method of rod-fishing is receiving a full rent for that right so far as he lets it to others, and is putting on it a fair value so far as he retains it in his own hands. No doubt he has been fortunate enough to secure an additional payment from the upper proprietors, with the view of increasing the value of their own fishings in other parts of the river. But we must take it that this circumstance does not in point of fact diminish the rent which he receives from his actual tenants in this part of the river, and if the rent or valuation (as the case may be) is fair and full, the requirements of the Act I think are satisfied, and nothing more can enter the roll.

I therefore propose that we should sustain the deliverance of the Committee.

LORD LOW—I entirely concur.

The Judges were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellant — Cullen. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondent—C. K. Mackenzie, K.C.—W. Mitchell. Agents—John C. Brodie & Sons, W.S.

COURT OF SESSION.

Friday, March 17.

FIRST DIVISION.

CADELL *v.* ALLAN AND WALKER.

Property—Competition of Title—Mines and Minerals under Foreshore—Boundary—Foreshore—Glebe Bounded by the Sea—Barony Title with Express Grant of Coal ex adverso Barony Lands—Glebe Formed out of Land Feued Prior to Erection of Lands into a Barony—Title to Minerals which did not Form a Separate Tenement — Possession of Surface Sufficient to Prescribe Right to Minerals not Forming Separate Tenement.

In an action brought by the heritable proprietor of certain lands to interdict the tenants under a mineral lease granted by a minister with consent of the presbytery from working the coal situated beneath the foreshore and bed of the sea *ex adverso* of the minister's glebe, the titles founded on by the parties respectively were as follows:—The complainer's lands had been erected into a barony by a royal charter dated 1615, which contained an express grant of the coal under the foreshore *ex adverso* of the barony lands. In 1613, two years before the date of this charter, the predecessor of the grantee of the charter had feued out from his lands 24 acres of arable land lying along the seashore, and described as bounded by the sea on the north, it being provided in the feu-charter that the granter of the feu and his heirs should, notwithstanding the feu, have right to win coals upon the said 24 acres. By charter of confirmation and novodamus, granted in 1673 by the proprietor of the barony to the vassal then in right of these 24 acres, the novodamus, while setting forth that for onerous considerations the granter of new granted the 24 acres, contained no reservation as to the coals. The charter ended with a precept of sasine on which infeftment was duly taken. Subsequently by an excambion sanctioned by decree of the presbytery a minister's glebe was carved out of these 24 acres, it being declared in the decree that the sea was to be considered the boundary of the glebe on the north. Successive ministers had, after the date of the excambion, possessed the surface of the foreshore *ex adverso* of the glebe.

Held (1) that, under the finding of the presbytery, construed in the light of the possession following thereon, the glebe had a sea boundary and included the foreshore *ex adverso;* (2) that the glebe title followed by possession of the surface of the foreshore did not include a title to the minerals under the foreshore, which would avail against anyone having a special title to these minerals as a separate tenement; (3) that the glebe title embracing the surface was nevertheless a sufficient title to the minerals against anyone not holding such a special title to the minerals; (4) that the complainer had failed to establish a special title to the minerals, in respect that, though his barony title contained an express grant of coal *ex adverso* of the barony lands, the 24 acres had been feued prior to the erection of the lands into a barony, and, in the absence in the subsequent charter of confirmation and novodamus of the reservation of the right to win coal such as was contained in the original feu of the 24 acres, the coal must be taken to have been included in the new grant conferred by that charter; and accordingly (5) that the complainer, having failed to establish a special title to the minerals as a separate tenement, had no title to quarrel the right of the respondents to work the minerals *ex adverso* of the glebe under their lease from the minister and presbytery.

Superior and Vassal—Contract of Feu with Reservation of Coal—Subsequent Charter of Novodamus not Containing Reservation of Coal.

Certain lands were erected into a barony by royal charter containing an express grant of the coal under the foreshore *ex adverso* of the barony lands. Prior to the date of the royal charter the owner of the lands, which were subsequently erected into the barony, feued out a portion of his lands lying along the sea, and described as bounded by the sea, the feu-contract containing a clause reserving to the superior the

right to win coal under the land feued. Subsequently to the date of the royal charter the proprietor of the barony granted to the vassal in right of the portion of land so feued a charter of confirmation and novodamus bearing to be granted for onerous causes, and ending with a precept of sasine on which infeftment was taken. This charter contained no clause reserving a right to the granter to win coal in the land.

Held that the charter of novodamus carried a grant of the coal under the land.

Church—Glebe — Designation of Glebe — Excambion of Glebe—Decree of Presbytery Sanctioning Excambion of Glebe—Difference between Title Conferred by Original Designation and Title Following on Excambion—Title in Excambion Flows from Excamber — Effect of Excambion Title.

Held that a decree by a presbytery sanctioning an excambion of a glebe and impressing new land with the character of a glebe, differs from an original designation of a glebe, in respect that it does not constitute an absolute title to the land described in the decree as forming the new glebe, and, in particular, is ineffectual to transfer land which is the property of a person not a party to the excambion.

Henry Moubray Cadell, proprietor of the lands and barony of Grange, in the parish of Borrowstounness and Carriden, Linlithgowshire, brought this action against Charles Edward Sellar, Stormont Castle, Strandtown, Belfast, and Robert Thomson Walker, mining engineer, concluding for interdict against the respondents, and all others acting by or under their authority, "from sinking pits or mines into, and from working, removing, or otherwise interfering with, the coal situated beneath the foreshore and bed of the sea *ex adverso* of the minister's glebe of the parish of Carriden, in the county of Linlithgow."

The complainer averred that he held a continuous series of titles to the lands and barony of Grange, dating from a charter of resignation and novodamus granted by King James the Sixth in favour of Sir John Hamilton, which was dated 15th December 1615, and by which the said lands were erected into a barony. No copy or extract of the said Crown charter of resignation and novodamus was known to exist, but the signature by King James VI., given at Newmarket on 15th December 1615, in favour of John Hamilton, eldest son of Sir John Hamilton of Grange, registered in the Register of Signatures on 26th December 1615, contained a grant to the said John Hamilton, his heirs and assignees, *inter alia*, of "all and sindrie coillis alsueill gryt as small now being or that sall happin to be fund and win in onie tyme cuming in the sey alsueill within as without the flude thairof perteneing to his Majestie and to the of his hienes croune be the actis of Parliament & lawis of this realme quhaireuir the samen ar or may be fund foiranent the haill boundis meithis and merchis of the landis of Grange Murehouss Littill Carriden and Stakkis with thair pertinentis or onie pairt or pairts thairof perteneing to the said Johne Hamiltoun lyand within the Srefdome of Linlithgow with speall and full power and libertie and preuiledge to the said Johne Hamiltoun and his foirsaidis To serche seik and caus be serchit socht fund and win coil heuchis in the sea ane or mae alsueill within as without the sey flude foiranent the boundis of the landis abonespeit wite the pertinentis and to brek the grund for that effect in sic pairtis as thay sall think expedient and to use all ingeynis neidfull for wyning of the said Coilheuchis and thairupon and upon the haill coillis gryt and small to be win thairin to dispone at thair pleasr in all tyme cuming."

The precept under the Signet for the charter of registration in favour of the said John Hamilton, dated 15th December 1615, and recorded in the Register of the Privy Seal, contained a description in Latin similar to that in the signature *supra*. An extract was also produced from the Crown Treasury Books showing payment of composition on Sir John Hamilton's entry to Grange.

A Crown charter of resignation, confirmation, and novodamus under the Great Seal, of date 21st August 1643, was produced, which confirmed the erection of Grange into a barony, and which also contained a grant of the coals *ex adverso* of the lands of Grange, Muirhouse, and Little Carriden, "within the sea as well within as without the sea flood."

In 1673 the barony was in the possession of John Hamilton of Grange, who granted the charter of novodamus in favour of Sir Walter Seaton, dated 11th July 1673, founded on by the respondents as narrated *infra*.

There was produced a contract of feu between Sir John Hamilton of Grange and Sir John Bruce of Carnock, dated 3rd March 1613, under which the former feued out to the latter 24 acres of arable land of Muirhouse and Little Carriden lying along the sea and described as bounded by "the sea on the north," and it was admitted that the present glebe of Carriden, as described in the minute of the presbytery of Linlithgow, dated 16th October 1817 (quoted *infra*), was taken. The said feu-contract contained the following clause:—"And notwtstanding of the setting in fewferme of the saids tuentie four aikeris of land in maner abonementioned wt liberteis of making of herbereis & poirtis in maner foirsaid It is speciallie provydit heirby that it salbe lesum to the said Sr John his airis & assignayis to win coillis & coilhewis stane querrellis & to mak schell lyme vpoun the boundis of the said twentie four aikeris of land in all tyme cuing except in theis pairtis & placeis of the samy qr the saids salt pannis girnell houss herbereis bulwarkis & vyis warkis abonespeit salhappin to be biggit & planttit the said John his foresaids alwayis refoundand & payand to the

said Sr George his airis & assignayis all damnage intest & skaith that he or they salhappin to incur be casting of mynis wying of coillis coilhewis and wyning of stanes vpone the aikeris foirsaids."

On 11th July 1673 John Hamilton of Grange granted in favour of Sir Walter Seaton a charter of confirmation and novodamus of the said 24 acres. This charter bore to be granted for onerous causes, and contained a precept of sasine on which infeftment was duly taken, the instrument of sasine following on it being recorded on 2nd October 1673.

