treated, and which has not accrued or been earned through the neglect or fault of the defenders in the course of their management. Whether the defenders are liable for such interest in the circumstances of this case is the main question. I am of opinion with the Lord Ordinary that they are. The defenders were bound to deal with the trust funds in the same way as a man of ordinary prudence would deal with his own, and I cannot think that a man of ordinary prudence would leave his fortune, or a very large part of it, lying in bank on deposit-receipt for a period of about twenty years. He would certainly seek some investment which would yield a higher return than bank deposit rate. I think the trustees here neglected their duty. It was not a mere omission in management; it was a total neglect of a duty incumbent upon them, to the direct injury of the trust estate under their charge.

I am not satisfied, however, that the defenders could easily have found first-class investments yielding 4 per cent. for the whole period of their trust management. I think if the defenders are found liable for 3 per cent., that that would represent a very fair return to the beneficiaries. In coming to this conclusion I have been partly influenced by two considerations—first, that some expense would have been occasioned to the trust by the investment of the trust funds which the trust estate has not actually been put to; and, second, that for some part of the period of administration part of the trust funds might and probably would have remained in bank while investments or renewals of investment were being sought.

LORD MONCREIFF—I am of opinion that to leave money in bank on deposit-receipt is not a proper permanent investment for trust funds. It is an excellent temporary use to make of them pending selection of a permanent investment. There might even be circumstances which might warrant trustees, if they applied their minds to the matter, in leaving trust funds on deposit-receipt for a considerable period. If, for instance, it were necessary for the purposes of the trust frequently to uplift the funds, or if in the state of the market there was serious difficulty in getting safe permanent investments. Evidence that the trustees had honestly applied their minds to the matter might in such a case be held to free them from personal liability although it might be thought that they had been unduly cautious.

But in the present case I think it is proved that during the whole currency of the trust the trustees did not apply their minds to the investment of the trust funds. They were bound from time to time to consider the question of investment with a view to getting for the beneficiaries as large a return as they could consistently with the safety of the capital. It is proved that they totally neglected this duty, and although it is proved that during most of the time safe investments yielding 4 and 4½ per cent. could easily have been obtained, they allowed the money to remain for about 20 years on deposit-receipt. This in my opinion was default, not mere omission.

The only remaining question is as to the rate of interest with which they shall be debited. In charging them with only 3 per cent. I think we shall impose a very moderate penalty upon them. The evidence shows that a considerably larger return than 3 per cent. could have been obtained, and although an investment in Consols could not have been objected to if it had been made, as no proper investment was made, we are not bound to take the lowest allowable investment as the measure of the trustees' liability. But the amount of interest to be charged is a matter in the discretion of the Court, and as during the first five years of the trust there may have been some excuse for leaving the money on deposit-receipt, it may be sufficient to charge the trustees with 3 per cent. over the whole period of the trust.

Decree in favour of the pursuers will be limited to their own interest in the trust funds.

The Court pronounced this judgment:—

"Recal the 2nd, 4th, and 5th findings in the interlocutor reclaimed against, and in lieu thereof Find (1) that the trustees having failed to invest the funds of the trust estate, a loss has been incurred to the trust estate to the extent of £353, 17s. 11d. as at 1st January 1894 through such failure; and (2) that in a question with the pursuers the defenders are bound in their trust accounts to debit themselves with said sums: *Quoad ultra* adhere to said interlocutor, and remit to the Lord Ordinary to proceed."

Counsel for Pursuers—W. Campbell—Brown. Agents—Winchester & Nicolson, S.S.C.

Counsel for Defenders—Ure—Salvesen. Agents—Gill & Pringle, W.S.

Friday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

WEMYSS AND OTHERS *v.* THE LORD ADVOCATE.

Prescription—Barony Title—Coal under Sea ex adverso of Barony Lands.

Under a general title of barony a right to the coal lying under the sea *ex adverso* of the lands (so far as the same is workable from the lands) may be acquired by possession for the prescriptive period, unless such right is expressly excluded by the title.

An express conveyance of the coal of barony lands does not, without possession, confer a right to coal under the

sea; and where the title contains a conveyance of coal *infra fluxum maris*, this limits the grant to the coal under the foreshore, and a right to coal below low-water mark cannot be acquired by possession.

Barony Title—Progress of Titles—Erection of Separate Baronies into Single Barony—Division of Superiority.

By Crown charter of resignation in 1651 the three estates of W., E., and M. were united into a single barony. The charter contained separate descriptions of the three estates, and of the grants, privileges, and pertinents attaching to each; and these separate descriptions were repeated in all the subsequent titles. In consequence of a division of the superiority subsequent to the Restoration, the estate of M. was disunited from the barony and held under a separate barony title under the Archbishop of St Andrews as superior. The superiority of M. having reverted to the Crown at the Revolution, Crown charters were in 1711 again granted to the vassal of the whole lands of W., E., and M. These charters, and those subsequently granted, did not re-unite the three estates into a single barony, but declared that one sasine, taken upon any part of the lands of W., should suffice for all the lands.

In the case of W. there was no grant of the coal of the lands, in the case of E. there was a grant of coal *infra fluxum maris*, and in the case of M. a general grant of the coal of the lands of the barony.

In the case of all three estates the proprietor had acquired a right to the foreshore, and in the case of W. a right to the coal lying under the sea below low-water mark *ex adverso* of the lands, but no coal was worked below low-water mark in E. or M.

Held (1) that although E. and W. were still united as a single barony, the possession of the coal lying under the sea in W. conferred no right to the coal below low-water mark *ex adverso* of E., such a right being expressly excluded by the terms of the grant of coal in E.; (2) that the possession in W. did not apply to M., these estates having, since the division of superiority, been held under separate titles.

Personal Bar—Minor and Pupil—Deed by Curators to which Minor not a Party—Homologation.

The tutors and curators of a minor, who was heir of entail of certain estates, and for whom his curators held, as trustees, certain unentailed estate adjoining the entailed estate, entered into a transaction during the heir's minority, by which they surrendered to the Crown any right which they as trustees, or which the minor, might have to the coal lying under the sea *ex adverso* of the entailed and unentailed lands, on condition that the Crown would forego any claim exigible by it in respect of the coal already worked. Subsequently the trustees obtained a lease of the coal under the sea *ex adverso* of the lands from the Crown, the lease containing no reference to the surrender of the heir's rights. The heir was not made a party to the lease or to the arrangement which preceded it.

Held (1) that he was not bound by the surrender of his rights as regards the entailed estate, and that as the transaction was a *unum quid*, it was altogether invalid, and (2) that homologation of the lease by the heir upon attaining majority, without knowledge of the previous agreement entered into between his curators and the Crown, did not amount to homologation of this agreement.

This was an action against the Crown by Mr Wemyss of Wemyss, in the county of Fife, and by the trustees acting under a trust-disposition and conveyance granted by Mr Wemyss in 1891 in favour of himself and two other trustees. The pursuers sought by the action to establish their right to the coal and other minerals under the sea *ex adverso* of the estate of Wemyss, and under the foreshore.

The lands of Wemyss consist of West Wemyss, East Wemyss, and Methil, and extend along the estuary of the Forth, which forms their boundary on the south. By a Crown charter of resignation and novodamus in favour of the pursuer's predecessor, David, second Earl of Wemyss, dated 22nd July 1651, confirmed by Act of the Scottish Parliament ten years later, the three ancient baronies of West Wemyss, East Wemyss, and Methil were disponed to him, and were erected into a single barony called the Barony of Wemyss.

The united barony created by the charter of 1651 was dissolved on the re-establishment of Episcopacy after the Restoration, and the superiority of the barony of Methil, which lay within the regality of St Andrews, reverted to the Archbishop of that see. The barony of Methil accordingly was not included in Crown charters of the lands of Wemyss granted in favour of pursuers' authors in 1671 and 1673. Separate charters of the barony of Methil were obtained by them from Archbishop Sharpe, who by a charter of 1662 erected Methil into a burgh of barony. A subsequent charter of the same lands was granted by him in 1665, on which sasine followed in favour of pursuers' author on 27th September 1665. At the Revolution the superiorities of the see of St Andrews reverted to the Crown, and Crown charters of the whole lands of West Wemyss, East Wemyss, and Methil were granted in favour of pursuers' authors in 1711 and 1756. The lands, however, were not by these charters reconstituted into one barony, although it was declared that one sasine taken at the manor place of West Wemyss, or upon any part of the ground of the barony of Wemyss, should suffice for all the lands.

