no power to enter into contracts with themselves regarding the affairs of that public body. He thought that was the principle upon which this lease was challenged; and in support of it reference was made to the well-known case of Blaikie *v.* Aberdeen Railway Company, which was decided in the House of Lords, and in which that principle was affirmed. If the case depended upon that principle I would be of opinion that the contract now under challenge would be null and void. But the answer which is made to that challenge is, that the Provost and certain of the Magistrates of Portobello were no doubt Commissioners of Police, and were in that respect acting in a *fiduciary* character, yet they did not transact with themselves as individuals. The party with whom they transacted, and with whom they entered into this contract of lease, was a joint-stock company in its corporate capacity; and the question came to be this, whether that principle to which I have alluded was sufficient ground for annulling a contract, however fair it might be, however useful it might be—without any inquiry into the merits themselves—whether all such contracts between the functionaries of a public body like the Commissioners of Police, or any joint-stock company in which they or any of them were partners or functionaries, were by law null and void, without any inquiry whatever into the merits or demerits of the contract. After giving the case every consideration in my power, I think the answer made by the defenders is a good one. I think it would be a most extraordinary state in which this country would be placed if it were law that no public body could enter into a contract with any joint-stock company whatsoever—however useful, however fair, such contract might be—if it happened that any of its functionaries were also directors, or any of them partners, of that joint-stock company. I need not enlarge upon that. The business of the country could not proceed. I think the principle does not apply here, because these functionaries were not dealing with themselves individually; they were dealing with a body under a separate management, and the principle was altogether inapplicable. There remained behind allegations which deserved most serious consideration. On these the Lord Ordinary had given no opinion, but had ordered inquiry. And if the Court refuses this reclaiming-note, as I think it ought to be refused, the case will be cleared for such inquiries. There was a good deal of argument on the seventh plea-in-law of the defenders, that the pursuer's first and second pleas-in-law are excluded by the 40th section of the General Police Act, 13 and 14 Vict., cap. 33. I think, however, that common law itself is sufficient to decide the question, and I go entirely upon it. On these grounds I think that the reclaiming-note should be refused, and that the Lord Ordinary's interlocutor snould be affirmed.

The other Judges concurred, and the reclaiming-note was refused, with expenses.

Agent for Pursuer—R. Pasley Stevenson, S.S.C.
Agent for Defenders—J. Knox Crawford, S.S.C.

Wednesday, May 23.

LORD ADVOCATE *v.* MACLEAN.

Property — Foreshore — Barony Title — Parts and Pertinents — Prescriptive Possession. In an action to have it declared that the foreshore between high and low water-mark belonged to the Crown *jure coronæ*, and formed part of its hereditary revenues, which was defended by a proprietor whose lands were adjacent to the shore, on the ground that he had possessed it during the prescriptive period under a barony title with a clause of parts and pertinents—*Held* that this defence was valid to exclude the Crown's rights, and that it had been established.

This action was raised on behalf of the Crown by the Lord Advocate, as representing the Commissioners of Woods and Forests, to have it found and declared "that the soil and ground of the coasts and shores of the sea round Scotland, below high water-mark of ordinary spring-tides, as far as the same have not been granted to any of our subjects by charter or otherwise, belong to us *jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland; that it should be found and declared that the soil and ground of the shore of the sea below high water-mark of ordinary spring tides, *ex adverso* of the lands of Ardgour, lying within the Sheriffdom of Argyle, the property of the said Alexander Maclean, belong exclusively to us." The case arose in connection with a pier or jetty which Colonel Maclean wished to erect on the foreshore at Corran Ferry, with the view of improving and giving access to his estate. Colonel Maclean had obtained the sanction of the Admiralty to make the erection, but he was then called upon by the Crown to take a conveyance from the Crown as proprietor of the foreshore of that part of it which was required for the proposed pier. Colonel Maclean having declined to do that, this action of declarator was brought. In defence, Colonel Maclean maintained the following pleas:—(1) "The *solum* of the shore, subject to the right of the Crown, as trustees for public uses, being carried by the defender's titles as part and pertinent of his estate, the action is unfounded, and he should be assoilzied from its conclusions. (2) The *solum* of the shore having been possessed by the defender and his predecessors for time immemorial on a prescriptive title, as part and pertinent of his estate, the right thereto alleged on the part of the Crown is unfounded."

A proof of possession was allowed by the Lord Ordinary, the import of which, as admitted in argument by the Crown, was that the defender had during the prescriptive period exercised various acts upon the shore, such as beaching and unloading vessels upon it, collecting seaware, taking gravel and stones, pasturing cattle, and digging for clay.

The LORD ADVOCATE, the SOLICITOR-GENERAL, and T. IVORY, for the Crown, argued—The Crown has a proprietary right in the foreshore. The shore is a pertinent of the sea and not of the land—it is a separate estate from the land altogether—and as the king is *dominus* of the sea, his sovereignty extends over the shore also. Therefore, unless the shore is specially conveyed, it remains the property of the Crown. It cannot be carried along with the adjacent lands by a clause of parts and pertinents, because it is not a pertinent of the land but of the sea. It is not disputed that the defender has exercised various acts upon the shore during the prescriptive period, but those do not constitute legal possession, upon which a title can be prescribed—they were not acts of possession by which all others were excluded — they merely amount to exercise of rights of servitude, which can not confer rights of property.