The novodamus narrated as follows:—"Moreover I, for certain sums of money paid and delivered to me by the said Sir Walter Seatoune, and for divers other good causes and considerations moving me, have of new given, granted, and by this my present charter have confirmed, and also by the tenor of the presents do of new give, grant, and by this my present charter confirm, to the aforenamed Sir Walter Seatoune, his heirs and assignees whatsoever, heritably." . . . The novodamus proceeded of new to grant the said 24 acres, but contained no reservation as to the coals. The novodamus, however, contained a clause in the following terms:—"And with power to make the following works as follows in the common language, 'To make open water waiffers, closemynes, cast langschottes and water passages' within any part of the said lands of Grange, Little Carriden, and Muirhouse, which can in any way whatever promote the winning and digging of the said coals of Bonhard, and the transportation thereof to the sea and land through the said lands or any part of the same, and to place 'water engines or works upon any of the saids mynes, for conveying and drawing water' from the aforesaid coals and coalheuchs in all time coming, upon the express provisions introduced in favour of the late Sir John Hamilton of Grange, Knight, and his heirs and successors, especially mentioned in the contract and disposition of the said acres of land by the said late Sir John Hamiltoun to the late Sir George Bruce of Carnok, knight."

The following excerpts from minutes of the Presbytery of Linlithgow contain the material points founded on in relation to the history of the glebe of Carriden:—"*Die* 16 *July* 1628.—. . . This day Mr Andro Keir craved a visitatioun of his church of Cariddenn and presented befor the brethrein ane precept for designatioun off his manse and gleib from the archbish. direct to the Moderator Mr Johne Gibbesonn Mr Thomas Spittall. It is ordeined that the visitatioun off Cariddenn be on the 24 off this instant moneth off July. . . . *At Caridden the* 24 *of July* 1628.—The quhilk day were conveined for the visitting of the said kirk Mr Jhone Tennent Moderatour, Mr Jhone Gibbesonn, Mr Allexander Keith, Mr Jhone Cornuall, Mr Richard Dicksonn, and Mr Jhone Drysdall. The sermoun was maid be Mr Thomas Spittall wpoun 2 Tim. 5. 17, quherin was handled the dutie and dignity of ministeris. Efter sermoun the holl gentilmen of the said parochin being present, to witt, . . . Sir Jhone Hammiltoun of Grange, . . . with the holl elderis and deaconis off that paroche, — The brethrein ordeined Mr Jhone Drysdall to be clark to the said visitatioun becaus Mr Andro Keir clerk to the presbytry is minister to this kirk of Cariddenn and is to be removed now that the visitouris may try off his doctrin disciplin and conversatioun . . . The quhilk day a procuratory direct from the Archb. of St Androis for designatioun off ane manse and gleib to the minister at the said kirk being produced and red publictly, the Brethrein inquyred iff there was any present quho knew that there was any vicar or parsoun landis within the said parochin or quher any gleib appertaining to the said kirk off old did ly, and finding efter inquisition that there was none to give notice theroff and quho wold informe them theranent, the brethrein signified to the gentilmen and parochineris present that according to the Act of Parliament and the precept direct from their ordinar they wold tak a course for the designatioun off the said manse and gleib betuix and the thrid Thursday off November nixt and that wpoun the neirest kirkland conforme to ordour and willes the gentilmen and parochineris to be present the said day to the effect forsaid. . . . *Die* 18 *Februar* 1629.—The quhilk day forsameikill as ther was ane precept direct from the archbischope of St Androis to Mr Thomas Spittall Mr Jhone Tennend and Mr Jhone Gibbesonn for designation of the manse and gleib of the kirk of Cariddenn, the Brethrein ordeins that the brethrein nominat convein at the said kirk wpoun Moonday next for the forsaid designatioun and ordeins that the gentilmen in the said parochin quho hes a tres be advertised that they may keip the said day. *Die* 4 *Martij* 1629.—. . . This day ane report is maid of the designatioun of the gleib off Cariddenn out off the landis off Grange neirest to the said kirk. *Die* 3 *Martij* 1630. — . . . This day Mr Jhone Gibbesonn in name off Sir Jhone Hammiltoun of Grange offred and desyred excambioun to be maid betuix the landis of Grange designed to be the manse and gleab of Carriddenn with other landis of his far neirer and mor ewous to the kirk off Cariddenn, with this provisioun and conditioun that iff it wer fund that thease landis off Grange designed befoir wer better land then these his other landis quhilk he now offeris that upon the astimatioun and valuatioun of thrij or four honest skilled men off the paroche off Cariddenn he suld giv so much mor land in quantitie as may mak out the equality of the ane land with the other. And offeris also to mak a disposition or resignatioun off these landis in the hands of the kirk to be ane manse and gleib in all tym comming. The Brethrein with advyse and consent off Mr Andro Keir minister at Cariddin ordeins a dispositioun and resignatioun of so much land to be maid adre^{m} and presented to them that they efter advyse finding it expedient may design it and that therefter a letter of excambion be maid and subscryved be the Archbischope and them in

favouris of the said Sir Jhone. *Die* 17 *Martij* 1630.— . . . Anent the manse and gleib of Carriddenn this day is presented ane disposition and resignatioun of 4 aickers and thrij rudes of the land of Littilcaridden belonging to Sir Jhone Hammiltoun of Grange, subscryved be the said Sir Jhone James Hammilton fear of Grange his sone and Alexander Bruce of Alvath for his entres quho hes ane part of these landis in few ferme off the said Sir Jhone. The Brethrein being contented and satisfied heirwith ordeins the Moderatour and Mr Jhone Gibbeson conforme to a commissioun given to them befor from the Archbischope to go doun efternoon to Caridden and to designe the said 4 aickeris and 3 ruids of land for to be manse and gleib to Mr Andro Keir. *Die* 31 *Martij* 1630. . . . Anent the designatioun off the manse and gleib of Cariddin the moderatour reportis that he had designed according to ordour and instrumentis takin in the handis of Peter Robesonn notar publict and that Mr Andro Keir minister at Caridden was put in possessioun of the said manse and gleib be Jhone Hendersonn in name and behalfe off Sir Jhone Hammiltoun and Alexander Bruce conforme to ane proquitory givin to the said Jhone Henderson be them with their full power, quherwpoun the said Mr Andro Keir took instrument off possessioun in the handis of the said Peter Robesonn notar. *Carriddin* 13 *Mar.* 1650. . . . Ordaines Mrs Jon Wauch, Rot Row and Wm Wischart with thair ruling elders or any 3 of them tuo of them being ministers to designe grasse for the minister of Carriddin."

The minutes of the Presbytery of Linlithgow, dated 16th October, 1817, contained the following account of another excambion of the Glebe of Carriden:—"Mr Keir stated that Sir George Hope agreed to build a sufficient fence between the lands proposed to be given in excambion for the present glebe and the road on the west side of the same, as well as to complete the fences between his property and the new glebe; and further, that Mr Willian Wilson at Gateside was appointed arbiter for Sir George Hope. . . . Mr James Trotter at Newton, the arbiter for the Presbytery, and Mr William Wilson for Sir George Hope being called, appeared, when they were solemnly sworn to decide according to the best of their judgment without favour or prejudice to any of the parties more immediately concerned. . . . Mr Robert Bauchope, landmeasurer appointed by the Presbytery, being called, appeared, and was solemnly sworn to measure the different pieces of ground faithfully and accurately according to his best ability. The different parts of the glebe were then pointed out to Messrs Trotter and Wilson, and likewise the land proposed to be given in excambion for them, when these gentlemen were informed that the Presbytery would expect their report in writing. The arbiters inspected and valued the lands submitted to their judgment. Messrs Trotter and Wilson gave in the following report:—'We William Wilson in Bridgend and James Trotter in Newton being appointed to value the minister's glebe at Carriden proposed to be given in exchange for the lands of Cuffabouts, &c., belonging to Sir George Hope of Carriden, Do hereby report our opinion that the minister's glebe containing ac. 9·916 is worth of yearly rent including the wood £37, 9s. 3d., And that the lands of Cuffabouts, including that part of Carriden estate lying betwixt them and the road leading from Carriden Church to to Linlithgow, containing in all ac. 11·367, making an allowance for the road to the old church yard, is of the same yearly value. As witness our hands at Linlithgow this 16th October 1817 years, (Signed) William Wilson, James Trotter.' The Presbytery having fully and maturely considered the same, Decree as they hereby do and have decreed that the old glebe of Carriden shall belong to Sir George Hope, his successors and assignees, and that the glebe of Carriden shall consist of the parks immediately to the north and east of the church and church yard of Carriden, the park lying to the south of the same usually called Cuffabouts, the park lying between the same and Pease Hill on the south, the triangular piece of ground lying between them and the road to Linlithgow on the west, amounting in all to 11 acres 367 decimal parts which shall be enjoyed by the present minister of Carriden and his successors in all time coming. It is at the same time expressly and particularly to be understood, though there is a dyke now erected between the northermost park and the road along the shore, that the sea is to be considered the boundary of the new glebe on the north, and the minister of Carriden for the time being to be entitled to all rights and privileges connected with the same."

Cuffabouts was in 1817 the name by which that part of what had originally been the lands of Little Carriden was known. It was admitted that the minister of Carriden had since 1817 possessed the glebe as fixed in that year by the decree of Presbytery above set forth.

The complainer averred that he and his predecessors had proved and worked the coal beneath the foreshore opposite to his lands from time immemorial.

The respondents averred—"The ministers of Carriden, ever since the designation of the glebe, and their authors before said date, have been in use to exercise all the rights of ownership over said foreshore. In particular, they have sold and used gravel therefrom, and constructed and used saltpans, and kept boats thereon. The complainer and his authors have never had any possession of said foreshore, nor have they at any time worked coal thereunder."

