The real question seems to me to be whether the testator must be presumed to have purchased his widow's *jus relictæ* for the benefit of his particular disponees only or for the benefit of his estate generally, and it appears to me to be one of those questions which may be decided either way without infringing either principle or authority. The testator has made a complete disposition of the capital of his estate in a certain contingency only, and has made no disposition in the event of that contingent gift failing. I do not know why he should not be deemed to have contemplated the fuilure of the contingency and to have elected in that event to die intestate. I understand, however, that all your Lordships agree in the result with the learned Judges in the Court of Session, and I need scarcely say that in these circumstances the decision is most likely to be in accordance with sound principle and the presumed intention of the testator. I therefore concur in the order proposed.

Appeal *dismissed*, with the declaration that the appellant Mrs Naismith's right to have her claim of legitim satisfied out of the fund *in medio* is not barred by the terms of her father's settlement.

Counsel for the Appellants—J. B. Balfour, Q.C.—P. Balfour. Agents—A. & W. Beveridge, for Carmichael & Miller, W.S.

Counsel for Respondent—The Lord Advocate (Graham Murray, Q.C.)—A. S. D. Thomson. Agents—Grahames, Currey, & Spens, for A. C. D. Vert, S.S.C.

Monday, July 31.

(Before Lord Watson (in the Chair), and Lords Morris and Shand).

THE LORD ADVOCATE *v.* WEMYSS, *et e contra.*

(*Ante*, December 11, 1896, vol. xxxiv. p. 216, and 24 R. 216).

Superior and Vassal—Crown--Barony Title—Sea—Submarine Minerals—Prescription.

Held (*aff.* judgment of First Division) that the grant of a barony by the Crown with parts and pertinents, or a grant of a barony with the coal of the barony lands, confers no right, apart from prescriptive possession, to coal lying under the sea *ex adverso* of the barony lands.

Opinion reserved—whether prescription by partial working of minerals under the sea, *ex adverso* of the lands, will give a title to the whole submarine minerals capable of being worked from the barony lands, or whether the rule *tantum prescriptum quantum possessum* will apply.

Superior and Vassal — Barony Title — Grant of Minerals infra fluxum maris.

Held (*aff.* judgment of the First Division) that a barony title containing a grant of coal *infra fluxum maris* is a bounding title limiting the grantee's right to coal under the foreshore above low water-mark, and excluding prescription of submarine coal below low water-mark.

Prescription—Superior and Vassal—Estates Held by Different Titles—Disjunction of Barony by 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. On the restoration of Episcopacy in 1662 the superiority of the barony of M passed to the Archbishop of St Andrews, and a charter was obtained from him by the vassal. The superiority of the estate 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, but these charters did not reunite the three estates into a single barony.

In the case of W there was no grant of the coal of the lands, in the case of E there was an express grant of the coal above low water-mark, and in the case of M a general grant of the coal of the lands of the barony. The vassals under these titles had worked submarine minerals *ex adverso* of the estate of W, but not those of E or M.

Held (*aff.* judgment of First Division) that as prescription of submarine minerals was excluded as regards the intervening estate of E by the terms of the title, and as the sea minerals of W and M were separated in locality by those of E, and the lands held under separate titles, the workings *ex adverso* of W could not be regarded as an act of possession applicable to the submarine minerals of M.

Personal Bar — Homologation — Minor — Compromise by Trustees for Minor.

The curators of a minor, who was heir of entail of certain estates, and for whom his curators held as trustees certain unentailed lands adjoining the entailed lands, entered in 1874 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 minerals 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 minerals already worked, and on condition of receiving a lease of the minerals from the Crown. The title to the unentailed lands was vested in the trustees, and they had by the terms of the trust full powers of "compromise and submission." They subsequently obtained a lease of the minerals under

the sea *ex adverso* of the whole lands, entailed and unentailed, from the Crown; the lease containing no reference to the surrender of the heir's rights, and he was not made a party to the lease or to the arrangement which preceded it. On the heir attaining majority the lease was assigned to him by the trustees, and he subsequently in 1890 applied for and obtained from the Crown a reduction of the royalty payable under and certain other modifications of the lease. At this period he had the means of information in his hands, but delayed to investigate his rights, although he then became aware of the compromise which led to the lease. It was not till three years after the reduction of the royalty and fourteen years after attaining majority that he challenged the Crown's title as owner. In this action it was found that the vassal had no right to submarine coal *ex adverso* of the entailed lands, while the House reversed its opinion as to the vassal's right to minerals *ex adverso* of the unentailed lands.

Held (*rev.* judgment of First Division) (1) that as no right had been surrendered except in regard to the unentailed estates, as to which the trustees had full powers to transact, the compromise effected by them, although including the entailed estate, was valid and binding upon the heir, and (2) that, in any case, the heir was personally barred from challenging it by acquiescence and homologation.

This case is reported *ante, ut supra.*

Both parties appealed.

At delivering judgment—

Lord Watson—I may state that their Lordships in this case have resolved to follow the precedent that was adopted by the House in 1861 in the Scotch appeal of *Galloway* v. *Craig*, reported in 4th Macq. p. 267. In that case the late Lord Campbell had heard the appeal, but died before delivery of the judgment. In this case our late lamented colleague, the noble and learned Lord Herschell, had prepared a judgment before his death, and I shall now ask Lord Shand to deliver it.

Lord Herschell (*read by Lord Shand*)—Mr Wemyss is the proprietor of the baronies of West Wemyss, East Wemyss, and Methil. He brought the present action to have it declared that he was entitled to the coal under the sea below low-water mark *ex adverso* the three baronies.

The baronies were originally distinct, but by a charter of resignation and *novodamus* dated 22nd July 1651 the three baronies became united. As regards Methil, however, the union did not last long, as in the year 1662 it became again separated from the other baronies.

In answer to the claim of the pursuer, the Crown pleaded that by reason of a transaction which took place in the year 1874 the pursuer was barred from asserting his present claim. The Lord Ordinary held that the transaction referred to afforded a good answer to the whole claim. On appeal the Inner House recalled the interlocutor of the Lord Ordinary *in hoc statu* and admitted proof. They ultimately held that the pursuer had no right to the coal under the sea *ex adverso* the baronies of East Wemyss and Methil, but that he had a right by prescription to the coal under the sea *ex adverso* the lands of West Wemyss so far as it was workable from that barony. They came to the conclusion that the pursuer was not barred by any transaction from asserting his claim to these coals.

The pursuer and the Crown have both appealed. It will be convenient in the first instance to consider the appeal of the pursuer against the decision that he was not entitled to the coal *ex adverso* the lands of East Wemyss and Methil, inasmuch as his right to this coal may have a material bearing on the question what was the effect of the transaction which took place in the year 1874 as regards the coal *ex adverso* the lands of West Wemyss.

