjudged the lands. Ochterlony, another creditor, subsequently adjudged both lands and mines. In a competition the question occurred, whether the mines were carried by the adjudication which mentioned the lands only? Ochterlony, who was the last adjudger, and who

had adjudged both the lands and the mines, pleaded that, in respect of the separate charter of the mines, the lands and mines were held under separate titles, and must be separately adjudged. But the Earl of Selkirk, who was the first adjudger, and who had simply adjudged the land, pleaded that, 'by the Act 1592 the proprietor of lands may demand a charter of mines, and he alone may work them; he cannot work them after the lands have been adjudged from him. Unless, therefore, the adjudication of lands carry the mines, the grant of the mines must become ineffectual, and the intention of the Act 1592 be frustrated.

"'The Lords found that the adjudication of the lands comprehended the mines.'

"The *rationale* of this judgment appears to me to be, that in the general case a grant of mines from the Crown in favour of the proprietor of the lands in which the mines are situated has the effect of reuniting the mines and the lands, so that the whole will pass to the successor of the grantee by any conveyance, voluntary or judicial, in which the mines are not expressly excepted, unless, perhaps, where the grantee has himself made a previous separate conveyance of the mines to another. If I am right in this view, it follows that, if Lord Glenorchy, after obtaining the charter of the mines of the earldom in 1742, made a general conveyance of the earldom without excepting the mines, the whole estate, including the mines, must have been carried by that conveyance, no separate conveyance of the mines having ever been made by his Lordship. But, farther, the foregoing narrative of the titles shews that in 1775 Lord Glenorchy (who had then become third Earl of Breadalbane) executed a new deed of entail in favour of himself and the substitute heirs of entail, by which he conveyed to the heirs of entail, not only the original lands and earldom of Breadalbane, but all the estates then belonging to him, with all their parts and pertinents. Now when the narrative of that deed of entail is carefully considered, I think that the conclusion is inevitable, not only that the Earl did not mean to except the mines, but that he believed that in executing that deed he was settling upon himself and his heirs of entail the old lands and earldom and all his subsequently acquired estates, and also all the accessory rights which he had acquired to any of these estates, including the mines and metals. The deed of entail was executed in 1775, after the date of the decision in the case of Ochterlony; and I think that the whole tenor of the deed shews (1) that it was with the view of carrying out his grandfather's intentions of enlarging and consolidating the family possessions that Lord Glenorchy had applied for and obtained from the Crown this grant of the mines and metals within his estate in 1742; and (2) that he believed he was entailing in 1755 not only the lands of the whole earldom and the lands subsequently acquired by himself, but also every right, title, and interest of whatever kind which he then had in the estate, and amongst these I think he must be held to have had in view the mines and minerals. On the whole matter, therefore, I think that both by the law as laid down in the case of Ochterlony, and by the intention of the entailer as described by the entail of 1775, the mines and metals in the lands and earldom of Breadalbane must be dealt with as parts and pertinents of the lands and earldom, and as having been brought under the entail. And if so, it follows that the title expede by the second Marquess to the mines and metals in 1845, not being a title as heir of entail under the tailzie of 1775, was inept, and must, with all the subsequent titles, including that expede by the defender, be now reduced and set aside. If this be the sound view of the title, it follows that the pursuer must prevail not only in the declaratory conclusions of the summons, but also in the reductive conclusions to the extent now indicated. I have therefore given decree in terms of that conclusion. It seems unnecessary, and indeed out of place, to reduce the original charter and sasine of 1742, because, if I am right, these deeds are the foundation of the pursuer's own title to the mines and metals.