The complainer pleaded, *inter alia*, as follows—"(1) The complainer having under his titles the sole and exclusive right to the coal beneath the foreshore and bed of the sea *ex adverso* of Carriden glebe, is entitled to interdict as craved. (2) The respondents having unlawfully interfered with the complainer's rights, interdict should be pronounced as concluded for, with expenses."

The respondents pleaded, *inter alia*, as

follows—"(1) No title to sue. (2) All parties not called. (3) The complainer's statements are irrelevant. (6) The respondents' working of the coal under the foreshore being in virtue of a lease from the owners thereof, the note should be refused."

On 9th June 1903 the Lord Ordinary (KINCAIRNEY) allowed the parties a proof of their averments, and the complainer a conjunct probation. The facts as to possession disclosed at the proof sufficiently appear from the opinions of the Judges *infra*.

On 19th December 1903 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor —"Repels the second plea-in-law for the respondents: Finds that the complainer has not proved that he has right to the coal beneath the foreshore of Carriden glebe: Repels the pleas-in-law for the complainer: Sustains the sixth plea-in-law for the respondents: Refuses the note, and decerns."

Opinion.—"This is an action brought by Mr Henry Moubray Cadell, proprietor of Grange, concluding for interdict against the respondents working the coal beneath the foreshore of the glebe of the parish of Carriden, which is situated on the south side of the Forth a short way below Bo'ness. The complainer does not claim the foreshore itself, but only the coal under it. In the suspension he also claims the coals under the bed of the sea, but the respondents stated that they had no lease of these coals, and had never intimated any intention of working them, and in these circumstances the complainer does not now press for interdict with regard to these coals. The respondents are lessees of the minister of Carriden and plead in his right, so that the question in the case is whether the minerals under the foreshore of or opposite to the glebe belong to Mr Henry Moubray Cadell under a title of property or to the minister as a portion of the glebe. The question is to my mind very difficult, and the title put forward by the complainer is involved and intricate.

"There seem to be two questions—(1) as to the minister's title, which it will be convenient to take first as being the simpler, and (2) as to the complainer's title.

"The minister's right, on which the case of his lessees, the respondents, depends, rests of course on the deed of designation of the glebe. The glebe of Carriden was designed in 1630, but the glebe so designed is not the present glebe, because an excambion or new designation was effected in 1817, on which new designation this question depends. After stating the heritors present or represented, and among them the ancestor of the complainer, and setting forth the procedure, the minutes of the presbytery bear that certain persons duly appointed had valued 'the minister's glebe at Carriden' (the old glebe) 'proposed to be given in exchange for the lands of Cuffabouts, &c., belonging to Sir George Hope of Carriden' (the new glebe), that they had found them of the same value, and that the presbytery had decreed that the old glebe should belong to Sir George Hope, 'and that the glebe shall consist of the parks immediately to the north and east of the church and churchyard of Carriden, the park lying to the south of the same usually called Cuffabouts, the park lying between the same and Peasehill on the south, the triangular piece of ground lying between them and the road to Linlithgow on the west, amounting in all to 11 acres and 367 decimal parts of an acre, which shall be enjoyed by the present minister of Carriden and his successors in all time coming.' The minute at the end of it bears—'It is at the same time expressly and particularly to be understood, though there is a dyke now erected between the northernmost park and the road along the shore, that the sea is to be considered as the boundary of the new glebe on the north, and the minister of Carriden for the time being to be entitled to all rights and privileges connected with the same.'

"Since that date the glebe so designed has been regarded and dealt with as the glebe of the parish, and the former glebe has been regarded as having ceased to be so. No one has questioned the designation, and I think it is not questioned now.

"It may be that the proceedings in carrying through this designation were blundered. It bears to proceed on an exchange between the minister and Sir George Hope; but it does not appear from the titles produced that Sir George was proprietor of the lands stated to be excambed. These lands seemed to have belonged to the Duke of Hamilton. This mistake passed unnoticed for a considerable time, but when it was discovered a contract of excambion was entered into between the Duke of Hamilton and Sir George Hope, apparently for the purpose, and certainly with the effect, of rectifying this mistake, whereby the Duke conveyed to Sir George the lands which had been declared to form the glebe. This was no doubt a considerable irregularity, but still I think it must be held to have been corrected by this excambion, whereby any flaw in the title to the new glebe, if there was one, was corrected, and as the procedure passed without objection I think it must be held that the glebe was effectually constituted. It has not been challenged, and no proposal has been made to attempt to reduce the proceedings, and I therefore regard it as the duly erected glebe of Carriden, and no question remains except as to its construction and effect.

"I understand that the measured space, 11·367 acres, does not include any part of the foreshore, and that if the foreshore be added it will be in addition to that measurement, and the complainer maintains that it cannot be supposed that it was intended in that way to increase, probably by as much again, the extent of the glebe; but I do not think that the mere addition of the foreshore can be held as a material addition to the extent of the glebe. It was truly (apart from the minerals) a piece of waste ground of very slight value, and the addition of it would have added very little to the value of the glebe but for the minerals. But I do not think it open to me to speculate on the intention of the designers of the glebe. I must give effect to

the express, distinct, and emphatic expression of their intention, that in any case, the sea is to be the boundary of the new glebe, and I think it must therefore follow that the foreshore is of necessity included in the glebe, because it is well settled that a boundary by the sea includes the foreshore.

"Whether the minerals under the foreshore were included in the glebe is a different question. But I am of opinion, on the whole, that they must be included. Probably little was known about them at the date of the designation, and nothing is said about them in the minute or the valuation. The glebe above the sea was valued without taking the minerals into account, and I can see no sufficient reason for treating the minerals in the foreshore differently. It may be that it was a piece of good fortune for the minister to find the minerals in the foreshore, or under his glebe, but I think they were part of the glebe which was designated, and that the designation cannot be interfered with.

"I am therefore of opinion that the minerals under the foreshore of the glebe are a portion of the glebe.

"If the minister have right to the minerals under the foreshore as part of his glebe, and if the designation of the glebe is not reduced, I am disposed to think that it must receive effect, and that it affords a sufficient defence to the respondents whatever the complainer's title may be.

"But without going into any close examination of the numerous titles which have been produced, the print of which I have gone over several times, I am at least not satisfied that they make out the complainer's case. In the first place, I am not satisfied that they express a title to the minerals under the foreshore as different and separate from a title to the foreshore. I am not satisfied that in any case they give a title to minerals apart from the lands under which they lie. If that be so, then I do not think that they give a title to the foreshore opposite the glebe or the minerals under it (the point now in question). Clearly they do not, because it clearly enough appears that that foreshore belonged to the Duke of Hamilton. I do not discover that the lands of Grange, Muirhouse, Little Carriden, or Stacks formed part of the lands designed as glebe, or that any part of the foreshore of the new glebe ever formed part of the foreshore of Grange, Muirhouse, Little Carriden, or Stacks.

"I observe that 24 acres part of the lands of Muirhouse and Little Carriden, to which so many of the titles refer, and the bearing of which on the case was not clear to me, I say I observe that these 24 acres were acquired by the Duke of Hamilton in 1742, and were, I suppose, the lands or part of the lands given in excambion to the minister on the occasion of the designation. But I cannot find any satisfactory proof that Mr Cadell was ever proprietor of any part of the lands given in excambion or of the foreshore, which then became part of the glebe, or of the minerals under that foreshore."

The complainer reclaimed, and argued — The question at issue related not to the foreshore opposite the glebe, but exclusively to the coal under the foreshore. The complainer produced an unimpeachable progress of titles to the barony of Grange, and these titles contained a grant *per expressum* of the coal under the foreshore *ex adverso* of the barony lands. The coals passed as pertinents in every transmission of the barony. Although the complainer's predecessors had not exercised acts of possession with regard to the particular coals under the foreshore *ex adverso* of the glebe, yet they had worked the barony coal at other points on the foreshore *ex adverso* of the barony lands, and that was sufficient to constitute possession of the coal under the barony title. The title produced by the complainers to the coals in question was certainly enough until some one with a better title to them appeared—*Magistrates of Culross* v. *Geddes*, November 24, 1809, Hume's Dic. 554. The title put forward by the respondents was the glebe. The glebe was not a title to the coal under the foreshore *ex adverso* of the glebe, and accordingly it gave the respondents no right even to criticise the complainer's title. The decree of the Presbytery of Linlithgow sanctioning the excambion was not in legal effect equivalent to an original designation. An original designation gave an absolute title to the minister in the lands designated as glebe. On the other hand, in an excambion nothing could be transferred except what had been the property of the excamber — *Linning* v. *Baillie*, 1709, M. 5145; *Stewart* v. *Glenlyon*, May 20, 1835, 13 S. 787; *Dalhousie's Tutors* v. *Minister of Lochlee*, 1890, 17 R. 1060, 27 S.L.R. 819, 18 R. (H.L.) 72, 28 S.L.R. 912: *Bain* v. *Seafield*, 1887, 14 R. 939, 24 S.L.R. 662; *Wallace* v. *University of St Andrews*, 1904, 6 F. 1093, 41 S.L.R. 812, Connell 383 and 428; Duncan's Parochial Ecclesiastical Law (ed. 1903), 468; *Fraser* v. *Robertson*, 1791 (unreported); *Dalrymple* v. *Callander*, July 11, 1827, 5 S. 935; *Nairn* v. *Tweedie*, 1605, M. 5143. The excamber had no right to the coals, which were effectually reserved in the original feu-contract of 1613 —*Dunlop* v. *Duke of Hamilton*, May 13, 1885, 12 R. (H.L.) 65, 22 S.L.R. 737. The absence of a clause of reservation of coal in the charter of confirmation and novodamus did not affect the fact that the coal was by the original feu-contract made a separate tenement — *Duke of Argyle* v. *Campbell*, July 9, 1891, 18 R. 1103, *per* Lord Rutherfurd Clark, 28 S.L.R. 813; *Campbell's Trustees* v. *Corporation of Glasgow*, March 20, 1902, 4 F. 752, 39 S.L.R. 461. *Per expressum*, the decree fixing the new glebe gave no title to these coals. It was said by the respondents, however, that the glebe included the foreshore either on a construction of its boundaries or by prescriptive possession. It was incompetent for a presbytery to design a foreshore as glebe. It was incompetent for the minister to prescribe beyond the glebe boundary. Glebe meant arable land. A right of servitude could not be designed — *Pres-*