It was argued at the bar on behalf of Mr Wemyss, in the first place, that the proprietor of a barony bordering on the seashore was presumably the proprietor of the foreshore. There is considerable authority against this proposition, and for the contention on behalf of the Crown that in order to establish a title to the foreshore, where it is not expressly included in the terms of the grant of the barony, it is necessary to prove acts of ownership upon it. I will assume, however, for the purpose of the argument in the present case, that the contention of Mr Wemyss is so far well founded. It was then further contended that not only was the grant of the barony to be presumed to carry with it the foreshore, but also the coal under the sea below low-water mark. There was some hesitation in fixing the limit seaward, to which the grant was to be taken to extend. Whether it was as far as the coal could be worked from the barony, or in the case of a *mare clausum* to the *medium filum* between the two shores, or in the case of the open sea to the three-mile limit. It was not maintained that the bed of the sea below low-water mark passed to the grantee of the barony, but only the strata of coal lying beneath it—that is to say, that by the grant of the barony these strata of coal were severed from the surface and created into a separate tenement. There is not, in my opinion, even a semblance of authority in support of the contention thus advanced, nor can I see any sound reason on which it can be rested. Yet it is on this, and on this alone, apart from prescription, that the claim to the coal under the sea *ex adverso* the baronies of West Wemyss and Methil is based.

It is asserted that the coal *ex adverso* East Wemyss may be claimed by virtue of the titles relating to that barony. By the charter of July 1651, already referred to, there was granted the barony of East Wemyss with its coals and coal workings, and also the right of getting and winning coals "*infra fluxum maris infra bondas*

predictas." It was argued that these words conveyed the right to the coals under the sea below low-water *ex adverso* East Wemyss. In my opinion the words *fluxum maris* as used in this charter mean the foreshore over which the sea ebbs and flows, and nothing more. It is, I think, the coal under the foreshore which is here designated, whether the word *infra* be construed strictly as meaning underneath, or whether it be regarded as a substitute for *intra*, which would seem to be the case having regard to the words "*infra bondas predictas*" which immediately follow. A case was cited in which it was said that *fluxum maris* had been construed to mean the line of high-water mark. That may have been a perfectly proper interpretation of the words in the instrument then in question. I do not think it is the meaning to be attributed to them in the charter of 1651. But if it were, I am at a loss to see how the contention could be a valid one that *infra* or *intra fluxum maris* would then mean the coal seawards of high-water mark. I may observe that in the Act of Parliament of 1661, which ratified the charter, the words *infra fluxum maris* are rendered "within the sea flood"—words which seem to me equally apt to describe the foreshore.

I have therefore come to the conclusion that apart from prescription Mr Wemyss has not made out a title to the coal under the sea *ex adverso* any of the baronies.

I now come to the alleged title by prescription. There has undoubtedly been a working of coal under the bed of the sea *ex adverso* West Wemyss for the prescriptive period. The question is whether the possession of these coal workings can be referred to the barony title. I agree with the Court below in thinking that they can. But whether the possession of these coal workings would establish a title, as the Court below have held, to all the coals seaward so far as they could be worked from the barony, or to any other limit seaward, or only to the area of which there has been actual possession, is a different question, and one of no small difficulty. I do not, however, in the view which I take of the case, find it necessary to pronounce an opinion upon it.

It was urged that although possession had only been taken of coal under the sea *ex adverso* West Wemyss, yet inasmuch as the baronies of West Wemyss and East Wemyss were united into a single barony of Wemyss by the charter of 1651, the prescription arising from the working of the coals alluded to sufficed to establish a title in respect of the coal *ex adverso* the entire barony of Wemyss. But for the specific grant of coals in connection with the barony of East Wemyss, to which attention has been called, this might perhaps have been the case. But although the two baronies were united by the charter the limits and rights of two baronies are separately stated and defined. I have already said that in my opinion the right to the coals under the foreshore of East Wemyss is expressly granted. It appears to me to be a bounding charter in the seaward direction so far as the lands of East Wemyss are concerned, and I do not think the barony title will support a prescriptive claim further seawards.

It was scarcely contended at the bar, and in my opinion is not open to argument, that possession for the prescriptive period *ex adverso* West Wemyss could confer a title to the coal *ex adverso* Methil, which, although for a short time united with the two baronies of Wemyss as one barony, ceased to be so united more than two centuries ago.

For these reasons I concur with the Court below in thinking that Mr Wemyss has established a prescriptive right to some coal under the sea *ex adverso* West Wemyss, but that he has not made out a right to any such coal *ex adverso* East Wemyss or Methil.

I have now to deal with the transaction which took place in 1874 by which it is alleged that Mr Wemyss is barred from asserting any right to the submarine coal which he might otherwise have established. In August 1874 the Office of Woods called attention to the workings under the bed of the Firth of Forth at West Wemyss, and inquired under what authority the coals were being worked by Mr Wemyss, as the Office was not aware of any grant in his favour. This letter was addressed to Mr Wemyss, who was then a minor, but the officials of the Office of Woods were apparently not aware of this until the close of the negotiations which led to the granting of the lease about to be referred to. The law-agents who acted for the Wemyss family and the trustees of the estates replied to the letter addressed to Mr Wemyss, setting forth the grounds of the claim to work the coal under the bed of the Firth of Forth, but stating that if the Office of Woods were advised that the Crown had a right to the coal under the Forth opposite to and connected with the barony lands, and was prepared to try the question of ownership in a court of law, they would be disposed to recommend Mr Wemyss, rather than enter upon a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty. To this letter a reply was sent by the Office of Woods maintaining the right of the Crown to the coal in question, and that Mr Wemyss was liable to account for the full value of the coal already raised and gotten. It is not necessary to pursue further the course of the negotiations which ultimately led to the lease. It is only necessary to call attention to the fact that in a letter from the law-agents of 17th October 1874 there occurred the following passage—"Of course the present negotiation is not to be held as prejudicing in any way the rights and pleas of the proprietor of Wemyss." In a letter from the Office of Woods of 21st November following it was stated that this remark required explanation before the lease was proceeded with, and inquiry was made whether it were a correct assumption that this reservation of rights and pleas was made only to meet the

contingency of the negotiation being fruitless. The law-agents on the 23rd November, in answer to this inquiry, said—"You are correct in assuming that the reservation in our letter of the 17th ultimo was made only to meet the contingency of the negotiation being fruitless." In the month of April 1875, as the result of the negotiations, a lease was granted by the Commissioners of Woods to the trustees under the trust-disposition and settlement made by the pursuer's father, of the coal under the sea *ex adverso* all three baronies, for a term of thirty-one years from 1st January 1874, at a fixed rent of £10 a-year, and certain royalty rents which were to merge *pro tanto* in the fixed rent. This lease was on 14th August 1879, after Mr Wemyss had attained his majority, assigned by the trustees with the consent of the Commissioners to Mr Wemyss and the heirs of his body, with certain destinations-over, and on 14th February following Mr Wemyss made an assignation in favour of himself.