The charter of 1651 contained separate

descriptions of the three estates of West Wemyss, East Wemyss, and Methil, and of the grants, privileges, and pertinents of each. These descriptions were repeated in all the subsequent titles. In the title to West Wemyss there was no grant of the coal, but a general grant of barony, with parts and pertinents. In the title of East Wemyss there was a grant of coal heughs (*carbones et carbonaria*) of the same, and a further grant "*lucrandi et effodiandi carbones et carbonaria infra fluxum maris, infra bondas prædictas*," *i.e.*, within the lateral boundaries of the barony of East Wemyss. In the title of Methil there was a grant of the whole coal heughs of the barony "*tam subtus terra quam supra terram.*"

In the series of charters forming the progress of titles the coal in the three baronies was dealt with in substantially the same terms as in the charter of 1651. The whole estate, with the exception of certain portions which had been alienated since that date, had been continually occupied and possessed down to the present time by the ancestors of Mr Randolph Wemyss.

In 1842 two deeds of entail were granted by the proprietor, Admiral James Erskine Wemyss, by which certain portions were entailed. The present pursuer Mr Randolph Wemyss succeeded to the estate upon the death of his father in March 1864, and from that time till 11th July 1879, when he attained majority, the estates, so far as unentailed, were under the management of his father's trustees.

In December of that year he executed an instrument of disentail by which he disentailed the entailed lands, and granted in his own favour a disposition of all these lands. He subsequently executed a trust-disposition in favour of himself and the other pursuers, by which he conveyed to himself and the other pursuers all the estate in question.

The estate extends about 5½ miles along the firth, and of this seaboard about 3½ miles consists of the entailed lands.

In 1874 Mr Howard, the Commissioner of H.M. Woods and Forests, wrote to the trustees who were then managing the estates, in the following terms:—"It has recently come to my knowledge that you are working a colliery at West Wemyss to the north of the harbour, and that your workings extend under the bed of the Firth of Forth. As the minerals under the bed of the Firth of Forth, unless specially granted away, belong to Her Majesty, and as I am not aware of any grant in your favour, I have to request that you will be good enough to inform me under what authority you are working under the Forth."

The matter was considered by Messrs Melville & Lindesay, who were at that time agents for the Wemyss family, and on 24th August they wrote to Mr Howard as follows:— . . . "We have accordingly made inquiry, and we now state, in reply, (1) that the family of Wemyss have been in the uninterrupted possession of the barony of Wemyss for upwards of two hundred years, under charters from the Crown; (2) that for more than forty years they have, as owners of the barony, worked the coal under the bed of the Firth of Forth *ex adverso* of the lands of the barony, and this not secretly, but in the most open and public manner possible; and (3) that such title and possession exclude all interference on the part of the Crown in regard to the coal in question, which can be worked only by means of pits sunk on the Wemyss land or shore. If, however, notwithstanding the above facts, you are advised that the Crown has right to the coal under the Forth, opposite to and connected with the barony lands, and is prepared to try the question of ownership in a court of law, we would be disposed to recommend to Mr Wemyss, rather than enter upon a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty for the coal he may find convenient still to take out under the existing very precarious working."

In reply Mr Howard denied that working coal under the bed of the sea on a barony title, even for forty years, could ever have the effect of setting up a right to the bed of the sea as part of the barony. Accordingly he intimated that the Wemyss workings had been an encroachment upon the ungranted rights of the Crown, and that the proprietor was liable to account for the full value of the coal which had been worked. At the same time he indicated that the full rights of the Crown in that respect might not be demanded.

Further negotiations followed, and in May 1875 the Crown granted to the trustees a lease for thirty years of the coal under the sea beyond the foreshore *ex adverso* of the whole estate, including both the entailed and unentailed lands, on the understanding that the trustees abandoned all right to that coal.

Under this lease, which bound the Crown in warrandice from fact and deed only, the Crown, as a consequence and in respect thereof, undertook expressly not to raise any question or make any claim in respect of past workings. Mr Randolph Wemyss was not made a party to the lease, or to the compromise which preceded it.

On his attaining majority he accepted from the trustees an assignation of the lease, dated August 1879.

In 1887 Messrs Melville & Lindesay, acting under the instructions of Mr Wemyss, wrote requesting the Crown to reduce certain of the lordships payable under the lease, and as a result of the correspondence a reduction was made.

In 1890 a minute was entered into between the Commissioners and Mr Wemyss, whereby certain alterations in the lease in regard to the working of the minerals were agreed to.

In December 1893 the present action was raised, concluding for declarator that "the ground forming the shore of the sea or of the estuary of the Forth between high-water mark and low-water mark *ex adverso* of the united barony and estate of Wemyss (including therein the ancient lands and older baronies of (1) Wemyss, now called West Wemyss, (2) Easter

Wemyss, and (3) Methil), all in the county of Fife, belonging to the pursuers;" and "the coal and other mines and minerals under the sea *ex adverso* of the said united barony and estate and foreshore thereof, belong in property to the pursuers, the said Randolph Gordon Erskine Wemyss, George Levinge Whately, and William Nocton, as trustees foresaid, and are parts and portions, or parts and pertinents, of the said united barony and estate," subject to the Crown's right as trustee for public uses, so far as regards the said seashore.

The action also concluded for declarator that "the pursuers are not bound by the terms and obligations contained in a lease of the coal and others under the sea beyond the said foreshore, entered into between the Honourable James Kenneth Howard, one of the Commissioners of Her Majesty's Woods and Forests and Land Revenues, and the trustees of the late James Hay Erskine Wemyss, dated 20th and 28th days of April and 3rd day of May, all in the year 1875, with addition thereto executed by George Culley, one of the said Commissioners of Her Majesty's Woods and Forests and Land Revenues, and the said Randolph Gordon Erskine Wemyss, dated 21st and 25th days of July, both in the year 1890."

The pursuers averred that Mr Randolph Wemyss had only recently become aware of his rights as owner of the submarine minerals.

They pleaded—"(1) The pursuers being heritable proprietors of the foreshore and the coal therein, and the coal under the sea *ex adverso* of the said united lands and barony of Wemyss, are entitled to decree in terms of the first conclusion of the summons. (2) The lease and addition thereto libelled having flowed *a non domino*, and being *ultra vires* of the lessees, and having been accepted by them in ignorance of the said Randolph Gordon Erskine Wemyss' rights in and title to the coal and others thereby leased, the pursuers are entitled to decree in terms of the second conclusions of the summons. (3) There having been no homologation or adoption of the lease to the effect of excluding the present action, the pursuers are not barred from insisting in the same. (4) The title of the pursuers is sufficient, especially as interpreted by immemorial or prescriptive possession, to carry the minerals claimed in the summons. (5) The possession of the submarine minerals *ex adverso* of part of the united barony is sufficient to explain the scope of the Crown charters along the whole of the continuous seaboard of the said barony."

The defenders averred that the lease in 1874 had been granted as the result of a compromise between the parties on, *inter alia*, the following terms:—"That the Crown should abandon all claim in respect of past workings, and should grant to the said pursuer (Mr Wemyss), and that the said pursuer should accept, a lease for thirty-one years of the minerals below low water-mark *ex adverso* of the lands of Wemyss within certain specified limits, and that the said pursuer should abandon, as he did abandon, on behalf of himself and the succeeding proprietors of Wemyss, all claim to the said minerals. The said transaction or compromise and agreement are embodied in correspondence between the late Mr Howard on the part of the said Commissioners, and Messrs Melville & Lindesay, W.S., on the part of the said pursuer."