bytery of Selkirk v. *Duke of Buccleuch*, 8 Macph. 121, at p. 126; nor a right of salmon fishings — *per* Lord Watson in *Ogston* v. *Stewart*, March 26, 1896, 23 R. (H.L.) 16, at p. 21, 33 S.L.R. 516. Neither could foreshore or the coal under it be designed—*Lord Reay* v. *Falconer*, November 14, 1781, M. 5151; *Minister of Newton* v. *Heritors*, 1807, M. *voce* Glebe, App. 6. The circumstances in *Gilmour* v. *Sutherland*, July 20, 1900, 38 S.L.R. 561 (as to minister's right to salmon fishing) were special, there being in fact no designation produced in that case. The boundaries of the glebe must be construed in the light of the legal rights of the presbytery—*Young* v. *North British Railway*, December 8, 1885, 13 R. 314, 23 S.L.R. 196, *aff.* August 1, 1889, 14 R. (H.L.) 53, 24 S.L.R. 763. The acts of possession of the foreshore by the ministers of Carriden, even if they amounted to possession of the surface of the foreshore, were not possession of the coal, and possession of the surface was ineffectual to prescribe a right in competition with an express title to the separate tenement of the minerals—*Forbes* v. *Livingston*, November 29, 1827, 6 S. 167, at p. 175, 3 Ross' Leading Cases, p. 409; *Lady Crawford* v. *Bethune*, July 10, 1821, 1 S. 111; *Lady Crawford* v. *Durham*, June 2, 1826, 4 S. 665.

Argued for the respondents—The respondents as mineral tenants of the minister founded on the designation of the glebe as being a good title to the foreshore and the coal. The right to a glebe was not a right merely to the superficies of the designed lands, but a right *a cœlo ad centrum*. Since the date of the designation of the glebe in 1817 the glebe so designed had been dealt with as the glebe of the parish. The fact that the designation of 1817 was the result of an excambion made no difference in the right of the minister in the glebe—*Lockerby* v. *Stirling*, June 25, 1835, 13 S. 978; *Presbytery of Selkirk* v. *Duke of Buccleuch*, November 9, 1869, 8 Macph. 121, 7 S.L.R. 65; *Minister of Falkland* v. *Johnston*, 1793, M. 5155; *Gloag, Petitioner*, November 17, 1873, 1 R. 187; *Bremner* v. *Officers of State*, July 11, 1826, 4 S. 832, June 29, 1831, 9 S. 838; *Bain* v. *Lady Seafield*, July 15, 1887, 14 R. 939, 24 S.L.R. 662; *Dalrymple* v. *Callander*, July 11, 1827, 5 S. 935. The objection that the designation of the new glebe could not transfer land from a person who was not a party to the excambion, even if it was a good objection when timeously made in the excambion process or at any time within the years of the negative prescription, must fail in a case like the present where the new glebe had stood unchallenged for eighty years—*Crawford* v. *Maxwell*, M. 10,819; *Williamson* v. *Mercer*, 1789, 2 Hailes 1062; *Panmure* v. *Halkett*, July 23, 1860, 22 D. 1357. It was quite competent to design foreshore as part of a glebe, provided it was included along with arable or grass land. Minerals and coal might, it was well recognised, form part of a benefice—*Minister of Newton* v. *Heritors of Newton*, M. *voce* Glebe App. 6; *Heritors of Kirkmabreck*, March 25, 1861, 24 D. 1456; Dunlop's Parochial Law, secs. 221 and 222; *Durward, Petitioner*, Jan. 27, 1886, 23 S.L.R. 322; *Gilmour* v. *Sutherland*, July 20, 1900, 38 S.L.R. 561. The terms of the designation included the foreshore, and the coals, not being a separate tenement, were conveyed with it—*Campbell* v. *Brown*, F.C., Nov. 18, 1813. In any event, the ministers had possessed the foreshore since 1817 by taking gravel and sand from the foreshore. The excamber had a right to the coals. The reservation in the feu-contract of 1613 was not effectual, for the reservation there was only of a personal right and did not enter the record—*Liddall* v. *Duncan*, July 12, 1898, 25 R. 1119, 3532 R. 801. Even if the reservation of the coals in the original feu-contract was good, the coals were carried by the new grant in the novodamus of the charter of 1673—Stair ii. 3, 15; Ersk. Inst. ii. 3, 23. If not granted at that date, the coals were carried by the disposition of the superiority in 1763—*Earl of Breadalbane* v. *Jamieson*, June 16, 1875, 2 R. 826, 12 S.L.R. 559; *Harvie* v. *Stewart*, Nov. 17, 1870, 9 Macph. 129, 8 S.L.R. 118. The complainer had shown no good title to these coals. The charter of 1615 had not been produced, and the circumstances made it doubtful whether that charter was ever issued. The complainer was in the position of a pursuer unable to recover a deed constituting his title to sue—*Shaw* v. *Shaw's Trustees*, June 13, 1876, 3 R. 813, 13 S.L.R. 526. The charter of 1643 purported to carry only such coals as the Crown possessed. The coals in question at the date of that charter were not held by the Crown, but belonged either to the barony of Carriden or to the Marquess of Hamilton. A barony title could not be extended to cover as a pertinent what was outside the barony—*Lord Advocate* v. *Hunt*, February 11, 1867, 5 Macph. (H.L.) 1.

At advising—

LORD PRESIDENT—This is an action of suspension and interdict directed by Henry Moubray Cadell, proprietor of the estate of Grange, against two gentlemen who have sunk coal pits in the foreshore *ex adverso* of the glebe of Carriden in the county of Linlithgow, in which he seeks to have them interdicted from continuing to work the coal underneath the foreshore.

The complainer rests his title to object upon an express grant of the coals *ex adverso* of the lands of which the glebe forms part, which he deduces through a long series of titles, commencing, as he alleges, with a Crown charter 1615. He does not allege any property in the foreshore itself, nor does he say that he has ever worked the coal at this particular place, although he does say that the express title to the coal is erected with other subjects into his barony of Grange, and that at other places of the barony of Grange he worked the coals therein.

The respondents produce a lease from the minister, with consent of the presbytery, of coals lying under the foreshore *ex adverso* of and forming, as they allege, part of the glebe, but they do not allege that, prior to their own workings, there has been

any working of the coal by the minister or his predecessors.

The Lord Ordinary has refused the note of suspension, and it is against his judgment that the present reclaiming note is taken. The effective part of the Lord Ordinary's judgment consists in sustaining the respondent's sixth plea-in-law, which is in the following terms:—"The respondent's working of the coal under the foreshore being in virtue of a lease from the owners thereof the note should be refused." It is true that the Lord Odinary in the course of his note also says that he is not satisfied that the complainer has made out a title which would include the coal at all, and that he in consequence repels the whole of the complainer's pleas. But he does not go with any minuteness into the progress of the titles produced by the complainer, merely contenting himself with the statement that he is not satisfied that the complainer has on this matter made out his case. I think, therefore, that I am not doing him injustice when I say that the true ground of his judgment must be sought in the following passage:—"I am therefore of opinion that the minerals under the foreshore of the glebe are a portion of the glebe. If the minister have right to the minerals under the foreshore as part of his glebe, and if the designation of the glebe is not reduced, I am disposed to think that it must receive effect, and that it affords a sufficient defence to the respondents, whatever the complainer's title may be."

Before I proceed to examine this conclusion at which the Lord Ordinary has arrived, it is necessary that I should set forth in some detail the circumstances connected with the history of the glebe in question.

In the joint print of documents there are to be found sundry excerpts from the minutes of the Presbytery of Linlithgow which show that on 16th July 1628 Mr Andro Keir, the minister of the church of Carriden, "craved a visitation and presented before the Brethrein ane precept for designation off his manse and glebe from the Archbishop direct to the Moderator, Mr Jhone Gibbesonn and Mr Thomas Spittall." The designation was duly appointed to take place on the 24th July and accordingly on the 24th July we have a minute detailing the proceedings therein observed.

They were of a most formal character. After a sermon which treated of the duty and dignity of ministers Mr Andro Keir was duly examined as to his doctrines, discipline, and conversation. These matters having apparently been found satisfactory, there was then produced a procuratory from the Archbishop. Upon this procuratory being read, public inquiry was made in presence of the whole gentlemen of the parish who were present as to whether anyone could testify "whether there was any vicarage or parsonage lands within the parish or where any glebe appertaining to the kirk of old did lie." No testimony to the effect that there existed any such old glebe or church lands presently belonging to the benefice being forthcoming, the brethren signified to the gentlemen present that, according to the Act of Parliament and the precept direct from their ordinar, they would take a course for the designation of the said manse and glebe before the third Thursday of November next and that upon the nearest kirk land. This "course" or investigation seems to have been duly made, and on 18th February 1629 the parishioners interested are again convened to hear the formal designation of the glebe which had been selected. On 4th March 1629 we have this entry "This day ane report is maid of the designation of the Gleib off Caridden out off the landes off Grange neirest to the said Kirk."