No doubt was, I think, entertained in the Court below, and I can entertain none, that if this lease had referred exclusively to coal *ex adverso* West Wemyss, the transaction would have barred any claim which Mr Wemyss might have had to those coals by virtue of his prescriptive title. The whole of the lands of West Wemyss bordering on the sea were vested in the trustees in fee. They had full power to enter into a transaction by way of compromise in relation to any claim connected with them. The Courts have always strenuously upheld transactions entered into for the purpose of averting threatened litigation with reference to rights which may be in dispute. And it does not admit of doubt that this was a transaction of that description. The correspondence renders this quite clear, especially the passages in the letters of the 17th October and the 21st and 23rd November 1874, which have been quoted.

Whilst, however, the lands of West Wemyss bordering on the sea were, as has been stated, vested in the trustees, part, at all events, of the lands of East Wemyss, and the whole of those of Methil bordering on the sea, were vested in Mr Wemyss and not in the trustees. It was on this that the judgment against the Crown was founded. The Lord President said—"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." Lord Adam on the same point says—"The lease includes the minerals of both the entailed and the unentailed lands. . . . 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 the consent of his curators."

If it had been found that Mr Wemyss had a title in right of his entailed lands to any coal under the sea *ex adverso* of them, I could understand this reasoning and should not dissent from it. But the judgment of the Court was to the effect that all these coals were the property of the Crown, and that the proprietor of East Wemyss and Methil never had any title to them. I do not think it can have been brought home to the mind of the Court that the only coal under the sea to which a right had been shown was in 1874 vested in the trustees, who had full power to enter into a transaction renouncing that right. I am confirmed in this view by the language of Lord Adam. He speaks, in the passage quoted, of the lease including "the minerals of the entailed lands." This is erroneous. The minerals under the sea *ex adverso* the entailed lands were not and never had been "minerals of the entailed lands." It is true that they were leased to the trustees, but this was to their advantage. If the lands of East Wemyss and Methil had belonged to some-one wholly unconnected with the trustees or West Wemyss, why would not the grant of a lease by the Crown of the coal under the sea *ex adverso* of these lands have been perfectly valid as a part of the transaction for settling a dispute between the Crown and the proprietors of West Wemyss as to the right to work under the sea? And what difference can it make that Mr Wemyss was the owner of East Wemyss and Methil?

For these reasons I think there is no ground for impeaching the transaction which culminated in the lease of 1875, and that Mr Wemyss is thereby barred from asserting his right to the only coal under the sea to which he has established any title.

Even if I were not satisfied on this point, it does not seem to me clear that Mr Wemyss would be entitled to judgment. He became aware in February 1890 that the lease of the sea coal had been taken in 1875 in consequence of a question having been raised by the Crown as to his right to coal under the sea. Instead of then looking into the matter and asserting any right on which he intended to insist, he sends the documents to his law-agent with the remark—"When matters get more settled we might look into the matter, though at present we had better let it lie." He continued working the coal under the lease, and subsequently obtained by negotiation an alteration of some of its terms, which were recorded in a minute of alteration annexed to the lease signed by Mr Wemyss on the 21st July 1890. It was not until the 27th December 1893 that he raised this action. It may be that he was not in July 1890 fully aware of his rights, but the means of ascertaining them were in his possession. I greatly doubt whether under such circumstances a person is entitled to put aside inquiry to take the benefit of a transaction, and even obtain a variation of it in his favour, and three years afterwards insist that it should be declared invalid.

LORD WATSON—There are three ancient baronies—West Wemyss, East Wemyss, and Methil—lying adjacent to each other along the north shore of the Firth of Forth, in the county of Fife, which have from time immemorial been the property of the respondent Randolph Gordon Erskine Wemyss and his ancestors. These baronies were, by Crown charter of resignation and novodamus in favour of the second Earl of Wemyss, dated 22nd July 1651, and confirmed by an Act of the Scottish Parliament in 1661, erected into a single barony under the title of the barony of Wemyss.

The lands comprised in these baronies were held and possessed by the late James Hay Erskine Wemyss, the father of the respondent Mr Wemyss, partly under the fetters of an entail and partly in fee-simple. Upon his death in March 1864, the respondent, who was at that time a minor in the sixth year of his age, succeeded, as heir of investiture, to the entailed portions of the estate. The deceased had, by *mortis causa* settlement, conveyed the unentailed portions of the estate to his wife and two other persons in trust, with directions that they should denude in favour of the respondent on his attaining majority, whom failing, in favour of a series of heirs therein designated. By the same deed the deceased appointed his trustees to be tutors and curators to his children during their pupilarity or minority.

The fee-simple lands, which were vested in the trustees, appear to have included nearly the whole of the barony of West Wemyss, and did admittedly include certain coal-pits and workings at a point near to the western boundary of the barony. It is matter of mutual admission that by means of these coal pits the late James Hay Erskine Wemyss and his predecessors in title had worked for a period exceeding forty years coal lying under the bed of the sea beyond the foreshore; and also that these submarine workings were continued by the trustees. It is not averred, and there is no evidence, that submarine minerals had been worked for forty years from any of the three baronies except at that one point within the barony of West Wemyss. In May 1875 the trustees entered into an arrangement with the Crown, the terms of which will be afterwards noticed, the result being that they accepted a lease from the Crown for the term of thirty-one years from and after the 1st day of January, 1874, of all seams of coal, ironstone, and fireclay lying under the bed of the sea, within an area extending seawards from the foreshore of the baronies of West Wemyss, East Wemyss, and Methil, for an average distance of two miles.

The respondent Mr Wemyss attained his majority on the 11th July 1879. By disposition recorded in the Register of Sasines on the 22nd August 1879, the trustees under his father's settlement conveyed to him the whole of the unentailed lands which had been vested in them; and by assignation dated the 14th and 18th days of August 1879 they made over to him their whole right and interest in the lease of submarine minerals which they had obtained from the Crown in the year 1875. The respondent accepted the assignation and continued to work under the lease as tenant of the Crown until the present action was raised by him, and the other respondent William Nocton, to whom, along with himself, he had conveyed the barony and estate of Wemyss in trust by a deed executed in the year 1891.

The summons, which was signeted in December 1893, fourteen years after the entire estate had become vested in the respondent Mr Wemyss, concludes for declarator (*First*) that the foreshore of the barony of Wemyss, including the baronies of West Wemyss, East Wemyss, and Methil, and (*Second*) the coal and other minerals under the sea *ex adverso* of the said baronies and their foreshores, belong in property to the respondents, and are parts and pertinents of the united barony, subject in so far as regards the foreshore to their rights as trustees for public uses. It also includes (*Third*) for declarator that the respondents are not bound by the terms and conditions contained in the lease of the sea minerals granted by the Crown to the trustees of the late proprietor, or in an addition thereto made between the Crown and the respondent Mr Wemyss, dated the 21st and 25th days of July 1890; and (*Fourth*) alternatively, for reduction of the said lease and additions thereto.