They pleaded—"(2) The pursuers are barred from insisting in their present claims, in respect (1st) that the pursuer Mr Wemyss and the said trustees, by entering into the said transaction or compromise, and by accepting and working the minerals under the said lease, admitted that the right of property in said minerals belonged to the Crown, and barred themselves from afterwards disputing the right of the Crown thereto; and (2nd) that the pursuer Mr Wemyss ratified or otherwise homologated and adopted the said transaction or compromise and the said lease, and worked the minerals under the said lease, as modified by the arrangements with him condescended on, and thereby admitted and barred himself from afterwards disputing that the Crown had right to the said minerals. (3) Upon a sound construction of the titles relied on by the pursuers, the said titles do not convey the minerals under the sea below low water-mark. (4) The titles libelled by the pursuers do not form a habile ground for the acquisition by prescriptive possession of any minerals under the sea below low water-mark, and *separatim*, such minerals cannot in law be acquired by prescriptive possession. (5) Assuming that the pursuers have a title to minerals under the sea below low-water mark, such title does not extend beyond the limits *ex adverso* of the sea specified in the charters of 1616 and 1651, or at all events the said title does not confer any right to minerals under the sea other than those *ex adverso* of the barony of East Wemyss."

The Lord Ordinary (STORMONTH DARLING) on June 24th 1894 allowed the parties a proof on the question of bar.

The pursuer Mr Randolph Wemyss deponed that he had never seen the correspondence of 1874 till the present case was raised, and that he had signed the assignation of 1879 among a number of other documents without having its tenor specially brought home to him. With regard to the concessions made by the Crown in 1887 and 1890, he deponed—"I took an interest in getting the royalty reduced. . . . I also dealt with the Crown in getting a remission of the restriction as to working. . . . The Crown granted both these concessions, but at that time I did not know my rights." About 1890 he first began to consider that he might have a right to the submarine coal, and instructed Messrs Tods, Murray, & Jamieson to look into the old titles. "At that time I did not know anything about the titles except for the period during which I was leaving my agent to consider the matter, viz., 1890 to 1892. I never in any way dealt with the Crown after I came to know that there was really a question, and that I might claim the minerals for my own."

Evidence was given to the effect that the old titles had not been kept by Messrs Melville & Lindesay, and as to the discovery of the charter of 1651 at Wemyss Castle by Messrs Tods, Murray, & Jamieson. Mr Jamieson deponed that in consequence of the investigation of the old titles they had come to the conclusion that the coal belonged to the pursuers, and had raised the present action.

The Lord Ordinary on 22nd December 1894 sustained the plea of bar and assoilzied the defenders from the conclusions of the summons, with the exception of the first, which they did not oppose.

Opinion.—"The pursuer, as proprietor of the barony and estate of Wemyss, in Fifeshire, seeks by this action to establish his right to the coal and other minerals under the sea *ex adverso* of that estate and the foreshores thereof. His case on the merits is laid both on express grant from the Crown by a charter of resignation and novodamus granted in 1651 and confirmed ten years later by Act of the Scottish Parliament and also on immemorial possession founded on his barony title. But it appears that in 1875, when the pursuer was a minor, his father's trustees (who were also his curators) accepted from the Crown a lease of the coal in question, which does not terminate till 1905, and that the pursuer himself, who came of age in July 1879, arranged with the Crown in 1887 and again in 1890 important modifications of the lease both as regards the rate of lordship and the mode of working the coal. The Crown accordingly pleads that he is barred by these transactions from insisting in his present claims.

"I am of opinion that this plea is a good one, and ought to be sustained. I shall consider (1) how the matter would have stood if the pursuer had been of full age at the time when the lease was entered into, and (2) whether the fact of his having then been in minority makes any difference.

[*His Lordship here narrated the negotiations between the trustees and the Crown as narrated above and proceeded*—]

"Further negotiations followed and resulted in the granting of the lease to which I have referred, in which the Crown as a consequence of the lease being accepted expressly departed from all claims in respect of bygone workings.

"Now this was unquestionably 'a transaction,' as that phrase is defined by Lord Stair, i. 17, 2. Both parties maintained their respective views, but each 'quitted some part of what they claimed, to redeem the vexation and uncertain event of a plea.'

"When that is the case Lord Stair says, 'It is therefore the common interest that the transaction should be firmly and inviolably observed, which both by the Roman law and our customs has been held as sacred and necessary for men's quiet and peace.' If an action had been raised by the Crown, and the proprietor of Wemyss had compromised it by accepting a lease in consideration of the Crown's renunciation of all claims for bygones, I apprehend it would have been impossible for either party afterwards to set aside the compromise on any ground except misrepresentation or fraud. I do not see that a different rule should be applied to a transaction entered into for the purpose of averting a threatened lawsuit. In the case of *Stewart* v. *Stewart* (1839, M'L. and Rob. 401), the House of Lords refused to set aside such a compromise on the ground that a particular point of law had been mistaken or overlooked.

"The pursuer, however, maintains his right to cut down the lease (for that is substantially the claim which he makes), not merely on the ground that his advisers in 1875 were wrong in giving up that part of his case which was founded on a barony title followed by possession, but also on the ground that he has recently discovered the Crown charter of 1651, which, as he says, contains an express grant of the minerals in question. I do not dispute his contention that for the purpose of testing a plea in bar everything must be assumed in his favour. But even assuming that the Crown charter does contain an express grant, it must be borne in mind that the deed was in his possession, and that its contents might have been known to his advisers at the time when the compromise was made. I am aware that this element existed in the case of *Cooper* v. *Phibbs* (L.R., 2 Eng. and Ir. Apps. 149), where the very same facts existed of a man having taken a lease of a heritable subject which was truly his own. But the essential difference between that case and the present is that there was in it no element of compromise. Both parties contracted under a mutual mistake and misapprehension as to their relative and respective rights. One party believed himself to be entitled to the property, the other party believed that he was a stranger to it. Accordingly there was no threat of litigation, and there were no opposing claims which could form the subject of a transaction. The question was treated just as if both parties had contracted on the footing that a particular person was dead, when in truth he was alive.

"If a similar state of facts had existed in the present case I do not say that the mere lapse of time, and the difficulty of reinstating parties in the position which they occupied in 1875, would of themselves have prevented the remedy of reduction being granted. But it is a peculiarity here that the pursuer does not limit himself to the case of express grant. He still maintains his case on a barony title, followed by possession, and it is obvious that the lapse of time might make it much more difficult for the Crown to meet that case now than if they had taken action when they threatened to take it in 1875. The element of compromise also makes this important difference, that if the lease were to be set aside, the Crown would undoubtedly be entitled to revive their claim for bygones, and that also might be rendered more difficult to establish by the fact that the pursuer has been working the coal under the lease for nearly twenty years.

"The next question is, whether the fact

of the pursuer having been a minor in 1875 gives him right to a relief which he would not otherwise be entitled to. That the trustees were entitled to compromise claims connected with the unentailed lands which formed the trust estate, so as effectually to bind him, is clear enough. But he might have been entitled, after he attained majority, to challenge the lease as regards the entailed lands if he had exercised his right in time. So far from doing that, however, he transacted with the Crown for himself in 1887, when he was twenty-nine, and again in 1890, when he was thirty-two. By the formal minute which was entered into in the latter year, he expressly agreed that the lease should be continued for its unexpired period according to its terms in all respects, except as thereby altered; and this seems to me to have constituted not merely an adoption of the existing lease, but a new agreement on the part of the pursuer himself, by which all objection on the ground of minority is entirely superseded.

"I shall therefore sustain the defender's second plea-in-law, and assoilzie him with expenses."

The pursuers reclaimed.

On 28th February 1895 the Court recalled the interlocutor reclaimed against *hoc statu*, and allowed parties a proof of their averments so far as not already admitted to probation. The proof was directed towards establishing the prescriptive possession by the pursuers by their having worked the submarine coal for more than the prescriptive period, within the knowledge of the Crown. The result of the evidence is sufficiently indicated in the opinion of the Lord President. By a joint-minute of admissions the parties admitted, *inter alia*—"(1) That for more than the prescriptive period prior to 1874 the pursuer, the said R. G. E. Wemyss, and his predecessors, continuously and without interruption worked the coal under the foreshore and beyond the foreshore, under the bed of the sea *ex adverso* of a part of the lands of West Wemyss; but the defender does not admit that the working of the said coal under the bed of the sea came to the knowledge of the Commissioners of H.M. Woods and Forests prior to the year 1874. (2) That there never was any working of the coal under the bed of the sea below low-water mark *ex adverso* of the lands of East Wemyss and Methil until after the year 1874. (3) That the pursuers have right to the foreshore and to the coal under the foreshore of the lands of West Wemyss, East Wemyss, and Methil."