The precise situation of the glebe thus formally designed in 1629 we do not know. It must have been designed out of kirk lands, for, as I shall have occasion to point out, it was not possible to design a glebe out of any other. The kirk lands which were chosen were those which were nearest to the kirk and seem to have been part of the lands of Grange. It is, however, immaterial what was the precise position of that glebe because of the events which are now to be detailed. Following the excerpts from the Presbytery records we find that on 3rd March 1630 John Gibson in name of Sir John Hamilton of Grange proceeds to offer certain other lands of his, which he represents as being much nearer and contiguous to the church of Carriden than the lands originally designed, and he intimated that if it was found that lands which he was now offering in exchange for the lands originally designed were not of the same value he would be willing to submit to the arbitration of three or four honest skilled men of the parish, who should add as much more to the lands he was presently offering as would make the two parcels of land equal in value. The lands thus offered by Sir John were obviously lands nearer, as he says, and more commodious for the minister, but not having been church lands could not have been designated under the Act of Parliament under the original designation. This offer was entertained by the brethren with the advice of the minister, and they accordingly ordered a disposition and resignation of so much land to be made *ad remanentiam* and presented to them, that they "after advice finding it expedient may design it, and that thereafter a letter of excambion be made and subscribed by the Archbishop in favour of the said Sir John." Accordingly on 17th March 1630 we find that this disposition and resignation of 4 acres 3 roods of the land of Little Carriden belonging to Sir John Hamilton of Grange, subscribed by the said Sir John, the fiar of Grange, and Alexander Bruce of Alvath for his interest, who had a certain part of the lands in feu farm, was presented to the brethren, and they being contended and satisfied therewith ordained the moderator, Mr John Gibson, conform to a commission given him by the Archbishop, to go down in the afternoon

and to design the said 4 acres 3 roods of land for the manse and glebe to Mr Andrew Keir. Then on the 31st of March we have another entry, that the moderator had reported that he had designed according to order, and that instruments were taken in the hands of a notary-public, and that Mr Andrew Keir had been put in possession of the manse and glebe by John Henderson in name and behalf of Sir John Hamilton and Alexander Bruce, conform to a procuratory given to the said John Henderson, whereupon the said Andrew Keir took possession at the hands of the said notary.

The situation of the glebe thus designed, which it will be observed was out of the lands of Little Carriden, has been probably identified with fair accuracy by the complainers and respondent, but again I do not detain your Lordships upon this matter, it being immaterial in view of what follows. The glebe remained the glebe of the parish, but in the joint print we have another excerpt from the presbytery minutes which shows that 20 years after, in the year 1650, proceedings were taken for designing grass for the minister, an Act of Parliament in the meantime having been passed which allowed the minister a provision of grass over and above his glebe. From what followed thereafter I think it highly probable that the grass was designed at some place contiguous to the glebe. So matters remained for nearly 200 years. Turning to the joint print, we find that on October 16th, 1817, the presbytery of Linlithgow again met to deal with yet another excambion of the glebe of Carriden. The excamber this time was Sir George Hope of Carriden, although, as afterwards turned out, he was, curiously enough, not the proprietor of the lands which he proposed to give. The presbytery duly appointed arbiters in order to judge of the relative value of the lands proposed to be given in exchange for the old glebe, and we have the report of the arbiters. From this it appears that the glebe, as it then existed, consisted of 9·916 acres. Seeing that the original glebe was only a little over four acres, it warrants, I think, the supposition I have made, that the minister's grass had been designed at a place contiguous to the glebe, and that the whole glebe came to be known as the glebe, without distinction between the originally excambed glebe and the minister's grass which was added to it. In exchange for this Sir George Hope proposed to give part of the lands of Cuffabouts. Cuffabouts, we know from the titles, was by this time the name by which that part of what had originally been the lands of Little Carriden was called. The portion to be given extended to 11·367 acres. The final finding of the presbytery is in the following terms:—"The presbytery . . . Decree as they hereby do and have decreed that the old glebe of Carriden shall belong to Sir George Hope, his successors and assignees, and that the glebe of Carriden shall consist of the parkes immediately to the north and east of the church and church yard of Carriden, the parks lying to the south of the same usually called Cuffabouts, the park lying between the same and Pease Hill on the south, the triangular piece of ground lying between them and the road to Linlithgow on the west, amounting in all to 11 acres 367 decimal parts, which shall be enjoyed by the present minister of Carriden and his successors in all time coming. It is at the same time expressly and particularly to be understood, though there is a dyke now erected between the northernmost park and the road along the shore, that the sea is to be considered the boundary of the new glebe on the north, and the minister of Carriden for the time being to be entitled to all rights and privileges connected with the same."

No more conveyancing followed on this so far as the minister was concerned, but it is admitted that the minister was thereafter admitted to possession of his new glebe and that he has possessed the same ever since. The respondents say that this pronouncement of the presbytery was a decree by a competent court designing the glebe to the minister, which glebe is described as having a sea boundary on the north; that a sea boundary is in law a conveyance *per expressum* of the foreshore; and that such a designation operates as a conveyance of all and sundry of the lands included in the designation. They plead, therefore, that the designation of the lands took the lands not only from Hope, if he was truly the owner thereof, but also, for the matter of that, from Cadell of the Grange, who had been convened to the process, and who, as a matter of fact, was personally present in the earlier steps of it; and that accordingly, so long as that decree stands unreduced, there is nothing more to be said. They say, further, that the decree having been pronounced in the year 1817 is long ago unassailable under the law of the negative prescription. This view has been taken by the Lord Ordinary. All through his note he speaks of this transaction as a designation of the glebe. He holds that as long as that designation remains it must be unreduced. No one can contend that the minerals underneath the lands falling within the designation were not carried, because the designation itself, *proprio vigore*, took them from the owner in whose hands they were. This view dispenses with the necessity of any further inquiry into the titles either of the complainer, as forming a competing title, or the title of the excamber, to see whether he had any right to give what, upon a just construction of the boundary given in the designation, he was proposing to give.

I am not satisfied that the case can be disposed of on what would be a very simple and easy ground. I think this view gives to the actings of the presbytery a power and effect to which they are not entitled. But in order to consider this question it is, I think, necessary to examine with some care the series of statutes by which presbyteries in Scotland have power to design a glebe, and the light which is thrown by decisions upon those powers. The matter is

dealt with by no fewer than seven Statutes of the Scottish Parliament. They are conveniently collected and the material provisions thereof set forth in the well-known work of Mr Duncan on Parochial Ecclesiastical Law. They may be said to be divided into two chapters—one from the Reformation down to 1644, and the other from 1644 down to 1663. In pre-Reformation times the Church was amply provided with temporality of benefice. After the Reformation the claim of the Protestant clergy to succeed to the benefices of the Church was never admitted. And accordingly, in the earlier of these statutes we find that the mischief which was sought to be remedied was the feuing out or letting on long leases of the manses and glebes, without making any provision for the incumbent who at the time was actually doing the work of the cure. The word "designation," which is first used in the Act of 1572, refers not to the setting out of a glebe for the first time but to the marking out by the Archbishop, Bishop, Superintendent, or Commissioner, of four acres of land of the existing glebe lying contiguous to the manse "if there be sa-meikle."

It is quite certain that up to 1644 the only source from which a glebe could be designed were Church lands, although, if these Church lands had in the meantime passed into other hands, the particular possessors for the time being were to be warned out. But in 1644 a new advance was made by legislation, and presbyteries—for this Act was passed during the second period of the temporary suppression of Episcopacy—were given the power, where no glebe had been designed, or if designed had not been of the full quantity, to design a glebe of four acres of arable land not only out of Church lands, but, if there were no Church lands, out of whatever lands happened to be most commodious and nearest to the parish church and manse. It is perhaps well to note, as regards this Act, that in Mr Duncan's book there is an unfortunate misprint, the word "Kirk" in the excerpt from the Statute of 1644 being printed after the word "whatsoever" instead of the word "other," which is the proper word in the Statute. The other heritors of the parish whose lands are not taken are made liable proportionally to make recompense to those heritors out of whose lands the glebe has been designed. Up to this point there is no provision whatever for changing the glebe. Designation only takes place either if there is no glebe or the glebe which is in existence is not of the sufficient extent of four acres. In 1649, it is true, another Act was passed which provided that where glebes were far distant from the manses so that they could not be conveniently laboured in respect of their distance, those glebes should be changed and new glebes designed more commodious and nearer to the manse, as good in quality as the former and not further than a quarter of a mile from the manse. But the power is given not to presbyteries to effectuate these changes but to the Parliamentary Commissioners for the Plantation of Kirks—the predecessors of the present Court of Teinds. Further, the Act fell under the recissory Act, and it is exceedingly doubtful, to say the least of it, whether it was revived by the Act of 1663—*Nairn* v. *Tweedie*, M. 5143, and following cases. Stair, who treats of the subject of Glebes, (ii), 3, 40, makes no mention of any such power; there is not a single case on the subject mentioned in Brown's Synopsis, and Erskine, as of date 1773 (Inst. ii, 10, 61, ad fin.), mentions exchange only in connection with the case of the transportation of a church.