The defender and appellant, the Lord Advocate, as representing the Crown, did not dispute that the respondents were entitled to a decree affirming that, subject to the interest of the public, they were, in virtue of their titles and possession following thereon, proprietors of the foreshore of the baronies. He opposed, on various grounds which it is not necessary to notice in detail, their claims to have declarator of property in minerals lying below the bed of the sea, and to have decree either annulling or reducing the lease of these minerals granted by the Crown to the trustees of the late proprietor, and pleaded, *separatim*, that these claims are barred by the terms of the transaction which was entered into between these trustees and the Crown, and had been adopted by the respondent Mr Wemyss.

The Lord Ordinary (Stormonth Darling), of consent of the appellant, decerned in terms of the first declaratory conclusion, affirming that the foreshores of the barony belonged in property to the respondents. His Lordship sustained the plea in bar advanced by the Lord Advocate, and in respect thereof assoilzied him from the remaining conclusions of the summons, with expenses. On a reclaiming-note, the learned Judges of the First Division allowed further proof, which was led, and on the 11th December 1896 they recalled the interlocutor of the Lord Ordinary, of new pronounced a declaratory decree with respect to the forrshore, adding to the words of the summons "and to the coal under the foreshore of the said lands;" found and declared that the respondents, as proprietors of the barony of West Wemyss, have right

to the coal lying under the sea *ex adverso* of the said barony; found and declared in terms of the third declaratory conclusion with respect to the lease libelled and addition thereto; dismissed the fourth and reductive conclusions as unnecessary, and *quoad ultra* assoilzied the appellant, and found him entitled to four-fifths of his expenses.

I have come to be of opinion, with my noble and learned friends, that the plea in bar of action stated on behalf of the Crown ought to prevail. In that view it becomes unnecessary to give judgment upon the merits of the respondents' action in so far as it concludes for declarator of their property in minerals outside the foreshore; but the claim preferred by the respondents being one of novelty and importance, there are some considerations affecting it which I desire to notice before adverting to the plea of bar.

I see no reason to doubt that by the law of Scotland the *solum* underlying the waters of the ocean, whether within the narrow seas or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown. Whether the Crown could make an effectual grant of that *solum* or of any part of it to a subject appears to me to be a question not unattended with doubt, but I do not think that the Crown could, without the sanction of the Legislature, lawfully convey any right or interest in it, which, if exercised by the grantee, might by possibility disturb the *solum*, or in anyway interfere with the uses of navigation, or with any right in the public. The mineral strata below the bed of the sea, in so far as they are capable of being worked without causing disturbance, appear to me to stand in a different position. To that extent I know of no principle of Scotch law which could prevent the Crown from communicating the right of working to a subject in the character either of tenant or proprietor. If that be so, it would follow that submarine minerals, if expressly included, might, to the extent which I have indicated, be competently made parts and pertinents of a baronial or other Crown grant of adjacent lands. But it is by no means so clear, that when these minerals have not been expressly included in a grant of barony, the whole submarine mineral field lying *ex adverso* of the barony lands ought to be treated upon the same footing as the foreshores of a barony have hitherto been dealt with in our law, or that the baron's prescriptive working at one point of a comparatively small portion of a single seam ought to be received as evidence either that he had actual possession of the whole submarine field, or as showing by implication that the field was included in the original grant.

The learned Judges of the First Division appear to have regarded the relation of the minerals claimed by the respondents to the barony of Wemyss as being, if not strictly the same, at least analogous to the connection between a barony and its foreshores, where these have not been expressly granted, and their Lordships with much force point to various considerations which, so far as as they go, tend to support that view, such as the immediate vicinage of the sea minerals, and the fact, which they assume, that these minerals cannot be worked except from the barony lands or foreshores. Whether the latter fact ought to be assumed as having application all round the coasts of Scotland I am not prepared to say. I should have thought that in some, if not many, localities it could not be accepted. And, on the other hand, I am disposed to believe that, at the dates when the three original baronies were created, as well as at the time when they were subsequently united, it might be safely predicated that neither the Crown nor its grantees had it in contemplation that the grants were to carry any right to work submarine minerals. If that conclusion could be legitimately reached, it would seriously differentiate the position of adjacent sea minerals from that of the foreshores of a barony, which, according to an opinion expressed by many eminent Scotch judges, are carried by the mere grant of barony, without their being expressly mentioned. That doctrine has not been expressly affirmed by a judgment of the Court; but the contrary has never been expressly decided, although in the majority of the cases an opposite doctrine appears to have been followed.

There is, in my apprehension, or ought to be, a practical distinction recognised between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits, for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance. In the first case the rule obtains *tantum prescriptum quantum possessum*. In the second it appears to me that a much more liberal effect has been given to partial acts of possession, as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement. The foreshore is simply a tract of land, at times covered by the tide and at other times dry, and is in many respects attended with the same incidents as land estate situated above the level of high tide. When the adjacent minerals have not been severed from it in title, an absolute grant of foreshore will, just as in the case of other land, carry the whole minerals below it *usque ad centrum;* and in the absence of express grant, the fact of the baron having worked a mineral seam below it might be reasonably regarded as a strong act of possession, to be taken into account along with other acts and circumstances, in determining whether he and his predecessors in title had been in prescriptive proprietary possession of the whole foreshore. For a definition of what will constitute sufficient evidence of such possession I may refer to the remarks made by Lord Blackburn in *Lord Advocate* v. *Lord Blantyre*, 4 App. Ca. 791. In the case of mineral strata lying below the bed of the sea, it is doubtful whether they have any covering tenement

which could be made the subject of a feudal grant, and if such a tenement were possible it is not claimed by the respondents. In their natural state these strata are mere *partes* of the soil under the surface of which they lie, and it may be doubted whether there is any such connection between them as would justify the inference that the owner of a barony situated on the coast, when he works one of the strata in whole or in part, ought to be regarded as having possessed them all.

The original and older titles of the three baronies in question have not been produced. But the titles to West Wemyss, which are in process, describe the barony and its pertinents as lying "infra vice-comitatum nostrum de Fyff." I entertain no doubt that these are "bounding" words, and that the respondents could not claim as pertinent of the barony any subject lying in the county of Perth. I can hardly believe that at the time of the grant the Firth of Forth was understood to be within the *vice-comitatus* of Fife, or that at that date, or for centuries afterwards, any court in Scotland would have so held.