IV. It is right, however, to notice a view of the title which has been presented by the pursuer, and which will deserve consideration in the event of it being held that the mines were not by the charter of 1742 amalgamated with the lands. He maintains that the grant of 1742 cannot be regarded as an effectual feu grant of these mines and metals, in respect that the lands within which the mines and metals are supposed to lie are not mentioned by name, or pointed out by any reference to locality, The grant is merely in favour of John Lord Glenorchy and the heirs-male of his body, whom failing the other heirs-male of tailzie and provision contained in the rights and infeftments of his estate and his assignees whomsoever, heritably and irredeemably, of All and Whole the mines of gold, silver, lead, copper, tin, and other metals and minerals whatsoever which are or may happen to be found within his said estate, lying within that part of the united kingdom of Scotland. The pursuer maintains that this want of specification of the subjects renders the grant inept as a feudal grant, and that the infeftment which followed in favour of Lord Glenorchy, being precisely in terms of the warrant, was wholly inept, and that the special retour by the second Marquess was inhabile as a transmission of the mines and metals, and that he himself had no title, and that the defender as representing him has none, and reference is made to the case of *Belshes* v. *Stewart*, 21st January 1815, F. C. I am not inclined to adopt this argument of the pursuer's to its full extent, because, although Lord Glenorchy may not have been validly infeft in the mines and minerals, yet if he had a good personal right to them under the Crown charter of 1742, that personal right may have been taken up by the second Marquess' retour, which, although inept as a special retour, yet implied a general service in the same character, and it might thus still be open to the defender to connect himself with the orginal charter of 1742, and complete a feudal title thereon, if such a charter can be held to be a valid warrant for infeftment at all. As regards this point, I incline to think that this grant of 1742 is so expressed as only to confer upon the grantee a right to demand a valid warrant of infeftment, and as that grantee died without having expede a valid infeftment, the right to demand such a charter, which really is no higher than the right conferred by the Act 1592, transmitted not to the personal representatives of Lord Glenorchy, but to those who successively represented him, or succeeded to him as heir of taillie and provision. In short, until the Crown grants a valid and effectual feudal charter, capable of being followed by an effectual sasine in

favour of the grantee, the mines and metals still remain with the Crown, and can only be taken up by the person for the time being proprietor of the lands. If this view of the case be taken, the present action would probably fall to be dismissed, but with a finding that the pursuer, as proprietor of the lands mentioned in the summons, is entitled to claim from the Crown a valid charter of the said mines and metals. If, however, I am right in the views indicated in the earlier part of this note, the pursuer is entitled to the decree of declarator embodied in the interlocutor."

The defender reclaimed against this interlocutor.

Authorities cited:—Statute 1424, c. 12; 1592, c. 31; Thomson's Acts, iii. 556; Craig, L. Dieg. § 36; II. D. 8, § 21; Stair, II., iii. § 60; Erskine, II., vi. 16; Bankton, II., iii. 107, 109; *Earl of Hopetoun* v. *Officers of State*, M. 13,527; Elchie's Regalia, No. 3; *Ochterton* v. *Earl of Selkirk*, 28th Nov. 1755, p. 164.

At advising—

Lord Neaves—My Lord, this case, which has been very ably argued to us, is one of interest and importance, and relates to a branch of our law which does not often come before us, and as to which we have not much clear and explicit authority. The question comes to be, whether those portions of the minerals in lands which, under whatever title, were at one time held to be annexed to the Crown, and which now are still dealt with in a peculiar manner as between the Crown and its vassals, can, ultimately at least be carried by a general conveyance where once they have been transferred by the Crown to the owner of the lands. What the exact right or origin of the right of the Sovereign to those minerals was is rather a matter of obscurity, but in law it has led to very high claims on the part of the Sovereign and our own law, so far as the Sovereign was concerned, evinced a tendency to equal its powers to those of any other prince, though at the same time the proprietors of lands were insisting upon certain rights of theirs, and only conceded the rights of the Crown to a limited extent. It came, however, at last to this, that if minerals of the privileged description existed, two great objects should be looked for—1st, that they should be worked and not allowed to lie idle within the ground, and, in the next place, that on their being so worked the Sovereign should have a species of title to a portion of them—a sort of tithe of their output—and that that should be secured to him; and he had the means, on the one hand, of giving to the owner of the lands a right to the minerals for the purpose of working them on paying the lordship I have alluded to, while, on the other hand, he had the power of giving them as a separate estate by feu, not as a portion of the whole subjects, so as to secure the working of the minerals both for the public benefit and for his own private interest in them in reference to the share which should come to him. Now, in this case these minerals were granted by the Crown to one of this noble family, and came in this way to be vested in them along with the lands. And the question after that comes to be,—If a general deed is made conveying the lands, does it or does it not carry with it also to the disponees of that deed the right to the minerals that had thus been parted with by the Crown and vested in the proprietor as proprietor of those estates? Now, upon the whole, endeavouring to get at the true principles applicable to this case, and looking to the authorities, such as they are, which are not numerous, I am of opinion that when once the minerals are thus vested in the vassal along with the lands they can be carried by a general writing of his under the description of the lands, and that, if nothing appears to the contrary in the way of a reservation of them, or of a divided right being contemplated, they pass as parts and pertinents of the subjects. This is not an unreasonable thing, because the only object of the separation originally was that which I have referred to; and when once the Sovereign has claimed his right and enforced it in the manner that is suggested, by giving the minerals to the proprietor who can best work them, and who alone can work them, and has at the same time secured his own rent by so doing, there seems no reason whatever why the lands and minerals thus united and consolidated according to the natural connection between the subjects should not pass under one and the same title that carries the lands. Whatever right we may call that of the Sovereign, —whether we may call it a *regalia* or something less than a *regalia*,—if the conveyance is calculated to produce the effect I have mentioned it ought to be maintained.