Notwithstanding, however, that there does not seem any statutory sanction for excambion, it is certain that from early times there grew up a practice of excambion. It is worthy of notice that the excambion in this case seems to be of earlier date than any case reported in the books. The first case I have been able to discover is the case of *Robertson* in 1791, not reported but mentioned in the notes of the older editions of Erskine, and commented on in Mr Duncan's book. The transaction in that case was dated 1752. The position of excambion has accordingly since that date been often recognised by the Court, and I entertain no doubt that it is a completely legal operation.

It is, however, a different question what is its precise legal effect. I am of opinion that Mr Duncan takes a just view of it (530, 2nd ed.)—"The transaction itself resolves into or presupposes an extrajudicial contract, and necessarily implies voluntary consent to the proposed arrangement on the part of the heritor whose ground is to be acquired as glebe as well as of the presbytery."

I do not see how any other view can be fairly taken, and the matter may be tested by seeing to what lengths the opposite contention would lead. If this had been an original designation, two things are certain—first, that the designation could not have been of greater extent than 4 acres, and second, that foreshore could never have been designed as arable land, but here the arable lands are over 11 acres in extent and included (upon the construction of the boundary which I for the moment assume) the foreshore. It is a startling proposition that this can be done by a third designation which could not be done by a first. But on the other theory all this is simple enough. In proper excambion the title flows from the excamber, and he can give whatever extent he thinks it worth his while to give in exchange for the glebe lands. A good illustration of such a subject will be found in the case of *Stewart* v. *Glenlyon*, 13 S. 787, where the Dukes of Atholl had given a very large glebe in exchange for the old glebe which lay close to the castle of Blair, and which they were therefore probably very glad to obtain as their own property.

The true view accordingly seems to me that the title to the land in a case of excambion flows from the excamber. The finding of the Presbytery does not give the land; it gives over the old glebe to the excamber, and it also impresses the new land

with the character and status of glebe. Some important results flow from this; it pays no tithe; it need not be held by formal title; and it is emancipated from the claims of any superior, and holds blench from the crown. Further than that I do not think the finding of the Presbytery can go, and consequently it must, in my view, be quite ineffectual to transfer land which is not the property of the excamber behind the back of a person who is not a party to the deed of excambion. In other words, the difference between the position at an original designation and at a proceeding of excambion is this. At an original designation each heritor knows or ought to know that his land may be taken. And if he allows his land to be designed, taken, and possessed for the years of prescription he cannot be heard to say that it ought not to have been taken—*Dalhousie's Trustees* v. *Minister of Lochlee*, 17 R. 1060, *aff.* 18 R. (H.L.) 72. At an excambion transaction, on the other hand, the heritor who is no party to the excambion deed is entitled to suppose that nothing will be transferred except what belongs to the excamber, and if a question afterwards arises as to what has passed under the deed he is entitled to treat it as any other competition of title.

For these reasons, I am of opinion that the excambion of this glebe sanctioned by the Presbytery in 1817 has not the effect contended for by the respondents and allowed by the Lord Ordinary. This, however, far from ends the matter. The excambion remains quite good as a conveyance, and we must construe the finding of the Presbytery just as we should construe a formal title. It is true that in so far as it proceeded from Sir George Hope it was at the time a conveyance *a non domino*. As there has been ample possession for the prescriptive period that would not in any event matter, so far as the landward portion is concerned, but at any rate it was saved by a disposition from the Duke of Hamilton, who was by this time the real proprietor of the lands, and which accresced to the conveyance of the excamber. The first point therefore that arises is, did the lands conveyed include the foreshore? The matter cannot be said to be quite clear. It depends on the correct interpretation of the finding of the presbytery which I have already read to your Lordships as the description in a title. On the whole, however, I think the respondent is right when he says that this does give the glebe a sea boundary, and it is now I think conclusively settled that a sea boundary is equivalent to an express conveyance of the foreshore. But, further, if there was doubt on the matter it is permissible to look to possession to clear it up. Now, I do not propose to go through the evidence which has been led. I shall only say that the evidence is, in my view, ample to show that the minister here did possess the foreshore in such a way as to show it belonged to him, and that the acts of possession are quite as strong as those that are said to be necessary by Lord Watson in the leading case of *Young* v. *The North British Railway Company*, 14 R. (H.L.) 53. Now, if there were a competition for the foreshore itself this would end the matter. But the complainer points out that there is not a competition for the foreshore but for the minerals under it, which minerals he says were long ago erected into a *separatum tenementum* from the foreshore, and to which he holds an express title. That being the state of the title, he says that the glebe title does not include a special title to these minerals, and that possession of the surface can never be effectual to prescribe a right in competition with an express title to the separate tenement of the minerals. Assuming the complainer's title to be as he says (and for the purpose of this argument I am bound to make this assumption) I think the complainer is right. I think that this is the result of the second case of *Forbes* v. *Livingstone*, Ross' Leading Cases, iii, 409, which I consider a binding authority. The whole law on the subject will be found in the two cases of *Forbes* v. *Livingstone* and the cases of *Lady Mary Craufurd* v. *Bethune* and *Lady Mary Craufurd* v. *Durham*. I do not say that these cases are without difficulty—at least in the case of *Craufurd* v. *Bethune*. But if *Craufurd* v. *Bethune* does not square with *Forbes* v. *Livingstone*, the latter must prevail. It was a very carefully considered case — re-considered by the whole Court on a remit from the House of Lords, and it was the unanimous judgment of a Court of Judges who knew more of such matters of conveyancing than it is possible for us to aspire to. The gist of the judgment may be found in one sentence which I take from the joint opinion of Lord President Hope and Lords Gillies, Mackenzie, Eldon, and Medwyn—"Here we must not regard the possession of the surface of land; for when coal is claimed in virtue of an infeftment not specially conveying the coal, but the lands generally without any reservation of the coal, in competition with an express reservation of coal in prior, and in themselves preferable, infeftments in favour of another party, the possession founded on for prescription must be that of the coal itself." This authority, so far as I know, has never been controverted or shaken, and with its authority I think the proprietor of the minerals would have been entitled to look on unconcernedly at any possession of the surface by others. The minerals themselves were never interfered with till the proceedings which at once gave rise to the present action.

This brings the state of the matter to this, that the complainer is entitled to prevail if he can show that he is the proprietor of the separate tenement of minerals upon a title flowing from the Crown; but that the respondents, as in right of a title which, embracing the surface and with possession of the surface, would be good against anyone not holding that special title, are entitled to criticise the complainer's progress of title at any period they please.

I therefore find myself obliged to apply myself to that minute consideration of the

complainer's title from which the Lord Ordinary in his view of the case held himself excused.

The complainer begins with an express grant of the coal *ex adverso* of the lands of Grange, Murehouse, Little Carriden, and Stacks, contained in a Crown charter which he alleges existed in 1615. He has not got the charter, but he has got the signature signed by the King at Newmarket, the precept under the Signet, and an extract from the Treasury Books which show figures of the composition. The charter is to be in favour of John Hamilton, eldest son of Sir John Hamilton of Grange. It is not, I think, matter of dispute that *ex adverso* of Little Carriden and Murehouse covers the point in dispute. The charter was primarily a charter of the lands of Grange. I do not profess to discuss the steps, but I think all your Lordships are satisfied that the progress from this title, if it existed, is correctly made out to the complainer.

"It is, however, quite enough for the respondents if they can at any stage put a blot in the progress so far as it affects the special conveyance to the coal. I think they have done so in a charter of confirmation and novodamus in 1673, for the proper understanding of which it is necessary to make some further explanation.

In 1613, two years before the alleged Crown charter of 1615 was granted, Sir John Hamilton of Grange feued out to Sir George Bruce of Carnock 24 acres of arable land of his lands of Muirhouse and Little Carriden lying along the sea-shore, and described as bounded by the sea on the north. It is out of these 24 acres that the present glebe is taken, and there is no dispute as to that between the parties. Now, that was a sea boundary, and therefore carried the foreshore, and would have carried the minerals under it (if they belonged to the granter or came to belong to the granter by a subsequent title) were it not for a certain clause which is in these terms — "And notwtstanding of the setting in fewferme of the saids tuentie four aikeris of land in maner abonemention wt liberteis of making of herbereis & poirtis in maner foirsaid It is speciallie provydit heirby that it salbe lesum to the said Sr Jon his airis & assignayis to win coillis & coilhewis stane quarrellis & to mak schell lyme vpoun the boundis of the said twentie four aikeris of land in all tyme cuing except in theis partis & placeis of the samy qr the saids salt pannis girnell houss herbereis bulwarkis & vyis warkis abonespeit salhappin to be biggit & planttit the said Jon his foirsaids alwayis refoundand & payand to the said Sr George his airis & assignayis all damnage intest & skaith that he or they salhappin to incur be casting of mynis wying of coillis coilhewis and wyning of stanes vpone the aikeris foirsaid."

The respondents argue that this is not a good reservation of the coals for want of proper specification. I do not take that view. I think, looking to the law as laid down in *Dunlop* v. *Duke of Hamilton*, 12 R. (H.L.) 65, that there is here a proper reservation of the coals in the subjects conveyed. These 24 acres passed into the hands of Sir Walter Seaton, and in 1573 we have a charter of confirmation and novodamus in favour of Seaton granted by the then Hamilton of Grange. Nothing need be said of the charter so far as it is a charter of confirmation, but I ask your Lordships' special attention to it in so far as it is a charter of novodamus. The novodamus contains the recital of an onerous consideration as follows:—Moreover, I, for certain sums of money paid and delivered to me by the said Sir Walter Seatoune, and for divers other good causes and considerations moving me," and then proceeds to of new grant the lands, without inserting any reservation as to the coals, and it ends with a precept of sasine, and on this charter infeftment was duly taken, as is shewn by the instrument of sasine recorded on October 2, 1673.