Argued for reclaimers—(*a*) *On bar*—The trustees had no right to deal with the entailed lands and to compromise as to the minerals contained in them, without Mr Wemyss being made a party to the transaction, so that the lease, being a *unum quid*, must fall as *void ab initio*. But this was not really a compromise at all, for the trustees were ignorant of the existence of the charter of 1651 giving a barony title. The fact that they were in possession of the means of getting this knowledge, did not bar them from setting aside a compromise based on common error—*Cooper* v. *Phibbs*, 1867 (L.R., 2 Eng. and Ir. Apps. 149); *Huddersfield Banking Co.* v. *Lister & Son*, 1895, L.R. 2 Ch. 273, at 281; *Beauchamp* v. *Winn*, 1873, 6 Eng. and Ir. App. 223, at 233; *Kelly* v. *Solan*, Nov. 18, 1841, 9 M. and W. 54; *Stewart* v. *Stewart*, Nov. 22, 1836, 15 S. 113; 1839, M'L. and Rob. 401; *Kippen* v. *Kippen's Trustees*, July 10, 1874, 1 R. 1171; *Balfour* v. *Smith*, Feb. 9, 1877, 4 R. 454. Accordingly there had not really been a "transaction" as defined by Lord Stair in the passage quoted by the Lord Ordinary. Nor could it be said that the pursuer had homologated the agreement, since he too was in ignorance of his legal rights at the time when he took up the lease and entered into the subsequent negotiations; nor was he aware of the so-called surrender contained in the correspondence leading to the lease. Accordingly the case was ruled by that of *Cooper* v. *Phibbs*. But in any case the lease did not amount to a renunciation of the pursuers' rights, but merely to a suspension of them for 30 years. Accordingly the pursuers' rights to the coal were still open. (*b*) Assuming this to be the case, their claims to the coal in the three baronies were based on somewhat different principles. With regard to West Wemyss they founded upon a barony title followed by prescriptive possession of the coal under the sea. In East Wemyss there was an express grant, of which the true reading must be held to include the coal claimed, and alternatively the possession *ex adverso* of West Wemyss applied to the coal *ex adverso* of East Wemyss, the two old baronies having been united. It also applied to Methil, it having been united to the other two, but failing its application, a simple barony title carried the coal in question even though not followed by possession. (1) *West Wemyss*—There had, as the evidence and the admissions of the defenders showed, been uninterrupted and open working of the coal from time immemorial. A seaboard barony such as this held on a charter with a clause of parts and pertinents was a good foundation for the prescription not only of the foreshore, which was admitted by the defenders, but also of the *regalia*, both in the wider and narrower sense, as including both corporeal and incorporeal things—*Duke of Montrose* v. *Macintyre*, March 10, 1848, 10 D. 897. That was the case of a ferry, but the present case was *a fortiori* of it, because here it would be physically impossible for anyone but the Crown or the pursuers to use the coal. Accordingly, there was a presumption that the Crown, having by its grant to the pursuers' authors rendered it impossible for itself to use the coal, intended to convey the right to the pursuer, a presumption which was capable of being verified, and had been verified by possession. The defenders' argument that only the actual amount which had been worked could be prescribed was clearly untenable,

for it would practically exclude coal altogether from prescription or confine it to operating an indemnity for unlawful acts already done—*Crawford* v. *Durham*, June 2, 1826, 4 S. 665; *Forbes' Trs.* v. *Livingstone's Trs.*, Jan. 31, 1822, 1 S. 311, Nov. 29, 1827, 6 S. 167. Accordingly possession was not a measure but an index of the pursuers' right. The case of *Young* v. *N.B. Railway Co.* (Aug. 1, 1887, 14 R. H. of L. 53), showed that this principle applied in the case of the foreshore, and there was no reason why it should not be applied to minerals below low-water mark. Accordingly they had acquired rights below low-water mark the same as those above, viz., rights limited only by those of the public to fishing, navigation, etc.—Ersk. ii. 1, 6, ii. 6, 18; Bell's Prin., sec. 642; *Hunter* v. *Lord Advocate*, June 26, 1869, 7 Macph. 899. Their boundary seawards might be held to be either at the *medium filum* or at the three-mile limit. (2) *East Wemyss*—There was here an express grant of winning the coal "*infra fluxum maris.*" The meaning of this expression simply was "below high-water mark" *ex adverso* of these lands. Accordingly, it conferred a right to all the coal below the sea *ex adverso* of East Wemyss. If, however, it were held that the defenders' interpretation of this as merely conferring a right to the coal below the foreshore were the right one, the pursuers still had a right to the coal *ex adverso* of East Wemyss in virtue of the prescriptive possession at West Wemyss, the two baronies being parts of the one united barony. Where the barony lay, as this united barony did, in a continuous line along the coast, possession of one part would fortify a title to the whole. It was only where different parts of the barony were discontiguous that this rule did not apply—*Lord Advocate* v. *Cathcart*, May 19, 1871, 9 Macph. 744; *M'Douall* v. *Lord Advocate*, March 18, 1875, 2 R. (H. of L.) 49; *Lord Advocate and Clyde Trustees* v. *Blantyre*, June 19, 1879, 6 R. (H. of L.) 72, at p. 80; *Lord Advocate* v. *Lovat*, July 12, 1880, 7 R. (H. of L.) 122. The fact that the pursuers' rights on East Wemyss might be held to be limited by their title did not prevent the application of this principle, for there was no reason why their rights should not be increased by possession in another part of the united barony, which was treated as a *unum quid*. Moreover, there was the alternative reading of the clause, viz., that it gave power to open the foreshore, in sinking pits for supplying with coal the salt pans mentioned in the same clause. (3)—*Methil*—The same argument applied to Methil as being part of the united barony of 1651, but even more forcibly, since there was no limit fixed in the title applying to it. It was not true to say that the taking of the charter of resignation from the Archbishop of St Andrews dissolved the united barony. At the date of that charter the Crown was still the superior, and so this did not get rid of the Crown title. There should have been a special dissolution of the barony under the statute of 1662. Alternatively a barony title with parts and pertinents such as that upon which Methil was held gave a title *per se* without any possession being required to the coal below low water-mark. The case of the foreshore was analogous, and that was carried by a barony title without possession. No doubt in many of the cases reported the proprietor had proved possession, but it was not necessary for him to do so—Bell's Prin. 642; *Innes* v. *Downie*, May 27, 1807, Hume, p. 552; *Campbell* v. *Brown*, November 18, 1813, F.C.; *Macalister* v. *Campbell*, February 7, 1837, 15 S. 490; *Patterson* v. *Marquis of Ailsa*, March 11, 1846, 8 D. 752; *Lord Saltoun* v. *Park and Others*, November 24, 1857, 20 D. 89; *Hunter* v. *Lord Advocate*, June 25, 1869, 7 Macph. 899. It was true that in the case of *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309, the vassal did prove possession of the foreshore, and there were *dicta* to the effect that it was necessary, but the question was really left open (Lord Neaves, at p. 332)—*Officers of State* v. *Smith*, March 11, 1846, 8 D. 711, July 13, 1849, 6 Bell's App. 487. The rule applied in the case of baronies, which were *de facto* bounded by the sea, as well as in the case where the words "bounded by the sea" were inserted in the title.