I have made these observations, not with the view of expressing any final judicial opinion, but simply for the purpose of suggesting some considerations which will require to be disposed of when it becomes necessary to decide any of these three questions—(1) Whether prescription by partial working of minerals under the sea *ex adverso* of his barony, under a general grant which does not expressly include these minerals, will give the baron a title to the whole minerals which are capable of being continuously worked from his hands? If so, (2) Whether the partial working of one seam ought to be regarded as proprietary possession of the whole seams of such minerals so far as workable from the barony? And (3) how far seawards, in the case of a frith or estuary, prescriptive right of working acquired by mining close to the foreshore can be held to extend? I shall now, in referring to the merits of the respondents' claim, assume in their favour that, as appears to have been held by the learned Judges of the Division, all these questions ought to be answered in favour of the respondents. Upon that assumption, in which I am not at present prepared to acquiesce, I have to express my concurrence in certain points of considerable importance which were ruled by their Lordships in arriving at their judgment.

In the first place, I think it is not matter of reasonable inference from the terms of any of the charters or other titles in process that submarine minerals *ex adverso* of the three baronies of West Wemyss, East Wemyss, and Methil, or of the larger barony created by their union, were included in the grants made by the Crown, although upon the assumption which the Court below has made such minerals might be brought within their ambit through the explanatory aid of a very limited possession by the barons during the period of prescription.

In the second place, I am of opinion that the description of the barony of East Wemyss and its parts and pertinents contained in the Crown charter of 22nd July 1651 does in effect constitute a bounding charter, the extreme boundary seawards being the low-water line of the foreshore, and that the baron is consequently precluded from acquiring or otherwise comprehending in his original grant sea minerals beyond that limit by reason of his prescriptive possession. The words "infra fluxum maris" do not, in my opinion, refer to the permanent waters of the ocean, but solely to that part of them which is liable to flux or reflux, or, in other words, which covers the foreshore during high water. That such is their true meaning is made clear by the words which immediately follow them in the same sentence—"infra bondas prædict." These "foresaid" boundaries refer back to the general description of "omnes alias partes et pendicula quæcunq. dict. t'rarum et baronie de Eist Wemyss jacen. in parochia de Wemyss." That parochial boundary is strictly territorial, and can include no part of the waters or bed of the sea beyond the foreshore. My noble and learned friend Lord Herschell has called attention to the fact that in the Act of 1661, confirming the Union Charter of 1651, the words "infra fluxum maris" are rendered "within the sea flood."

In the third place, I agree with the learned Judges of the First Divison in thinking, that inasmuch as the submarine minerals lying *ex adverso* of the baronies of West Wemyss and Methil respectively are so separated in locality by the intervening sea minerals of East Wemyss, to which the respondents are not in the position of having acquired any right by prescription, the baron's working of minerals below the sea in connection with the seams opposite to his lands of West Wemyss cannot be regarded as an act of possession exercised in the mineral field which the respondents claim *ex adverso* of the barony of Methil. The finding would be applicable to a claim for foreshore when there is a considerable space intervening between the parts claimed; and it is, in my opinion, applicable *a fortiori* to a claim for separate sea minerals.

The result of these rulings, in which I concur, is, even on the assumption which I have already stated, to exclude the respondents' claims for submarine minerals connected with the baronies of East Wemyss and Methil. In the case of East Wemyss there is a bounding charter, and prescriptive possession cannot operate beyond the outer margin of the foreshore, which is the limit prescribed. In the case of Methil it was made matter of admission in the course of the proof "that there never was any working of the coal under the bed of the sea below the low-water mark *ex adverso* of the lands of East Wemyss and Methil until after the year 1874." It is not stated at what date these workings commenced or how long they were continued. But they have been, since the beginning of 1874, and until the date of this action, carried on

under a Crown lease, and, so far, can be of no avail to set up the title of the baron as against the Crown. It would be in the power of the Crown at any time within forty years from the date at which the respondents or their successors might begin to work the sea minerals *ex adverso* of the lands of Methil, as in the assertion of a proprietary right, to extinguish their inchoate and imperfect title by declarator.

The result of holding, as your Lordships were evidently prepared to do, that the compromise and lease of 1875 are effectual and binding upon the respondent Wemyss, so far as regards the unentailed lands and minerals of the barony of West Wemyss, to which he derived title from his father's testamentary trustees, was that the respondent, for the first time in the course of the case, asserted that a small portion of the lands of West Wemyss lying on the east side of the barony, and abutting on the sea shore, was under the fetters of the entail, and did not belong to the trustees. The record and the evidence in process are silent on the subject. Counsel for the Crown, whilst unable to give any admission, was of course not prepared to affirm that on investigation the fact might not prove to be as asserted in argument. If it were, it would necessarily follow, in your Lordship's opinion, that the respondents could not in any view lay claim to the property of submarine minerals except such as were attached to and lying *ex adverso* of the foreshore of that eastern portion of the barony of West Wemyss which was shown by them to be within the entail, and to that extent formed part of the estate to which the respondent Mr Wemyss succeeded upon his father's decease.

I shall now refer to the circumstances which have given rise to the Crown plea in bar of action. In the beginning of August 1874 Her Majesty's Commissioners of Woods and Forests sent a letter to the respondent Mr Wemyss, who was at that time a minor in the seventeenth year of his age, intimating that the minerals under the Firth of Forth, unless specially granted, belonged to Her Majesty, and requesting to be informed by what authority he was working under the Forth at West Wemyss. That working was, in reality, carried on by the trustees in connection with the unentailed lands and minerals which were vested in them. The letter was taken by Mrs Wemyss, one of the trustees, the respondent's mother, to Melville & Lindesay, Writers to the Signet in Edinburgh, who were agents for the estate, both entailed and unentailed, with whom she had a personal meeting in regard to the subject of the Commissioners' letter. On the 24th August Melville & Lindesay replied that the family of Wemyss had worked coal under the bed of the sea in the most open and public manner for more than forty years, which was sufficient to exclude all interference on the part of the Crown, and they added—"If, however, notwithstanding the above facts, you are advised that the Crown has right to the coal under the 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 circumstances."

That suggestion was followed by an intimation from the Commissioners in a letter of the 25th September 1874, to the effect that, subject to the approval of the Board of Treasury, they were prepared to grant to Mr Wemyss a lease of the "coal, culm, ironstone, and ore and fireclay," within and under the bed of the sea *ex adverso* of the lands and barony of Wemyss upon certain conditions, for the term of thirty-one years as from the 1st January 1874. Negotiations then took place between the Commissioners and the firm of Melville & Lindesay, with the object of settling the terms of the lease which it was proposed should be granted by the Crown, and accepted by the proprietors of the lands and barony of Wemyss. These negotiations lasted until the month of November 1874, when the whole terms of the proposed lease were finally arranged.