Now the granter of this charter was *ex hypothesi* the owner of the reserved coal; and I am of opinion that when he granted a charter of novodamus of the lands without reservation of the coal, the coal necessarily passed under the general description of the lands. This all depends upon the true import of a charter of novodamus. No doubt a very ordinary use of the addition of a novodamus to a confirmation may be to replace a lost title or to cure a defective title. But it is also well settled that it is, in the words of Mr Bell (Conveyancing, 739) "the appropriate medium by which to express and complete a change in the prior contract between the superior and vassal in any respect."

In this respect it operates and must be construed as an original grant. Stair, ii. 3, 15, says as follows:—"On the charters by the King or subjects, there may, and useth to be inserted a clause *de novodamus* which doth dispone the fee, as by an original right, in case the disponer's right should be found defective, . . . and therefore a novodamus in a bishop's charter from the King disponing a patronage *pro omni jure* was found to give the bishop's successor right to that patronage, though it was a laic patronage, without necessity to instruct that the bishop had any pretence of a title thereto before, but that the novodamus was as effectual as an original right." And Erskine, ii. 3, 23, is to the same effect:—"For a charter of novodamus is, in the judgment of law, an original right, and an original grant implies a release to the vassal from all burdens affecting the property previously to the date of it. One might imagine from the words of this clause, that it ought to contain a grant of no subject which had not been made over to the vassal in a former charter; for the expression *de novodamus* seems to impart that the right of that very subject had been formerly made over to the vassal, and that the superior then granted it to him of new; and indeed they are for the most part no more than renewed rights, yet it has been adjudged by repeated decisions that a charter of novodamus may

be itself a first grant as well as the renovation of a former, and that every subject or right expressed in the clause of novodamus is deemed to be effectually conveyed to the vassal though there had been no antecedent title to it in his person."

There is a dictum by Lord Rutherfurd Clark in *The Duke of Argyll* v. *Campbell*, 18 R. 1103, which, if not sufficiently considered, might seem to be adverse to the view I have been expressing. His Lordship says that a charter of novodamus wherever doubt exists will be construed as commensurate with the previous titles. I think, however, that the doubt to which his Lordship here refers must be a doubt which is raised by the charter itself, and I think this is clear by considering the cases which are cited in the *Duke of Argyll's* case and to which his Lordship was probably referring. They were the cases of *The Magistrates of Inverkeithing* v. *Ross*, 2 R. 48; *The Earl of Perth* v. *Lady Willoughby de Eresby's Trustees*, 2 R. 538, *aff.* 5 R. (H.L.) 26. In the first of those cases the question was whether taxation of the entry of an assignee had been altered by a charter of novodamus, but the judgment of the Lord President is very distinctly put at the bottom of p. 52, and shows that he rested his construction of the novodamus upon the ground that the cause of granting the novodamus had been clearly expressed in the deed, and had to do with something quite other than the alteration of the holding. In the same way, in the *Earl of Perth's* case the question was not as to what was conveyed, but was a question whether the entail under a novodamus must be considered as contained in the procuratory flowing from a subject originally made, and accordingly to be valid and effectual it had to be registered in the register of tailzies, and whether the charter of novodamus flowing from the Crown could be held as constituting the entail. I think these cases go no further than this, that it is perfectly legitimate to look at other parts of the charter of novodamus to explain any ambiguity in the subjects conveyed. But here there is no ambiguity of the subjects conveyed, because the lands are conveyed and include the minerals, and accordingly I do not think that, because the infeftment confirmed by the charter of confirmation contained the reservation, there is any right to construe the charter of novodamus, which is expressed in general terms, by importing a reservation which is not in it. It is, as I have said, legitimate to look at any other portion of the charter of novodamus, and accordingly the complainer here points to the expression used between A and B, which is in the following terms:—"Upon the express provisions introduced in favour of the late Sir John Hamiltoun of Grange, Knight, and his heirs and successors especially mentioned in the contract and disposition of the said acres of lands by the said late Sir John Hamiltoun to the late Sir George Bruce of Carnoch, Knight."

I am satisfied that upon a just construction the provisions here meant are referable to the provision to make open waters and so on, and are not words of general application which would import reservation. Two other considerations go very strongly for holding the novodamus to be a full grant. The first I have already mentioned, viz., that there is a recital of a money payment for the charter, an altogether inappropriate proceeding unless something new was granted which had not been granted before. But, further, there is the fact that the charter winds up with a precept of seisin. I need not remind your Lordships that this precept of seisin was entirely inappropriate to the charter in so far as it was a charter of confirmation. The existing deeds being hereby confirmed, the vassal was, without anything more, in a full position to grant either procuratory or precept. But with the novodamus, in so far as it operated a new grant, it was otherwise, and a precept of seisin was absolutely necessary if the grantee was ever to be infeft in the subjects for the first time granted. And accordingly I find without surprise that the title was after that completed by taking seisin upon the precept therein expressed. If nothing new had been granted I look upon this proceeding as an entirely unnecessary performance. It is true there is a phrase in the precept of seisin "reserving as is above reserved." But besides the general well-known doctrine, that the dispositive is the measure, and is not to be cut down by phrases in executory clauses, I should refer this to the only reservation in terms, *i.e.*, the reservation by the king's highway. It is strictly inappropriate altogether, as there is no reservation of any sort in the novodamus grant, and, as I have explained, the precept of seisin is only referable to that grant. My opinion therefore on the whole matter is that Hamilton of Grange, being proprietor of the coal and superior of the lands when he gave the charter not only of confirmation of the lands but also of novodamus, and granted of new the lands without reservation of the coal, cannot now be heard to say that the coal is not part of the grant. This of course disposes of the case, for it kills the title of the complainer. As a matter of fact I think the respondent has shown that the title thus given under charter of novodamus entirely did pass to the Duke of Hamilton, and by accretion became good to Sir George Hope, who was the excamber of the glebe of 1817. But, as I have already pointed out, I do not think this matters, because the minister has a perfectly good title upon possession if he is not confronted by somebody having a separate title to the minerals.

This disposes of the case, but there are one or two other matters on which I think it right to give an opinion, as it is possible this case may go elsewhere, and the view I have expressed might not be considered sound. I do so all the more readily as on these other points I am in favour of the complainer. It was said by the respondent that the complainer has not produced the original charter of 1615, and that he

cannot assume that he would be able to substantiate that charter in the only formal way, viz., by an action of proving the tenor, in which action he would have to call the Crown and the Duke of Hamilton, both of whom would perhaps have a good deal to say in the matter. If that were so I think this is a formidable objection. But I do not think it matters for this simple reason. Leaving out of view the charter of 1615, the respondent is able to connect himself with a Crown charter of 1643. Now the only difftrence between the date of 1615 and 1643 as regards the complainer's title is that there has been produced a Crown charter in favour of the third Marquis of Hamilton, of date 1629, which also has a special title to the coals *ex adverso* of the whole barony of Carriden, of which it seems there is little doubt that the lands of Grange, Muirhouse, and Little Carriden originally formed a part. But I think this is immaterial, because the respondents are totally unable in any way to connect themselves with that title. Now, although if the title of 1643 flowed from a subject it might be sufficient to show an antecedent ground by which that subject had parted with it to somebody else, this is not the case with the Crown. There is always enough left in the Crown to give a good title, and accordingly in 1643 the Crown charter is a perfectly good title, unless something else better, that is to say prior, can be shown flowing from the Crown by the person objecting. Accordingly the complainer cannot have the Hamilton title pled against him except by somebody who can connect himself therewith. The other matter depends upon the effect of a disposition of 1736 by Hamilton of Grange in favour of Robert Mirrie, but without going at any great length into that deed I am of opinion that, upon the principles laid down in *Fleeming* v. *Howden*, 7 Macph. 782; and *Orr* v. *Mitchell*, 19 R. 700, *aff.* 20 R. (H.L.) 27, the said disposition is a conveyance of the superiority and nothing more. On the whole matter, while, as I have explained, not agreeing with the grounds of the Lord Ordinary's judgment, I have come to be of opinion that the result arrived at is right, and I think we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR—I entirely concur in your Lordship's opinion, which I have had the advantage of reading. Anything that I can say will, I fear, be mere repetition of what has already been said, but since the question is important and presents some points of difficulty I think it may be right that I should express in my own words the view I take of what I conceive to be the main points for consideration, without attempting to repeat anything like an examination in detail either of the titles or the principles of law that are applicable to the case.