Argued for the respondent:—The pursuers could not plead that the trustees had not the same means of ascertaining the pursuers' rights when the compromise was made as they had now. It had not even been proved that their legal advisers did not know of the 1651 charter. There was, however, authority which clearly showed that a compromise based on the abandonment by the Crown of certain legal rights, could not be set aside even if error or bad advice by an agent were shown to have influenced the other party—Ersk. Inst. iii. 3, 54; *M'Alister* v. *M'Alister's Trustees*, June 29, 1827, 5 S. 871; *Stewart* v. *Stewart*, *supra*; *Haldane* v. *Ogilvy*, November 8, 1871, 10 Macph. 62, at p. 71; *Wason* v. *Waring*, June 1852, 15 Beav. 151; *Callisher* v. *Bischaffsheim*, June 6, 1870, 5 Q.B. 449. The case of *Cooper* v. *Phibbs* was clearly distinguishable from the present, because in that case there were no elements of a compromise, it being merely a case of mutual error. It made no difference that Mr Wemyss was a minor at the time of the transaction, nor did the fact that the trustees only really managed half of the estate, and yet were entered as tenants for the whole, affect the nature of the compromise. In any case, Mr Wemyss had by his conduct since attaining majority clearly homologated the lease, the formal agreement of 1890 being more than this, and amounting to a new agreement on his own part. Accordingly, no objections could be raised on the ground of his minority, and if the compromise were to be reduced, it must be on the grounds of error such as would have enabled the trustees themselves to reduce it. The authorities showed there were no such grounds. (1)—*West Wemyss*—Even assuming that the pursuers' possession had been open and uninterrupted,

which the defender did not admit, the coals under the sea were not a subject which could be acquired by prescription. There were three different species of rights belonging to the Crown, viz., *Regalia minora;* comprising incorporeal rights, such as fishing; rights held in the public interest such as highways; and property, including the right to the *solum* of the sea—Bell's Prin., sec. 667; *Lord Advocate* v. *Clyde Navigation Trustees,* November 25, 1891, 19 R. 174. The cases quoted by the pursuers dealt with rights of the first class, but rights of the third were not on the same footing. It was not possible to acquire the whole by possessing a small portion. The land under the sea was not a recognised tract, a *unum quid* like the foreshore, and the pursuers could not even define the limit seawards which they claimed to have acquired. Accordingly, the most that they could claim was "*quantum possessum tantum præscriptum.*"—*Maitland* v. *M'Clelland,* Dec. 21, 1860, 23 D. 216. Their mistake lay in treating the sea as cut into small pieces running out *ex adverso* of each seaboard barony, instead of as a whole, which was the correct method of considering it. Moreover, they were not in a position to prove that their possession had been in virtue of their barony title, and this was essential for showing that their grant was explained by possession—*The Lord Advocate* v. *Hunt,* Feb. 11, 1867, 5 Macph. (H. of L.) p. 1; *Mackintosh* v. *Abinger,* July 12, 1877, 4 R. 1069. (2) *East Wemyss*—The words of the grant in this barony clearly limited the right to the coal under the foreshore. That was the only intelligible meaning which could be given to the words "*infra fluxum maris.*" The word "*fluxus*" was used in a distinct sense from "*mare*" as a whole, and meant that part of the sea flowing over the foreshore. It was clear that prescription, which might apply at West Wemyss could not apply to East Wemyss, where the grant seawards was expressly limited. Moreover, all the cases quoted in support of the pursuers' argument dealt with rights within a barony. The question here was, what was the extent comprised in the barony—a very different question. Though the two estates had been united into one barony, they must still be dealt with as two estates, one of which, viz., East Wemyss, had a bounding title limiting the proprietor's rights to the foreshore. This was the theory of all the titles subsequent to 1651, and accordingly these rights could not be extended by possession *ex adverso* of the other estate. (3) *Methil*—This barony had been separated from the united barony, and had never been re-united with it. Accordingly, the pursuers' contentions as to partial possession could not apply. As regards the effect of a barony title, it was plain that it did not *per se* confer on the grantee the rights claimed by the pursuers. In the first place, it was a startling pro position to maintain in the face of the opinions in *Agnew's* case, where the point was expressly decided in a manner contrary to the pursuers' contention. This was approved by the Court in *Lord Advocate* v. *Clyde Trustees and Lord Blantyre,* June 19, 1879, 6 R. (H. of L.) 72, and the point was really no longer open for decision, it being laid down clearly that the title must be followed by possession. In none of the cases quoted by the pursuers was there a contest of titles, as the baron was fighting with persons having no rights whatever. But even if the foreshore was carried, it did not follow that a barony title carried also the *solum* under the sea. All their cases accentuated the difference between the sea and the foreshore, which were treated as different territories.

At advising—

LORD PRESIDENT—The Lord Ordinary's interlocutor, which sustained the plea of bar, was but faintly supported by the counsel for the Crown, and they invited our attention in the main to the merits of the cause. I do not think that the pursuers are barred by the series of events set out in support of that plea. It is clear that the rights of Mr Wemyss in the entailed estate were not effectually dealt with during his minority, for he was not so much as made a party to the transactions which touched them. Nor does it seem possible to separate the action of the trustees in regard to the unentailed lands from their action in regard to the entailed lands. The transaction purported to be one, and was one, and it is impossible to affirm the validity of part while negativing the validity of the whole. Accordingly, I do not think that any rights to the coal in question were validly renounced during the minority of Mr Wemyss.

On the next question, whether the pursuer Mr Wemyss, after his majority, adopted the acts of the trustees, it is certain that he dealt with the Crown on the footing of his being a tenant. But while he was thus aware of the lease, it does not appear that he knew of or considered the surrender of rights which led to the granting of that lease, and it is this surrender which he is now said to have adopted. The surrender, such as it was, is contained in letters collateral or antecedent to the lease, and not in the lease itself. Accordingly the renewal of the lease, or the recognition of the lease, does not bring home to the pursuer Mr Wemyss more than was present in *Cooper* v. *Phibbs.*

On the merits of the question it is necessary to distinguish between the lands of East Wemyss, West Wemyss, and Methil. Each formed a separate barony until the year 1651, when a Crown charter purported to form them into one barony. For a reason, to be afterwards mentioned, it cannot be held that this union was operative during the period of prescription so far as Methil was concerned, but it was operative as regards West and East Wemyss. It is necessary, however, to consider the case of each barony separately, as each is separately described in the uniting charter and the subsequent titles, and the facts as to possession are also different.

Let us take then, first, West Wemyss—

what of its title, and what of possession?

There is here no express conveyance of coals, but a simple conveyance of a barony in general terms, and with no boundary seaward. There has been for the prescriptive period working of the coal under the foreshore, and beyond the foreshore under the bed of the sea, *ex adverso* of a part of these lands. The pursuers' right to the coal under the foreshore is now, although it was not at first, admitted. The question is, what is the legal result of this possession in regard to the coal under the sea?

It, was, however, in the first place, maintained for the Crown that the possession had not been open. In a sense this is, of course, true—from the physical conditions. But it was not necessary to prove either that officers of the Crown had been apprised of the workings, or that they in fact knew of them. Apart from this, the evidence shows that the workings under the sea were in no sense clandestine, that they were well known in the district, that they had been the subject of public scientific discussion, and that they were inspected and reported on in the usual way by the Government inspector of mines.

If the principles of the law of prescription be applicable to coal, then the possession in the present case seems sufficiently regular, continuous, and open to avail for the purposes of that law. The question remains, whether the possession will apply to the barony title so as to bring within it the coal now in dispute. This is a question of novelty, and it must be considered on principle.

"A title of barony," says Lord Wood in a passage of recognised authority (*Duke of Montrose* v. *Macintyre*, 10 D. 897, at 914), "is sufficient to include, without enumeration or its being expressed, every part and parcel of it, and every right and privilege connected with the barony, and naturally incident to it—everything, in short, that it may be supposed might naturally accompany and form part and pertinent of a grant of so high a character. Nor does it present any objection or difficulty to this view that the right in question may be one of the *regalia*, seeing that, as the title flows from the Crown, it is derived from a party competent to grant the right, and seeing also that there is no ground for holding that the Crown would not give out such a right to a subject." A barony title "being a title which is broad enough to cover the right if truly intended to be given out, is capable of being cleared and confirmed by evidence of possession of the right having followed upon it, which, if continued undisturbed for forty years, affords the best evidence, and in law conclusive evidence, of that right being one of the unenumerated particulars contained in the grant and conveyed under the general title of barony."

Such is the general law; and the question is, whether it is applicable to the right of working coal under the sea *ex adverso* of the barony.

Now, first of all, it is sufficiently clear that the coal in dispute was originally part of the patrimony of the Crown; and when the barony lands were granted out by the Crown the coal might have been lawfully worked by the Crown, and was alienable by the Crown. The contrary was not maintained in debate.