On the 17th October 1874 Melville & Lindesay had written to the Commissioners indicating that their clients were disposed to accept the terms then offered by the Crown, subject to certain modifications, adding, by way of precaution, "Of course the present negotiation is not to be held as prejudicing in any way the rights and pleas of the proprietor of Wemyss." The Commissioners then wrote agreeing to some of these modifications; and in a letter of 21st November 1874 they asked an assurance that the reservation just quoted "was made only to meet the contingency of the negotiation being fruitless." On the 23rd November Melville & Lindesay replied—"You are correct in assuming that the reservation in our letter of the 17th ultimo was made only to meet the contingency of the negotiations being fruitless." Mrs Erskine Wemyss, in her evidence as a witness for the respondents, admits that Melville & Lindesay's letter of the 17th October was submitted to her, and that she approved of its terms. She states that she had given special instructions to Mr Lindesay that the proprietary rights of the estate were to be carefully safeguarded—that the reservation in the letter met her views upon the subject—and that the explanation in Melville & Lindesay's letter of the 23rd November to the effect that the reservation was intended to meet the contingency of the negotiations proving fruitless was made without her authority. To my mind that circumstance is immaterial. Had the letter of 23rd November never been written I am of opinion that as soon as the negotiation had been concluded with the trustees, and passed into an agreement, and a lease had been granted in terms of that agreement, the reservation could not have been construed in any other sense than that attributed to it by Messrs Melville & Lindesay.

As already stated, the terms of the lease were finally adjusted and agreed to in November 1874; and on the 7th January 1875 a draft lease was sent to Melville & Lindesay to be communicated by them, for revisal, to the law-agent of the Commissioners. On the 19th January Melville & Lindesay wrote to the Commissioners' law-agent—"Until young Mr Wemyss is of age in 1879, the lessees will be the trustees of his late father, and we have substituted their names for his." The lease was finally settled between the agents in April 1875; and it was formally executed on behalf of the Crown as lessor of the one part, and by Mrs Erskine Wemyss and Sir David Baird of Newbyth, two and a *quorum* of the trustees, as tenants, of the other part, on the 20th and 28th days of April and the 3rd day of May 1875.

By the lease thus executed there were let to the trustees, for the space of thirty-one years from and after the 1st day of January 1874, the whole seams of coal, ironstone, and fireclay in or under the bed of the sea, within an area bounded on the north-west by the ordinary low-water mark, on the north-east by a straight line drawn in the direction thirty degrees east of south by true meridian, on the south-west by a straight line drawn in the direction forty-five degrees east of south by true meridian, and on the south-east by a straight line drawn from the south-eastern extremity of the north-eastern boundary to the south-western extremity of the south-western boundary. The area so defined includes the whole of the specified minerals lying in or under the bed of the sea *ex adverso* of the three baronies of West Wemyss, East Wemyss, and Methil to a distance of about two miles from the foreshore. The lease also contained a provision to the effect that it should not be competent for the Crown to raise any question with, or to make any claim against, the lessees in respect of workings by the lessees and their predecessors or authors or tenants, of coal and other minerals *ex adverso* of the lands and barony of Wemyss prior to the 1st day of January 1875.

The trustees continued to work under the lease, and to make payment of the royalties due to the Crown until July 1879 when the respondent Mr Wemyss attained majority, and it became their duty to denude themselves of the trust-estate in his favour, which they accordingly did in the month of August 1879. The said respondent having obtained a conveyance to the property of the unentailed lands, and also an assignation to the Crown lease of submarine minerals, continued to work under the lease, and to occupy without objection or challenge the position of a tenant of the Crown until the present action was brought in December 1893.

In March 1887 the said respondent, through his agents, Melville & Lindesay, applied for a reduction of the royalty of 4d. per ton, payable under the lease for common coal to a royalty of 2d. per ton. The Commissioners ultimately agreed to his proposal, and effect was given to the reduction from and after the 1st August 1887. Again, in the year 1890 the same respondent made a successful application to the Crown to vary the conditions of his lease, by permitting him to work the Chemirs seam, which was above 42 inches in thickness, by the method known as "Longwall," or complete excavation, when the seam is found at a depth below the bed of the sea of not less than 180 fathoms, and when such a mode of working is considered safe and suitable by the Home Office inspector for the district for the time being. A minute varying the conditions of the lease to that extent was endorsed upon the lease itself, and was, on the 20th and 28th April 1890, duly executed by the respondent Mr Wemyss, and by one of the Commissioners as representing Her Majesty.

The correspondence to which I have referred, between the officers of the Crown and Messrs Melville & Lindesay, followed as it was by the adjustment and execution of a Crown lease of the minerals under the bed of the sea *ex adverso* of the united barony of Wemyss, embodies an arrangement in the nature of a compromise, by which the owners of the barony lands, whether entailed or unentailed, were to obtain a lease of those minerals for the term of thirty-one years, in consideration of their conceding the right of the Crown to the property of the minerals. A transaction of that kind cannot, according to the law of Scotland, be lightly set aside, and it is not impeachable upon many grounds which would be sufficient to infer reduction of an ordinary agreement. The considerations upon which that rule rests are fully explained by Lord Stair (Inst. b. 1, tit. xvii., secs. 1 and 2). It must of course be shown that the arrangement was not an idle transaction between the Crown and agents who professed to have, but did not possess any authority to bind the owners of the barony and land, but the latter will be bound, if it appear either that they sanctioned the arrangement at the time or that it was subsequently adopted by them. At the time of the transaction there was this material difference between the position of the owners of the unentailed and the owner of the entailed portions of the estate of Wemyss, that the former were all *sui juris* whilst the latter was in minority. It will, therefore, be convenient to consider separately whether the transaction was binding upon the trustees of the late Sir James Hay Erskine Wemyss, who ceased in 1879 to have any interest in the unentailed lands, and whether it is now obligatory on the respondents, who are proprietors of the whole barony and lands.

In my opinion, it is sufficiently established that the trustees sanctioned the arrangement which was made with the Crown by Melville & Lindesay, and that they were aware of its terms when they entered into the mineral lease of April and May 1875. One of their number, Mr Jonathan Peel Baird, does not appear to have interfered actively in the management of the trust, and he did not subscribe the lease, which was executed by Mrs Erskine

Wemyss and Sir David Baird, being a quorum of the trustees. Mrs Erskine Wemyss took a more active share than either of her co-trustees, and was generally cognisant of the whole course of the negotiations from first to last. The lady states in her evidence that she "was the acting trustee," from which I infer that she was permitted by her co-trustees to assume that position, and that they were content to recognise and if necessary confirm her acts of management. Mrs Erskine Wemyss, according to her own statement, read Melville & Lindesay's letter of the 24th October 1874, in which the firm suggested that in the event of the Crown being prepared to try the question of right to the sea minerals in a court of law, they would recommend Mr Wemyss to avoid a protracted litigation by paying a small rent or royalty to the Crown. Mrs Wemyss says, "That letter conveyed to me that a question of right was raised, and that Mr Lindesay advised compromise, and with that knowledge I left myself entirely in his hands as the agent of the trustees. Further, I saw and approved, on his advice, of the letter of 17th October 1874." The last-mentioned letter shows that the whole terms of the lease which was to be granted by the Crown had been adjusted, and would be accepted by Mr Wemyss and his advisers, subject to modification in regard to three points. These points were subsequently either adjusted to the satisfaction of Melville & Lindesay or were conceded by the Crown. I cannot come to the conclusion that the trustees, other than Mrs Erskine Wemyss, in accepting the lease from the Crown, and in working under it for more than four years as tenants the minerals which they had previously worked as proprietors, were ignorant of the fact that in so doing they were giving effect to an arrangement which had been made with the authority of one of their number in whom they had such confidence that they practically left to her the administration of the trust. It is quite possible that they may not have carefully studied the terms and conditions of the transaction, but it appears to me to be equally clear matter of inference that, whatever these terms and conditions were, they were willing to assent and did in point of fact assent to them.