But we are not left entirely without guidance in this matter, for I confess I do not see any answer that can be made to the case of *Ochterlony* which was stated in argument. In that case there was a stronger reason for strictness of application than in the present case, for it was a competition between creditors using competing diligence to attach those subjects; and if they were a separate estate the diligence that was specially applicable to that estate ought to have prevailed over the diligence which only attached them *per aversionem* as part of the lands. There was a decree of adjudication obtained by one of the creditors of the proprietor, containing no special mention of these or of any minerals, as in competition with another adjudication that did refer to them as a separate estate *per se;* and that entitled the party who had the most specific diligence to the full benefit that was legally available. If the former was not an adequate mode of conveying them,—if it was not a feudal form of conveying the subjects in such a way as to justify the claim to them,—it ought to have been postponed; but the Court held it was sufficient, and that, in the circumstances in which the minerals and lands stood, the general adjudication in its terms was sufficient to carry the minerals, and was preferable to the other because of its priority in date, and was not to be postponed in consequence of its defect in specification. I cannot see how that can be got over. It was a decree of adjudication, to be sure. It was not a feudal deed in its form or nature; but what is an adjudication? An adjudication is a judicial disposition. A person who adjudges in the first instance, gets an adjudication as if he got a conveyance. It is a compulsory conveyance such as a party might have been forced to grant in order to the liquidation of his debts, and it in that way just requires to be as complete and express as a disposition would require to be. There may be a charter of adjudication. That is a charter that comes from the superior so as to create an actual feudal right in order, perhaps ultimately, to carry

the property of the whole subjects; but that charter must come in place of the decree, just as an arrestment comes in place of an assignation. You get a decree of adjudication as a personal title, in the first instance, because it is not feudal, but still it must be as specific as any other title, and having got that you go to the superior and get a charter of adjudication, which will only be given in terms of the base disposition or adjudication that has already been obtained; and when you get that it is competent to carry the whole estates, including those minerals, notwithstanding the peculiarity in their supposed original situation. Now, I cannot see that we would be justified in shaking the authority of that case, or in applying a stricter rule to the present case, which is not a case by any means entitled to any peculiar favour, because it is the case that the party here claiming them as a separate estate got them in virtue of his property or the purpose of working them along with the lands, and for the purpose of giving the Sovereign and the public the benefit of this source of revenue and of advantage which arises from their natural connection together; and it is not a favourable case for him to say—"I will retain these subjects that I got as proprietor of the lands, but I shall separate them from the property of the lands, and while I admit that the lands are well entailed, I shall have liberty to separate these and deal with them as if they were property." That is not a favourable case at all, but the reverse. The subjects ought to remain where they were,—as an accessory in point of fact,—a statutory accessory, it may be,—of the lands themselves of which he is a proprietor. But he got those lands under an entail, and no favour is due to an attempt to separate them, because the result of a separation would be that he could alienate those minerals to somebody else and undermine the title by which he got them, while the lands remained entailed.

Upon these grounds, without attempting to define the matter more fully, I am of opinion that the judgment of the Lord Ordinary ought to be affirmed.