It is equally certain that, as matter of fact, this coal is workable from the barony of West Wemyss, and in connection with the coals under the foreshore, which admittedly form part of the barony; it is naturally so worked, and, what is more, the Crown, which is the only suggested competitor, could not by physical possibility work it without the licence of the baron.

Accordingly, it would appear to be every way natural that a right to work this coal, inaccessible to the Crown and naturally accessible to the baron, should form one of the privileges of the barony. The Crown's admission in fact in this action proves that to a certain and substantial extent the coal *ex adverso* of West Wemyss has been worked by the baron in connection with the barony colliery. That this has been done in virtue of the barony title seems to be the legitimate and necessary inference from the facts.

Accordingly, I hold that in working the coals *ex adverso* of West Wemyss the pursuers are exercising one of the rights of that barony. The Crown counsel very legitimately tested the argument of their opponents by inquiring whether any, and what, limit bounded this right seaward, and the terms of the summons fairly justify this challenge. The same magnitude and vagueness of the claim were made to constitute an argument against the application of the law of prescription to a measure of use so small in proportion to the claim.

The true answer to this objection is to be found in the limited and relative nature of the right. I do not think that the pursuers have right to any coal except such as can be wrought from the barony lands. I do not see on what sound reasoning the pursuers could obtain declarator that, let us say, some patch of coal, five miles away from Fife, in the middle of the Firth of Forth (whether isolated geologically or delimited for the purpose of controversy), was theirs merely because it was *ex adverso* of their barony. The same objection, in point of principle, opposes the claim to a continuous right *ad medium filum* of one of the narrow seas (however great the distance) on the part of a seaboard baron, whose right to the coal depends on prescriptive use to a much more limited extent. The true inference to be drawn from the use is, that he has right to the coal which he can get by submarine workings from his lands within the prolongation of their lateral boundaries. That the words naturally used to describe this right are very much those descriptive of a privilege, is nothing against the doctrine, as is shown by the cases in which such words have been held to embody a right of property in coal. So I should hold that, the pursuers' right being to work as much coal as they can from the barony lands, this infers a right of property in an area of coal hitherto

undefined but susceptible of definition should the Crown sue or show an interest to sue for a delimitation.

All this, of course, has little practical importance—at least in the existing means of submarine mining. But in principle it is necessary to place the pursuers' right upon a tenable basis, and I think that the decree he seeks is too wide and ought to be limited by the insertion of appropriate words.

In the case of East Wemyss there has been no possession, and the claim of the pursuers is therefore rested (1) on the terms of the title, and (2) on the title as supported by the possession *ex adverso* of West Wemyss.

There is in the East Wemyss title, first of all, so far as coal is concerned, a grant of the coal down to high-water mark, and then a grant of working coal "*infra fluxum maris.*" That these words define a limited area is made sufficiently clear by realising that the contrary contention is that they mean a grant of all the coal below high-water mark and indefinitely outwards. No precedent or authority, legal or literary, was adduced in support of this construction of the words *fluxus maris*, which seem to denote, in popular language and according to ideas common to scientific and pre-scientific days, the flow of the tide between high and low-water marks. The words "*infra fluxum maris*" seem therefore to prescribe and limit the subject of the grant as the coal under the foreshore.

It was indeed suggested that the words were intended to confer a special privilege of working the coals from the surface of the foreshore, but this does not seem tenable. Such a privilege of working coals which *ex hypothesi* had already been granted would be either superfluous or, having regard to the public uses of the foreshore, illegal.

In the construction of the East Wemyss title which I adopt, the baron's right to coal is expressly bounded seaward by low-water mark.

The next question is, can the possession *ex adverso* of West Wemyss be held as applicable to East Wemyss? The argument in support of the affirmative was, that the possession having taken place when the two baronies, West and East Wemyss, were held under a title uniting them into one barony, the possession of coal at any part interpreted the whole title, and was applicable to every part of the barony. The answer, which in my opinion is sound, was that while the charter of 1651 made the two baronies one barony, yet that writ, and all the subsequent titles, kept up the same description of the lands of East Wemyss, and thus limited the right to coal in that part of the united barony just as much after as before the union. The express terms of the title of the united barony thus preclude the suggested extension.

In the case of Methil there is again (as in the case of East Wemyss) a twofold question, according as it is treated separately, or as it is regarded as part of the united barony which purported to be established in 1651.

If the description of Methil as a separate barony be alone regarded, the case stands thus—there is a conveyance of a barony, and of the coal of the lands of the barony. There has been no possession of the coals under the sea. The question therefore is the pure one, does a barony title, without possession, give right to work coal under the sea *ex adverso* of the barony? It was represented for the pursuers that this question is the same as that raised in *Agnew's* case, that the opinions that possession was necessary were *obiter*, and that the weight of authority and principle were in favour of the inherent efficacy of a barony title independent of prescription. Now, even assuming that the right now in question is, for the purposes of the argument, *in pari casu* with that of foreshore, the opinions in the case of *Agnew* must, I think, be held authoritative in this Court, and I was not struck with the success of the pursuers in their attempt to marshall against that decision a superior weight of earlier authority.

The other argument of the pursuers was, that the West Wemyss possession might be held to interpret the title of Methil, as Methil was made part of the same united barony under the title of 1651. The answer here is different from that in the case of East Wemyss. The terms of the description of Methil present no such difficulty as arises in East Wemyss. But the fatal defect is, that the union of baronies constituted by the charter of 1651, had ceased to exist before the possession founded on took place. Now, as there is no need to amplify by mere repetition an opinion already sufficiently long, I may say that the true position of the title is stated with perfect accuracy in the Crown's answer to the first article of the condescendence, and that this is a complete answer to the pursuers' contention.

Turning to the summons, the following is the result of my opinion:— The coals under the foreshore were not at first, but are now (under the third head of the joint-minute of admissions), allowed to belong to the pursuers. The pursuers are therefore entitled to decree under the first conclusion of the summons, varied, however, so as to treat the three baronies as separate baronies.

Under the second conclusion the pursuers seem entitled to decree of declarator that the coal lying under the sea *ex adverso* of the lands and estate of West Wemyss, so far as workable from the said lands and estate, form part of the barony of West Wemyss. There must be absolvitor as regards the other two baronies.

In accordance with the view stated in the first part of this opinion, the pursuers seem entitled to the declarator sought regarding the lease, but the reductive conclusions seem unnecessary and may be dismissed.

LORD ADAM—The question raised by this reclaiming-note is, whether the pursuers are proprietors of the coal under the sea below low-water mark *ex adverso* of their lands. These lands lie in the county

of Fife, and extend for several miles along the estuary of the Forth, by which they are *de facto* bounded on the south.

It appears from the titles produced that by a Crown charter of resignation in favour of the pursuers' predecessor David second Earl of Wemyss, dated 22nd July 1651, the three ancient baronies of West Wemyss, East Wemyss, and Methil were thereby disponed to him, and were erected into a single barony called the Barony of Wemyss.

It will be observed that this charter is a charter by progress, and that we have not the original grants in the case of any of the three baronies. It is, however, I think, to be presumed, in the absence of evidence to the contrary, that they were in the terms set forth in this charter.

It will further be observed that while the three old baronies are united into one barony, it is in order that one sasine may suffice for the whole, but there is no new grant of any kind in connection with the united barony. The united barony just consisted of the three old baronies with their respective grants, privileges, and pertinents, whatever these might be.

In this charter of 1651, in so far as regards the ancient barony of West Wemyss thereby disponed, there is no mention of coal. It is neither expressly granted nor reserved. The effect of that in law would appear to be to give to the vassal the coal within the area of the barony, whatever that may be.

In so far as regards the barony of Easter Wemyss, there is a grant of the coal heughs of the same, and there is a further grant "*lucrandi et effodiendi carbones et carbonaria infra fluxum maris infra bondas prædictas*," *i.e.*, of the barony. I shall afterwards have to consider what the meaning and extent of that grant is.

As regards the barony of Methil, there is a grant of the whole coal and coal heughs of the barony "*tam subtus terra quam supra terram.*"

This union of the three baronies into the single barony of Wemyss did not long continue, because we find that David Earl of Wemyss, having completed his title under the charter of 1651, resigned the barony of Methil into the hands of the Archbishop of St Andrews as his immediate lawful superior, and obtained from him a charter of resignation dated 9th August 1665, under which he was duly infeft, and the pursuers' title to this barony is derived from this charter. I cannot understand how a single barony can be held under different superiors, and I think that the necessary effect of this was to dissolve the recently created barony of Wemyss.