The trustees did not labour under any defect of power to enter into the transaction, because the trust-deed under which they acted gave them very wide authority, including ample powers of "compromise and submission." Accordingly, their transaction was effectual to bind not only themselves but the land in which they were vested and all who might derive title from them under the destination contained in the trust-deed. I am unable to follow the chain of reasoning by which the Lord President and Lord Adam arrived at the conclusion that in a question with the trustees the Crown lease of minerals was invalid. I can find no *termini habiles* upon which to rest that conclusion. The Lord President said, "How 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." To the same effect Lord Adam said, "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 unentailed lands, as both are let as an *unum quid*." Now, according to the judgment of both the learned Lords, of which to that extent I approve, the Crown was in February 1875 free to let the sea minerals *ex adverso* of the entailed baronies of East Wemyss and Methil to the trustees or to any other tenant, because in the case of East Wemyss the Crown had excluded these minerals from the barony by a bounding charter, in the case of Methil there had been no prescriptive possession. The trustees were admittedly owners of and had the right to deal as they chose with the fee of the unentailed lands of the barony of West Wemyss, and they had full and undisturbed possession of the sea minerals under the Crown lease. Whatever might be the right of the respondent Mr Wemyss, I do not think the trustees had any title to challenge their own transactions with the Crown. They must be held to have known the state of the title as well as if not better than the Crown, and they could not, in my opinion, set aside a transaction of which they had taken all the benefit they could on the ground that they were mistaken in supposing they had authority to act for the respondent Mr Wemyss, then a minor.

The learned Judges have omitted to notice the fact that the mineral lease was taken in name of the trustees as tenants upon the suggestion of the latter, and upon the representation that it was to be assigned by them to the respondent Mr Wemyss on his attaining majority. The arrangement was not an unreasonable one, inasmuch as at that time the trustees were working sea coal opposite to their unentailed lands at West Wemyss, whereas no sea coal either had been or was being worked *ex adverso* of any other part of the united barony and lands of Wemyss. So far as the Crown was concerned it is clear that the transaction was begun and completed upon the footing that all claim for the property of sea minerals, whether by the proprietors of the entailed or unentailed portions of the barony was to be withdrawn. According to the evidence of the respondent Mr Wemyss he took no part in the management of the entailed estate during his minority, but left it to his curators, and in particular to his mother, who naturally was the most active of them, and that lady made these arrangements with the Crown which he now seeks to have declared inoperative or set aside with the knowledge of the other curators, and with the advice of Melville & Lindesay, who were, as he says, "the trusted agents of the family."

Had the respondent Mr Wemyss, upon his attaining majority or within a reasonable period thereafter, repudiated the arrangement which had been made on his behalf in 1875, there seems no reason to doubt that he would have been entitled to

do so. In 1879 he became the proprietor of the whole united barony and lands, and under the assignation from the trustees he also became tenant of the Crown in the sea minerals *ex adverso* of the barony, which he continued to work in that capacity until the present action was brought more than fourteen years afterwards. During the whole of that period he must be taken to have known that the Crown was asserting its right as owner to the sea minerals *ex adverso* of his barony and lands. He had distinct notice in the terms of his mineral lease that at its commencement the Crown had not stood in the position of owner, and that the Crown, in consideration of the trustees becoming its tenants, instead of exercising a proprietary right, had consented to forego its claims against the trustees and their tenants who had previous to the year 1874 asserted that they had the ownership of the sea minerals. He does not dispute that he was in possession of the titles to his estate, and had therefore the means of obtaining information at his command, but he seeks to excuse his long acquiescence by explaining that he was not aware that his titles gave him proprietary right to the sea minerals in question, and that his attention had never been directed to the point. I am not prepared to hold that the facts of the case bear out that excuse.

I think it is a strong circumstance against the respondent Wemyss that so early as February 1890 he became aware that the Crown lease under which he held had been taken in 1875, because of the Crown having then disputed the efficacy of the barony titles to carry coal under the sea. He admits that at that time it was prominently before his mind that there had been old workings on the Wemyss estate under the sea; and that he "came to have the idea that I might have the right to the under-sea coal." Yet in April 1890 he obtained a modification of the lease on the footing that the Crown and not he was the owner of the coal. I am of opinion that it was the plain duty of the respondent, having the means of information within his power, to investigate his right at once; and that he could not be permitted to go on for years, without notice to the Crown of his intention, to take the whole benefit of the existing arrangement, and tacitly to reserve a right to challenge it at some future time. I must admit that in regard to this part of the case I had at one time more difficulty than my noble and learned friends; but on consideration of the whole circumstances of the case I see no reason to differ from their opinion.

I am therefore of opinion that the interlocutor appealed from, except in so far as it declares the right of the pursuers to the foreshore of the barony, ought to be reversed, and that the cause ought to be remitted to the First Division of the Court of Session, with directions to assoilzie the appellant from the whole other conclusions of the summons, and to find the Lord Advocate entitled to his expenses of process in both Courts below, and also his costs of these appeals.

LORD MORRIS—I have only to express my concurrence in the opinion pronounced by my noble and learned friend, which so fully and completely deals with every point in this case.

LORD SHAND—I have had, as your Lordships know, a full opportunity of considering the judgments of my late honourable and lamented noble friend Lord Herschell, and of my noble and learned friend Lord Watson, now on the Woolsack, and as I agree entirely with the views which have been expressed in both of these judgments, I think it unnecessary and undesirable to enter again fully into the numerous questions which are raised and which have been discussed in this case.

I must, however, observe with reference to the transaction of 1875, and the lease which was then entered into, which was adopted by the pursuer when he came of age, and was acted upon for many years afterwards, that it seems to me their Lordships of the First Division have not given full effect to their own decision that no right to the submarine minerals *ex adverso* of East Wemyss or Methil was ever conferred upon the Wemyss family or belonged to the pursuer or to the trustees. If one considers for a moment the position of matters in 1874 and 1875, when the negotiations between the trustees and the Crown took place, in the view that there was no right whatever in the Wemyss family to the submarine coal *ex adverso* of either East Wemyss or Methil, the matter stood simply thus—that the trustees on the one hand maintaining that they had the property in the submarine coal *ex adverso* of West Wemyss, found the Crown disputing that right and claiming the property, and threatening the trustees themselves or those whom they represented with a claim for byegone working which might have amounted to a large and serious responsibility. Those who represented the Wemyss family could not successfully maintain that they had a right to the submarine coal either of East Wemyss or Methil; and they were therefore shut up to the single question, had they the right to the submarine coal in West Wemyss.