In the first place I agree with your Lordship's view as to the first point which seems to me to arise that the respondent is in exactly the same position in a competition between him and the complainer as if he had obtained a conveyance from Hope of Carriden in 1817 and possessed upon that conveyance to the same extent as he has possessed upon the designation of the glebe. He derives no advantage from the so-called designation except in so far as it gives him a title of possession without direct conveyance and without infeftment. Mr Campbell argued that the designation, being the act of a competent Court, was final and conclusive as to the right of the benefice to everything which the minute of presbytery purported to design, irrespective of any defect or limitation which might be shown to attach to the right and title of the landowner from whom the lands of the glebe were derived. The argument was that a designation following upon a voluntary contract of excambion has exactly the same effect, as concluding the whole question of right between the benefice on the one hand and a landowner on the other, as if it had been a designation in the proper sense in the exercise of the statutory powers which were conferred upon the Bishops and which have been held to be transferred to the presbytery. But I know of no authority to support that proposition, and I think it is inconsistent with legal principle. I take the result of the examination which your Lordship has made of the statutes and decisions to be clearly this, that when a full and sufficient glebe has once been designed by a presbytery, there remains no right whatever in the presbytery to design anew to the effect of taking land from anybody but a willing granter so as to substitute the new for the old. I do not think it necessary to consider the rescinded Act of 1649 because it is not alleged that the presbytery proceeded under that statute or that its conditions were satisfied. But the general rule, as I have stated it, was applied in *Linning* v. *Baillie*, M. 5145, and *Nairn* v. *Tweedie*, M. 5143, and I do not find in any of the decisions to which your Lordship has referred, and which I have examined, any indication of any law to the contrary. But the statutory powers of the presbytery were exhausted in 1629 and 1630, and after that they had no more power to take land from a heritor for the purpose of turning it into a glebe than the minister himself would have had. It is quite true that a practice has grown up by which glebes have been excambed for other land in the same parish with the sanction of the presbytery, and the excambed land has been thereafter designed by the presbytery as glebe in place of that given up by the other excamber. But that kind of transaction rests upon voluntary contract and nothing else. The presbytery had no kind of power or authority to add anything to the right of the landowner from whom they had excambed. They have no statutory power in the matter at all, and the sole source of the right of the benefice to the new land must be found in the right of the granter of the new land which he gives in exchange for what the presbytery and the incumbent of the benefice choose to give. The right of the grantee must of necessity be limited

by the right of the granter, unless it can be shown that there is some overruling power or authority given by Parliament which will enable the presbytery to convey from an unwilling heritor land he does not choose to give, or to carry land from an ignorant heritor by a conveyance to which he is no party. That appears to me to be the view taken in all the cases, down to the most recent case of *Bain* v. *Seafield*, 14 R. 939, of the meaning and real effect of a voluntary contract of excambion between the incumbent of a benefice with the sanction of the presbytery and the private landowner. The case of *Stewart* v. *Lord Glenlyon*, 13 S. 787, is a good example because the benefice was found to have right to a large tract of land which the presbytery could not lawfully have designed as glebe land, just because the landowner had given it in excambion for the glebe. The intervention of the presbytery seems to me to serve two purposes, and two only. In the first place it fills up what the authority of the incumbent himself falls short of in disponing the glebe land. An incumbent of a parish has no power to alienate that or any other Church property, but the presbytery, as the guardian of the benefice, may sanction a transaction of that kind which they, in their discretion, are satisfied is for the benefit of the benefice; and therefore their intervention, in the first place, supplies the authority which the incumbent of the benefice does not in himself possess; and in the second place I think it is settled, by a series of decisions, that the consequent designation by the presbytery of the new land of the glebe in the place of the old is, like the original designation, equivalent, for the purpose of title, to infeftment. It impresses, as your Lordship said, on the new land the character of glebe land, and therefore the benefice has acquired by the transaction a good title of possession upon which a right may be prescribed; but the prescriptive possession which follows must be exactly the same as the prescriptive possession which would follow upon a direct conveyance from a private landowner to a purchaser. This disposes of Mr Campbell's argument on the negative prescription, and the case of *Paul* v. *Reid*, F.C., February 8, 1814, because the designation is no judicial determination which must be set aside by reduction but a mere link in the progress of titles which must stand or fall by its own merits in a question with the competing progress. The action, therefore, really resolves into a competition of titles, except in so far as the respondent may be able to say that he has had prescriptive possession upon the title constituted by the contract of excambion, and consequent designation which will fortify his right so as to exclude the competition of any earlier title. That raises the next most important question in the case, as to what kind and extent of possession upon the excambion is necessary to establish a valid title to the minerals in dispute. Now, I think that for the purpose of determining that question it is necessary in this case to look, in the first place, at the competing titles, because the question of the extent of possession really depends upon whether the complainer has been successful in showing that at the time when the possession of the incumbent of the benefice began the estate of minerals under the foreshore was a separate tenement, separate I mean from the surface of the land or not. If the minerals were separate from the land at the time the minister's possession of the land began, then I think with your Lordship that the case of *Forbes* v. *Livingstone*, 3 Ross' Leading Cases, p. 409, is conclusive against any case, that the respondent might make of the acquisition by prescriptive possession of a right to the minerals by the mere possession of the surface of the foreshore. If, on the other hand, the minerals and the surface were not separate estates, but if the surface were conveyed with the minerals under it in the ordinary form, so that the whole subject passed by one conveyance under a sufficient title, then the distinction taken in *Lady Mary Crawford* v. *Bethune*, 1 S. 111, would apply, and the possession of the land must then be treated as possession of the whole undivided estate, including the minerals below it. I think that view is entirely consistent with the opinion of the Lord President and Lord Gillies in the case of *Forbes* v. *Livingstone*, *supra*, because the whole point of their reasoning depends upon this that you cannot prove your right to one estate by possessing another. They start from the proposition that the estates are separate, and they say that in order to acquire your title to each you must prove separately your possession of each. That seems to be entirely consistent with the general principle of law. But the moment you get rid of any difficulty created by the separation, the question assumes a different aspect altogether, and is whether you do not possess the whole estate by possessing part of it, even although you have not exercised every right and power which your right of ownership in that entire estate would have given you. In that view, when you have a conveyance of land from which the minerals have not been separated, then the working of the minerals is *res mercæ facultatis* which the landowner can exercise or not as he pleases, but his failure to exercise it can throw no doubt upon his right under his title to the land. Therefore it seems to me, as your Lordship has explained, that at this part of the case the true question is whether the minerals under the piece of foreshore in question were or were not a separate estate. Now, I think that the one and conclusive answer to that question is afforded by the charter of novodamus. My own view, which so far coincides with that of your Lordship, is that the complainer has succeeded in showing that he had a good title to the minerals in question as a separate estate under the charter of 1643. I should by no means be disposed to attach much weight to the signature for a charter in 1615, because the signature, so far as we know, was not followed by the granting of a charter, or at

all events it is not shown that any charter was granted, and I am not disposed to hold that we can infer, as a matter of fact, that because a signature had been obtained, a charter in terms of the signature had also been granted by the Crown. But then, for the reasons your Lordship has given, I think that of no importance, because there is certainly a perfectly good title beginning in 1643. But then the question is whether the separation effected by that charter between surface and minerals was put an end to, and the entire estate, including the surface and minerals, conveyed by the charter of novodamus of 1673, and I think that it was. I do not think it necessary to detain your Lordships by going over again the terms of the charter. I entirely agree with the construction your Lordship has put upon it, and I only say that I cannot entertain any doubt as to the legal effect of a charter of novodamus if it be clear upon the construction of the language used in it that it conveys something which had not been conveyed by an original grant. I take it to be quite settled law that if a superior who has once granted out lands desires to add anything to the right he had originally created, or to make any alteration in favour of his vassal, or for that matter in favour of himself, upon the grant as originally constituted, the right way to do it is to grant a charter of novodamus; and it is a matter of ordinary style and perfectly familar in conveyancing that the confirmation of previous infeftments is combined with a novodamus when the superior intends to make any such new grant as I have supposed.

I should have had very great hesitation in saying so much, or at all events in saying it with any confidence, if I thought that it was inconsistent with the dictum of Lord Rutherfurd Clark, because the authority of that learned Judge upon any question of conveyancing has so much weight, and certainly so much weight with me, that if I thought he really intended to convey something inconsistent with my own opinion I should be much more disposed to believe that my opinion was wrong than that his dictum was erroneous. But then I do not think that the observation which fell from him will bear the construction which the complainer's counsel have endeavoured to put upon it. The rule of construction to which he refers he mentions merely for the purpose of dismissing it as of no consequence to his argument, and therefore it is not impossible that it may have been expressed with something less than his usual precision in laying down a doctrine of law upon which he means to proceed, but apart altogether from that consideration I think the true meaning of it is exactly what your Lordship has explained. Lord Rutherfurd Clark says that when a doubt arises as to the true meaning of a charter of novodamus, then you must construe the charter with reference to the previous grants, and that may be perfectly consistent with sound principles of construction, for the reason which is explained by Lord Stair in the passage which your Lordship also read. But then the question is, what is the true meaning of a doubt arising, and I agree that must mean a doubt arising upon the face of the charter of novodamus itself? Now, a material point to my mind to exclude any doubt of that kind—any doubt which ought to send us back to the previous writs—is that the novodamus starts in terms by the announcement of the granter's intention to make a new departure. He begins by confirming his former infeftments, and then he goes on to say that in respect of certain sums of money paid and delivered to him, and for diverse other good causes and considerations moving him, he makes a new grant. That seems to him to bring in as clearly as possible the one consideration for granting a novodamus, which makes it clear that the granter intended something more than the mere renewal of former rights, because he has stated the payment of money as his reason for giving something which professedly he has not given before. On that point, therefore, as on the others, I agree with your Lordship. Then I agree also that the legal effect of that consideration is that we now have lands and minerals well united in one estate, and that the complainer's point upon the separation of the two has completely gone. If the respondent's title can be connected with the charter of novodamus through the grant of Hope of Carriden, fortified by that of the Duke of Hamilton, he has a perfectly good and effectual title to the foreshore. I think with your Lordship that the connection is made out. But if it is not, the designation is still a good title to found a prescriptive right, and since the land and the minerals are shown by the novodamus to have been reunited into one estate before the designation or the excambion upon which it proceeded, it follows that if the minister and his predecessors have possessed the land of the foreshore in virtue of their title for forty years, they have possessed land which includes minerals, and have acquired a good prescriptive right to the whole estate, and I think that is the true legal effect of the whole series of titles and of the evidence of possession.

The Court adhered.

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