It is maintained by the pursuers that however that may be, the three old baronies were again united into one by the Crown charter of resignation in favour of the third Earl of Wemyss dated 17th July 1711.

The superiority of the barony of Methil had, no doubt, on the abolition of Episcopacy, reverted to the Crown, and this charter contains a grant of the three ancient baronies, but they are not thereby united of new into a single barony. It is true that the charter contains a clause declaring that infeftment taken in one place should be sufficient for all the three baronies, but that has not the effect of creating them into a single barony. The result appears to me to be that subsequent to 1665 the pursuers' predecessors held the ancient baronies of East and West Wemyss as one barony, and the barony of Methil as another and separate barony.

I do not think that the recent titles of the pursuers call for any particular remark. They are now infeft in the three old baronies under Crown charters containing grants of coal substantially in the terms set forth in the charter of 1651.

In the case of *Agnew* v. *The Lord Advocate*, 11 Macph. 309, it was held that when an estate on the shore, whether barony or not, is held under a Crown charter which does not by express grant or specific boundary extend the right of the vassal beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land, but that the charter may be shown to include the foreshore by such long-continued possession thereof as can only be ascribed to a right of property. There is no question that the pursuers are in right of the foreshore in this case, because they have obtained decree of declarator to that effect, which is not objected to by the Crown.

But the question appears to me to be, whether the possession by the vassal of coal below low-water for the requisite period will be sufficient to establish his right to the coal there, just as it was held in *Agnew's* case that possession of the foreshore was sufficient to show that it was included in the barony.

That leads to the consideration of the possession of the coal had by the pursuers and their predecessors *ex adverso* of their lands, and to the titles to which such possession is to be ascribed.

As regards possession had by the pursuers and their predecessors under their titles of the coal there is no difficulty, because it is admitted by the parties that for more than the prescriptive period prior to 1874, the date of the lease under reduction, the pursuers and their predecessors continuously, and without interruption, worked the coal under the foreshore and beyond the foreshore under the sea *ex adverso* of a part of the lands of West Wemyss, and that there never was any working of the coal under the sea below low-water mark *ex adverso* of the lands of East Wemyss and Methil until after the year 1874.

The first question appears to me to be, What is the effect in law of the admitted prescriptive possession by the pursuers and their predecessors of the coal *ex adverso* of the lands and barony of West Wemyss below low-water mark? The coal and other minerals in this barony were not, as I have said, reserved by the Crown. They therefore passed to the vassal as a part and pertinent of the lands. The barony is *de facto* bounded by the sea. It is not disputed that

prescriptive possession following on a barony title is sufficient to enable the vassal to acquire the foreshore and the minerals under it, or rather, perhaps, to show that they formed part of the original grant of the barony. It is maintained, however, by the Crown that prescriptive possession has not this effect as regards the minerals, including coal, below low-water mark. They say that such minerals cannot in law be acquired by prescriptive possession. Had the Crown been able to plead that such minerals were inalienable in their hands, I would have seen the force of the argument. But as we see in this case, the Crown is in use to make express grants of these minerals, just as they are in use to make express grants of the minerals above low-water mark. But as prescriptive possession is sufficient to show that minerals above low-water mark are included in the barony, though not expressly mentioned, so I do not see why it should not be sufficient to show that minerals below low-water mark are also included therein though not expressly mentioned. I do not see that there is any difference in the nature or quality of the Crown's right to minerals above or below low-water mark. It is said that in the latter case there is no limit seaward, but that does not seem to be material, because the same objection would apply to an express grant.

In the next place, I think the possession of this coal is to be ascribed to the old barony title of West Wemyss. As I have already pointed out, the charter of 1651, which united the three baronies, contained no new grant in connection with it or with the three old baronies. Any right therefore which the proprietor of West Wemyss had to the coal in that barony must have been in connection with the original grant of that barony, and it appears to me that possession of coal *ex adverso* of that barony can confer no right to the coal *ex adverso* of either East Wemyss or Methil.

But I think that the possession of coal which has been had *ex adverso* of the barony of West Wemyss is sufficient to afford the presumption that a grant of the coal below low-water mark was contained in the original grant, and that therefore Mr Wemyss had a right to the coal below low-water mark *ex adverso* of the lands and barony of West Wemyss at the date of the lease.

From what I have said it follows that the pursuers have established no right to the coal below low-water mark *ex adverso* of Methil or of East Wemyss in respect of the possession of coal *ex adverso* of West Wemyss.

But as regards the barony of East Wemyss, there is an express grant of coal *infra fluxum maris*, as it is described in the charter of 1651, or "within flood mark," as it is described in the disposition in Mr Wemyss' favour of August 1879. The pursuers maintain that this includes the coal below as well as above low-water mark. I do not think so. I think it means the coal within the area covered by the flow of the sea backwards and forwards over the shore, or, in other words, the foreshore. If this be so, then the pursuers have not an express grant of the coal below low-water mark *ex adverso* of the barony of East Wemyss. But they have an express grant of the coal *infra fluxum maris*, and it would be against the terms of their charter to prescribe a right *extra fluxum maris*, as they seek to do. They have an express right to the coal within an area defined as bounded by low-water mark, and they cannot prescribe beyond that boundary. The result, in my opinion, is that at the date of the lease in 1874 Mr Wemyss was in right of the coal below low-water mark *ex adverso* of the barony of West Wemyss, but not *ex adverso* of the baronies of East Wemyss and Methil.

But the Crown maintains that the pursuers are now barred from disputing the right of the Crown to the coals in question, by Mr Wemyss' trustees having accepted from the Crown the lease of 1874, and by his subsequent adoption and homologation of it after he came of age in 1879, and the Lord Ordinary has sustained this plea. The lease bears to be entered into between the Crown and the trustees of Mr Wemyss' father, under a trust-disposition and settlement dated 21st December 1860. The lease includes the minerals of both the entailed and the unentailed lands. At the date of the lease the trustees were in the possession and management of the unentailed lands under the trust-disposition and settlement, and they were also by it appointed tutors and curators of Mr Wemyss, and were in the management of the entailed lands in which Mr Wemyss was infeft. It appears to me that in order to constitute a valid lease of the coal in the entailed lands, the lease should have been entered into by Mr Wemyss with consent of his curators. Mr Wemyss, however, is not a party to the lease, and it is certain that he was not consulted, and knew nothing about it at the time. It may be that the trustees had power to enter into this lease without Mr Wemyss' consent as regards the coal in the unentailed lands. But I think it was not a valid lease as regards the coal in the entailed lands. And if it is not a valid lease as regards the coal in the entailed lands, it cannot stand as regards the unentailed lands, as both are let as an *unum quid*. It appears to me, therefore, that the lease must be reduced, unless it can be shown that Mr Wemyss, subsequently to his coming of age, homologated and adopted it in the full knowledge of its effects.

Now, it is not doubtful that the lease was a part of and the result of a transaction in respect of which the Crown maintain that any rights or claims which the proprietors of the estate had or might have had to the coal in question were abandoned by them, while on the other hand the Crown abandoned any claim they might have against them in respect of the working of this coal prior to the date of the lease.

The lease, however, does not set forth the transaction. It does set forth that, in respect of the lease being entered into, the Crown had abandoned their claims in respect of

the previous workings; but I do not think that that was sufficient to suggest to Mr Wemyss that part of the consideration for the lease had been that the trustees should abandon any rights they or he might have to the coal, or to put him upon his inquiry.