No one who has traced the history of this litigation and judgment from beginning to end can fail to see that that was a most delicate question. It is one upon which their Lordships who have preceded me have expressly refrained, now that the question has been so fully discussed, from giving any opinion except this, that they considered it to be a question of very great difficulty, and one which they were not prepared to decide in the pursuer's favour.

The position of the matter therefore in 1874 was this—That delicate and difficult question being raised by the claim of the Crown that the minerals belonged to them, and the threat that there might be a byegone claim for past workings, the trustees, acting I think with a very wise discretion, opened negotiations with the Crown, stating—We see there is a difficult question before us, and we are rather disposed

instead of having litigation, to avoid a decision of that question, and if you will give us a lease upon favourable terms for a period of time we shall take such a lease, and thereby acknowledge the Crown as owner. By that they were not only getting the advantage of obtaining a lease on favourable terms and getting rid of this question of byegone claims, but they were also to have included in that lease for thirty-one years the submarine minerals of the adjoining baronies of East Wemyss and Methil, to which, as has now been definitely found, both by the Court of Session and by your Lordships, they had no right whatever. It appears to me that that was a transaction not only, so far as I can see, expedient, but most reasonable and prudent on the part of the trustees.

The trustees accordingly concluded an arrangement; they got for the benefit of the estate a lease of the submarine minerals in the adjoining baronies, which they could not possibly have got otherwise, and they obtained the various advantages which I have mentioned. They proceeded to work all of these minerals, and did so for four or five years. Then came the point of time at which the pursuer himself took action. In 1879, four years after the lease was entered into, he came of age. The trustees had arranged that he should get what they considered the benefits of that lease, and in 1879 he acquired those benefits. He accepted an assignation of the lease, and intimated the assignation to the Crown, and became himself tenant of the whole of these minerals for a number of years afterwards. He worked those minerals, taking the benefit of the lease and all the advantages I have mentioned, until 1893, when this action was raised, that is, for a period of fourteen years. And not only so, but in 1879, shortly after he had right to the lease, he obtained certain stipulations in his favour by arrangement with the Crown. In 1887 he got a reduction of the royalties; in 1890 he obtained other advantages, upon application, for the working of the minerals, which enabled him to work mineral seams of greater thickness than he could have done under the original lease. As the case had been decided, there was no *unum quid* in the sense used by the learned Judges in speaking of the entailed lands, for the submarine coal *ex adverso* of these lands belonged to the Crown, who could let it to anyone just as it was arranged they were to let the coal of West Wemyss by the lease.

I confess I have never had the slightest difficulty in holding upon the case as it was presented to this House that an arrangement was entered into which it was impossible, in justice to the Crown, to cut down by setting it aside or by a reduction. What is the ground upon which it is said that it should be set aside? It is said that it was only in 1890 that it occurred to Mr Wemyss that he might make these larger claims, so many of which have proved to be without foundation. But what of the position of the other party to a contract of this kind? Had the Crown, in dealing with persons who are *sui juris*, first with the trustees who had the power to enter into the lease so far as West Wemyss was concerned, and thereafter for fourteen years with one who was *sui juris* and capable of looking into and managing his own affairs—I ask, had the Crown any duty to inform him (even if they knew) that he might have higher rights? I take it that one must look at the position of the other contracting party in a question of this kind and not at Mr Wemyss' position only. I have the strongest opinion that it was out of the question to cut down a transaction of this kind which has gone on for so many years simply upon a statement that Mr Wemyss, who was bound to look after his own interest, during all that time did not, until three years before the action was raised, know that he might possibly have claims such as he has set up in this action. The Crown gave up, as I have stated, claims they might have made; again, they gave favourable terms on entering into the lease by accepting a low royalty; they included in the lease coal to which the pursuer had clearly no right; they have repeatedly granted further concessions or modified terms; and the advantages given extended over a period of fourteen years during which the pursuer was himself tenant. I am clearly of opinion that in those circumstances this compromise could not be set aside; and I confess that I am further of opinion that it was a very reasonable compromise, for I am not satisfied that it was not a very great advantage to Mr Wemyss and no disadvantage to him at all.

Upon the larger questions which have been discussed I shall say very little. As to the property of West Wemyss, seeing that the plea in bar is to be sustained, it is not necessary to form an opinion whether the judgment of the Court of Session is or is not sound; but I shall only say for myself, as I think my noble and learned friends have already said, I should have very great difficulty indeed in extending the doctrine applicable to the foreshore to the extent of covering submarine minerals lying outside the foreshore. I think the moment you come to get below the foreshore which is dry at low tide and come to deal with minerals which are beyond that, the question you have to consider is a totally different one. I agree with what my late noble and learned friend Lord Herschell in his opinion has said, that if you have a mere conveyance of a barony it cannot possibly be maintained with any show of reason that that conveyance would give a right to minerals not only in the foreshore (as to which even some acts of possession are required), but would give a right to minerals below the foreshore. I doubt if possession applicable to the submarine minerals below the foreshore could be taken to be interpreting an old grant so that the grant should have the effect of conveying those minerals, or if it could be carried further than merely giving effect to the adage or maxim *tantum prescriptum quantum possessum;* and I feel fortified

in ths doubt by what my noble and learned friend Lord Watson has said, that it is inconceivable that at the time when these old grants were given, centuries ago, it entered into the mind of anyone that there should be workings of minerals not merely on the foreshore but out into the bed of the sea for a considerable distance. Such a thing certainly had not existed, and I do not suppose it was thought of.

Having expressed my views very shortly upon these latter questions because they have been so fully discussed by my noble and learned friends in the judgments which have been delivered upon the whole matter, I have no difficulty in holding that the appellants in the case are barred by the obtaining of this lease and by what followed, and I may say, if it were by nothing else, are barred by the actings of the appellant Mr Wemyss himself during the long time when he was himself tenant of the Crown of those minerals.

Ordered that the interlocutor appealed from, except in so far as it declared the right of the pursuers to the foreshore of the barony, be reversed, and that the cause be remitted to the First Division of the Court of Session, with directions to assoilzie the appellant from the whole other conclusions of the summons, and to find the Lord Advocate entitled to his expenses of process in both Courts below, and also his costs of these appeals.

Counsel for the Appellant (The Lord Advocate)—The Lord Advocate (Graham Murray, Q.C.)—C. N. Johnston. Agent—T. W. Gorst, Office of Woods and Forests and Land Revenues.

Counsel for the Respondent (Wemyss)—The Dean of Faculty (Asher, Q.C.)—Ure, Q.C. Agents — Broughton, Nocton, & Broughton, for Tods, Murray, & Jamieson, W.S.

END OF VOLUME XXXVI.