Lord Ormidale—I am of the same opinion, and I entirely concur with Lord Neaves in thinking that it is not necessary to enter into a great many of the views in regard to which we have had a very elaborate and learned dissertation from the Lord Ordinary. For my own part, and considering the view I take of the case, I think it quite unnecessary to determine whether gold or silver mines are carried by a deed from the Crown that does not make special mention of them. At the same time I may just make this observation upon that branch of the case, that though we have baronies included in the Breadalbane estates prior to the special grant obtained by Lord Breadalbane in 1742, we know very well that it is a principle of law which is well established that baronies do not carry the larger *regalia* unless followed by possession. Prescriptive possession may so interpret what barony was intended to carry as to give a right to the larger *regalia*—for example, salmon fishings and things of that kind. But whether gold and silver mines may or may not be carried by a grant of the Crown in reference to the lands—for there is no mention of them in the deed—we do not require positively to determine in the present case, for in 1742 we find Lord Breadalbane—having probably been advised on the subject—did obtain a special grant of the gold and silver in the lands. Then, beyond all doubt, whether under separate title or under one title, he stood the owner of the minerals in question, and, in that situation, he in 1775 executes a new entail. It is quite true, and it is in this way that the difficulty of the present case arises, that though he does convey apparently all his lands that he held in the deed of entail to a certain order of successors, he does not mention the minerals in question; but he held them, and he might have done so. Now, it rather appears to me—and I am very much in the situation of Lord Neaves—that there is no answer to the case of *Ochterlony* v. *The Earl of Selkirk*, for there, just as here, the proprietor of the estate against whom diligence was obtained had a title to his lands, and had also a separate title to the gold and silver mines. Well, an adjudication is led in which there is no mention of the minerals, but merely of the lands, and then a second adjudication is led specially as against the minerals; and in a competition between these two adjudications it was held that because the proprietor actually did hold the right to those minerals the first adjudication carried them although without any special mention of the minerals. Now, I do not see how that can be got over. I listened with all attention to see what answer could be made, and I rather think that the only answer attempted to be made was this, that that might be so, that the principle might be perfectly good, as it must be held to be after that decision; but here it is inapplicable, because looking at the entail of 1775 it was perfectly clear (so it was represented) that the mines and minerals were excluded and were not intended to be carried. There is no doubt that certain lands are referred to as being disponed by that deed of 1775; but I think, to escape the principle of the case of *Ochterlony*, we would require the positive exclusion of the mines and minerals. He conveys in that deed all the lands which he held at the time, and there is the most absolute and special enumeration of parts and pertinents and everything in connection with the lands which he so disponed.

Therefore, in that view of the matter, and having regard to the case of *Ochterlony* v. *The Earl of Selkirk*, I cannot, as I have already said, find an answer to the case of the pursuer here, and on that ground I adhere to the Lord Ordinary's interlocutor.

Lord Justice-Clerk—My Lords, I have found this case one attended with considerable difficulty, and I have listened to the exposition by both your Lordships with interest; and I have come, without any hesitation, to the same conclusion. In the first place, the *Ochterlony* case seems to me quite unanswerable. In that case there were two adjudications, as has been explained. The proprietor stood precisely, so far as I can understand, in the position of Lord Breadalbane in 1775. One creditor adjudged the lands and said nothing about the minerals; the other creditor specially adjudged the Crown right. The Court preferred the first; and therefore they decided that the judicial conveyance or disposition implied in the adjudication was sufficient by its terms to carry the minerals although not expressed. The only answer suggested was, that this decree of adjudication might be a sufficient warrant for a charter in general terms, but that the lands specifically would have been included in the charter. Well, if that be so, it goes very far indeed to settle this

matter, because I cannot conceive that a judicial conveyance, where intention is of no effect, and where technical accuracy is essential, should be more liberally construed and have a wider effect than a voluntary conveyance, where intention is the main thing in view. I think that upon every ground the case of *Ochterlony* prejudges this general question.