The fact that he adopted and acted on the lease after coming of age, in ignorance of the true facts, does not appear to me to be sufficient to prevent him from now challenging the lease when he has come to know the true facts of the case, viz., that he had well-founded claims to the coal, and that these had been abandoned by a transaction of which he knew nothing. But it is said that Mr Wemyss' actings went further than this, and that after he came of age he transacted directly with the Crown about the lease. He appears, it is true, in March 1887 to have applied through his agents to the Crown, and to have obtained a reduction of the royalty payable under the lease; and again in 1890 he appears to have been a party to a minute with the Crown whereby certain alterations with regard to the working of the minerals were agreed to. These proceedings, however, do not appear to me to carry the case any further against him. He acted in the belief, no doubt, that the lease was a valid lease and binding on him, as he was entitled to believe in the then state of his knowledge. The Crown cannot point to any act of homologation or adoption by him after he came to the knowledge of the facts; and therefore I think that this plea of the Crown which the Lord Ordinary has sustained ought to be repelled and the pursuers found entitled to the coals below low-water mark *ex adverso* of the barony of West Wemyss.

LORD M'LAREN—I was not able to be present during the whole time of the first hearing of the case, and therefore my opinion is confined to the subject which was argued at the second hearing, viz., the effect of a barony title followed by possession of the coal by workings below the low-water line. On this subject I am entirely satisfied as to the soundness of the view developed in the Lord President's opinion.

It is common ground that the rule or principle which enables the proprietor of a barony to acquire extraneous subjects by prescription is not an absolute rule. The grant of a barony in Caithness would certainly not be a title of prescription to subjects in Galloway. Two limitations have been recognised. First, the property which is claimed as a prescriptive acquisition must be locally situated in such proximity to the general barony estate as to be capable of being treated in a reasonable sense as a pertinent of the barony. Secondly, and having regard to the foundation of the rule, viz., that the subject in dispute is presumed to be covered by the original grant, if this presumption is displaced by the history of the title, or is shown to be untrue in fact, prescription will not take effect. This second limitation applies at all events to cases of competition with the Crown, the author of the grant, and it was, as I understand, the ground of the judgment of the House of Lords in the case of the *Lord Advocate* v. *Hunt*, 5 Macph. (H.L.) 1.

The mere fact that the barony is defined by boundaries or even by a plan would not, I apprehend, be an answer to a claim of prescription founded on a grant of barony with the usual clause of parts and pertinents, because in such a case it is open to the claimant to maintain that the subject claimed, although extraneous to the principal part of the estate, was originally conveyed as a pertinent of the barony, and had been possessed as such for the prescriptive period. In the case of West Wemyss, where alone possession for the prescriptive period is proved, I find nothing in the facts of the case which can be considered as putting the coal below the sea outside the category of subjects which may be pertinent to a barony. Discontiguity is not inconsistent with the notion of a pertinent. According to the Lord Chancellor's opinion in the case I have referred to, discontiguity is treated as being an element of difficulty only, and as throwing on the prescriptive possessor the *onus* of satisfying the Court that the subject is in fact a pertinent of the barony. But in the case of an estate which is in fact bounded by the sea or the seashore, and where the foreshore and the coal which is vertically beneath it have been possessed under the barony title, there is no discontiguity. The coal under the sea is continuous with the coal under the land, the whole being wrought as one *stratum* by pits and underground passages serving the uses of the mine as a whole.

But again it cannot be said that there is anything in the history of the titles which would prevent Mr Wemyss from ascribing his possession of the sea-coal to his grant of parts and pertinents. Other title there is none, except the general title of the Crown to all estate which has not been granted or feued out to private owners. The only argument against the title which affects my mind is that the boundary is in fact a geographical boundary capable of being precisely ascertained. But if we look to the substance of the thing, the very fact that the general estate is bounded by the sea, and that all access on the part of the Crown or its donees to coal below the sea is cut off, makes it most improbable that any chance of revenue from such sources was intended to be reserved, rather, I should say, creates a reasonable probability that such coal below the sea as could be got at through the workings connected with the land, was put at the disposal of the grantee as a pertinent of the barony. This would not of course give Mr Wemyss a title to the sea coal in the absence of proof of possession, because there is no proof that the sea coal is a pertinent except what is derived from or connected with possession through mining. But I am here considering whether there is anything in the nature of the subject, as existing or as described in the title-deeds, which would make the claim of "part and pertinent" inappropriate, or

which would disentitle the possessor to claim the coal under the description of a pertinent. Now, considering the impossibility of working the coal otherwise than by mines sunk in the adjacent lands, and taking account also of the necessary limitation from physical causes of the grantee's power of working the coal seaward, I think that the coal *ex adverso* of the barony is just such a subject as might very naturally be thrown in as a pertinent of the land with the coal contained therein. That being so, it follows, in my opinion, that the barony title is a sufficient title to which possession for the prescriptive period may be ascribed, and that Mr Wemyss has a good title to the sea coal *ex adverso* of the barony of West Wemyss.

I also agree with your Lordships that the effect of such possession cannot be extended to the lands of East Wemyss and Methil, and that the decree must be limited in the terms proposed.

LORD KINNEAR—I have had the advantage of reading the opinion delivered by your Lordship in the chair, and also that delivered by Lord Adam. I concur in these opinions, and I do not think it desirable, and it certainly is not necessary, to repeat reasons which have been already so fully explained.

The Court pronounced this judgment:—

"Recal the interlocutor of the Lord Ordinary: Find and declare (1) that the pursuers, as proprietors of the baronies of West Wemyss, East Wemyss, and Methil, have right to the foreshore (subject to the right of the Crown as trustee for public uses), and to the coal under the foreshore of the said lands; (2) that the pursuers, as proprietors of said barony of West Wemyss, have right to the coal lying under the sea *ex adverso* of the said barony so far as the said coal is workable from the said barony: Find and declare in terms of the declaratory conclusions relating to the lease libelled, and dismiss as unnecessary the reductive conclusions relating thereto: *Quoad ultra* assoilzie the defender from the conclusions of the action, and decern: Find the pursuers entitled to four-fifths of their expenses in the cause," &c.

Counsel for the Pursuers—Asher, Q.C.—Rankine—Ure. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Lord Advocate Graham Murray, Q.C.—C. N. Johnston. Agent—Thomas Carmichael, S.S.C.

Friday, November 6.

OUTER HOUSE.

[Lord Kincairney.

NISBET *v.* NISBET.

Husband and Wife—Separation—Cruelty—Separation for Cruelty of Wife.

Decree of separation may be obtained by a husband on the ground of cruelty on the part of his wife, on the condition of providing a reasonable aliment for her. *Observed* (*per* Lord Kincairney) that proof of cruelty to the children is an important element in such a case.

This was an action of separation at the instance of John Nisbet, miner, Galston, against his wife on the ground of her cruelty. No defences were lodged. Evidence was led, from which it appeared that the parties were married in August 1882, and had lived together up to the date of the proof. There were five children of the marriage, and the defender was now forty years of age. It was proved that the defender was addicted to drink; that she neglected her household duties, and kept the house and children in a filthy condition; and that she was habitually violent in her conduct towards her husband and her children. Their doctor deponed that in his opinion her conduct was likely to endanger the health of the children.

Counsel for the pursuer stated that this was the first instance in Scotland of an action of separation at the instance of the husband, but the competency of such an action was recognised by Lord Fraser—Husband and Wife (2nd ed.), p. 906; and in England — *Kirkman* v. *Kirkman*, 1807, 1 Hag. Con. Rep. 409; *Furlonger* v. *Furlonger*, 5 Notes of Cases, 422; *White* v. *White*, 1859, 1 Swab & Tris. 591; *Pickard* v. *Pickard*, 3 Swab. & Tris. 523; *Forth* v. *Forth*, 1867, 36 L.J., Pro. and Mat. 122. In the two most recent cases cited (*Pickard* and *Forth*) it had been made a condition that the husband should provide a reasonable aliment for the wife. In this case the husband's income was £37 per annum, and he was willing to undertake to allow his wife 3s. per week.

On 7th November 1896 the Lord Ordinary granted decree in terms of the conclusions of the summons.

Opinion.—"Actions of separation and aliment on the ground of cruelty are usually brought by a wife, but there is no doubt of the right of a husband to bring such an action. In this case it has, I think, been established that the conduct of the wife has been so violent to the pursuer and to the children as to entitle the pursuer to decree. It may be that the pursuer is able to take care of himself. But he could only protect himself from his wife's violence by retaliation, and his mere ability to retaliate cannot disentitle him to decree of separation. It has, in my opinion, been proved that the children, for whose safety the pursuer is bound to provide, have been endangered