But, in the second place, I have come also to think—although I own that my impression at first was the reverse—that the judgment is well-founded, upon very obvious principles. This matter of the Crown's right to gold mines is one of considerable historical interest. That it was part of the annexed property of the Crown, and therefore did not pass, and could not pass, either by a grant of barony or anything else, before the Act of 1592, is proved by the preamble of that Act; and it is proved by the preamble of that Act, and proved historically, that the Crown had been in the custom of making use of that *regalia*—the royal right to gold and silver mines—by granting tacks. I find that in the statistical account of the parish in which the lead hills are situated it is stated that before the Act of 1592, and in the reign of King James VI., there had been tacks given out to various German and Italian miners of gold and silver in the lead hills, and that had given rise to a good deal of jealousy; and in the Advocates' Library there are a variety of papers relating to the petitions of these foreign miners. That that led to the statute of 1592 there can be no doubt. That statute authorises the Crown, instead of letting those minerals in tack, to sett them in feu to the owners of the lands, and them only, on condition of their paying the lordship there expressed, with power to feu to others in the event of the minerals not being worked. Now, all that proves that this was a very peculiar right, and although it was a *jus regale*, it is very difficult to see how the ordinary principles of a separate feudal estate could possibly apply, for as the heritor had a right to the minor minerals, and as gold, silver, and fine lead can only be worked along with the minerals among which those more precious substances are found, it is clear that the right could hardly be susceptible of separate conveyance. The minor minerals belonged to the heritor, and therefore the Crown right was truly a right of lordship, a right of levying upon the persons who worked the mines a certain amount in name of lordship; and therefore I come to the conclusion—and I suppose it was that which guided the Court in the case of *Ochterlony*—that when the landed proprietor, who was alone the party to whom, in the first instance, the feu could be sett, came to receive the Crown right, his right to the minerals became complete, burdened only with the real burden of payment of lordship to the Crown, and from that time forward, at all events, it was a thing accessory to his feudal title. Therefore, upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

Lord Gifford—Not having heard the argument, I give no opinion.

The Court adhered with additional expenses.

Counsel for the Pursuer (Earl of Breadalbane)—Solicitor-General (Watson), and Kinnear. Agents—Davidson & Syme, W.S.

Counsel for the Defender (Jamieson)—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Wednesday, June 23.

SECOND DIVISION.

[Lord Young, Ordinary.

SMITH *v.* COMMERCIAL BANK OF SCOTLAND.

Bankrupt—Cautioner—Multiplepoinding—Promissory Note.

Circumstances in which the claims of a bank on an estate were to a certain extent *sustained* in a multiplepoinding, and in which *held* that the bank was bound to account to the real raisers for a sum fixed.

This case came up by reclaiming note against an interlocutor pronounced by the Lord Ordinary (Young) as follows:—

"*Edinburgh, 27th March* 1875—The Lord Ordinary, ... sustains the claim of the Commercial Bank of Scotland to the extent of Two thousand seven hundred and thirty-two pounds three shillings and tenpence, and ranks and prefers the said Bank accordingly: And with respect to the amount of the funds belonging to the estate of the late Peter Laing Gordon, deposited in the said Bank (subject to the arrestments at their instance) in the name of Mr A. G. Smith, as Judicial Factor on that estate, and forming part of the fund *in medio* in this process, Finds that the said amount (including interest to this date) is Five thousand five hundred and twenty-five pounds six shillings and ninepence, and that the Bank is bound to account therefor, and to pay the same to the real raiser, as representing the parties entitled to the said estate, under deduction of the foresaid sum of Two thousand seven hundred and thirty-two pounds three shillings and tenpence, for which the claim of the said Bank has been sustained, and of any claims by the Judicial Factor on said fund, which claims are reserved entire, and decerns accordingly; Finds the said Bank entitled to expenses, subject to modification, and remits the Account to the Auditor," &c.

His Lordship delivered the following Opinion *in causa*, in which the circumstances of the case are sufficiently detailed:—

"The question in this case regards the extent to which the Commercial Bank are entitled to enforce payment of a promissory note for L.10,000, granted to them by Mr John Duncan of Aberdeen, and Mr Gordon of Craigmyle, both now deceased, against the estate of the latter.

"The note being in common form, the Bank, as the holders, are of course entitled to enforce payment in full against Mr Gordon's estate—he being an admitted obligant on the face of it—unless it shall appear that their right is limited by some writing habile for the purpose, or by the contract, duly established, on which they received it or continued to hold it.

"The parties took the precaution of putting their contract into writing, and it is to be found in the letter of 12th January 1864, (quoted on page 50 of the Record), which was prepared by the Bank, and signed by Duncan and Gordon, the obligants on the note. It is remarkable that this document is not subscribed by the party whose right is thereby limited, but by the parties in whose favour it is limited. It is, however, admitted by both parties that the letter contains the contract on which the Bank received the note, and that it must have effect accordingly, except in so far as it may have been subsequently altered; and it was in fact subsequently altered.