The following authorities were relied upon by the pursuer:—Balfour's Practicks, p. 626; Bell's Principles, 1st edit., sec. 641; last edit., sec. 641-643; sec. 739; sec. 746, Duff's Feudal Con-

veyancing, p. 65, sec. 49; p. 63, sec. 47; Erskine, ii. 1, 6, 6, 17; 6, 18; 6, 1 and 3, 6, 14; 9, 14; 9, 16; 9, 17; Hendry's Conveyancing, p, 196, sec. 568; Menzies' Lectures, 3d edit., p. 547; More's Notes on Stair, cc., sec. 19; Ross's Lectures, vol. ii. p. 176; Stair, ii. 1, 5; 3, 45; 3, 67; 3, 69; 7, 5; Aikman *v.* Duke of Hamilton, June 17, 1830, S. viii. 943; Berry *v.* Holden, Dec. 10, 1840, 3 D. 205-210; Brown *v.* Kinloch, Dec. 20, 1775, M. 14,542; Commissioners of Woods and Forests *v.* Gammell, March 6, 1851, 13 D. p. 854; Earl of Fife's Trustees *v.* Cumming, Jan. 16, 1830, S.S. 326; Garden *v.* Earl of Aboyne, Nov. 27, 1784, M. 14,517; Innes *v.* Downie, May 27, 1807, Hume's Dec., p. 553; Leslie *v.* Cumming, Nov. 27, 1793, Mor. 14,542; Lord Saltoun *v.* Andrew Park and Others, Nov. 24, 1857, 20 D. 89-92-93; The Laird of Meldrum *v.* Feuars of Meldrum, July 28, 1716, M. 12,152; Nicol v. Blaikie and Hector, Dec. 23, 1859, 22 D. 335-340; Officers of State *v.* Smith, March 11, 1846, 8 D. 711; ditto in House of Lords, 6 Bell, pp. 487-498; Paterson *v.* Marquess of Ailsa, March 11, 1846, 8 D. 752; Trustees of Scrabster Harbour *v.* Sinclair, March 19, 1864, 2 Macpherson, 884-889; Wolfe Murray *v.* Magistrates of Peebles, Dec. 8, 1808, F.C., p. 36; Attorney-General *v.* Burridge and Others, Feb. 23, 1822, 10 Price 350; Bracton, ii. 12, 4 and 5; Callis on Sewers, pp. 65, 66; Davies' Reports of Cases and Matters in Law resolved and adjudged in the King's Courts in Ireland, pp. 152, 153; Duke of Beaufort *v.* Mayor, &c., of Swansea, Feb. 9, 1849, 3 Welsby, &c., Exchequer Reports, pp. 413, 415; Hall's Essay "On the Rights of the Crown and the Privileges of the Subject in the Seashores of the Realm," pp. 2, 3, 4, 5, 34, 35, 36; Kent's Commentaries on American Law, p. 560; Phear's "Treatise on Rights of Water," p. 87; Wheaton's International Law, p. 355.

PATTON, MILLAR, and CRAWFORD for the defender answered—It is not disputed that the foreshore may be made the subject of conveyance, because, according to the feudal theory of the law of Scotland, all property is derived from the Crown; but that part of it which is in dispute in the present case has been conveyed to the defender. It is so conveyed as part and pertinent of the estate of Ardgour. The conveyance of land is favourably interpreted in the law of Scotland, and everything is to be presumed as conveyed which may fairly be regarded as an accessory and necessary for the beneficial enjoyment of what is specially granted. A proprietor adjoining the seashore cannot enjoy the full benefit of it unless he is entitled to put it to various purposes, and exclude others from so doing; and the presumption is that where there is no reservation the foreshore is conveyed along with the adjacent lands, more especially if these are held under a title containing a clause of parts and pertinents. The Crown has no beneficial right of property in the foreshore—that belongs to the adjacent proprietor. The only interest that the Crown has in the shore is as conservator or trustee of certain inalienable public rights. The Crown's right in the shore is not a *jus regale;* but assuming it to be so, it is one of the minor *regalia* and may be carried by a barony title with a clause of parts and pertinents. The possession of the seashore had by the defender has been beneficial, profitable, and to the exclusion of all others, and establishes under the title which it has taken place—not mere rights of servitude, but a right of property. The defender relied upon the following authorities:—Bell's Principles, 4th ed., sec. 641; Craig, i. xv. 13, 15; xv. 17; Erskine, ii. i. 5; ii. i. 6; ii. 6, 17; Stair, ii. 1, 5; 3, 60; 3, 61; Boucher and Others *v.* Crawford, Nov. 30, 1814, F.C., 64; Campbell *v.* Brown, Nov. 18, 1813, F.C., 444; Commissioners of Woods and Forests *v.* Gammell, March 6, 1851, 13 D. 854, pp. 868-69; Innes *v.* Downie and Others, May 27, 807, Hume's Dec., 552; Ker *v.* Dickson, Nov. 28, 1840, 3 D. 154, p. 160; Macalister *v.* Campbell, Feb. 7, 1837, 15 S. 490, p. 493; Nicol v. Blaikie, March 23, 1859, 22 D. 335, p. 342; Paterson v. Marquess of Ailsa, March 11, 1846, 8 D. 752, pp. 756-65; Saltoun *v.* Park, Nov. 24, 1857, 20 D. 89, p. 91; Hale de jure maris, in Hargrave's Tracts, ed. 1787, part i., cap. vi., pp. 25-28.

The following interlocutor was pronounced by the Lord Ordinary (Jerviswoode), in which he assoilzied the defender from the conclusions of the action.

Edinburgh, 9th January 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the Closed Record, with the proof adduced on the part of the defender—*Primo,* Dismisses the appeals taken on the part of the pursuer in the course of the proof for the defender, in respect the same have not been insisted in before the Lord Ordinary: *Secundo,* Finds that the defender stands infeft in the lands and barony of Ardgour and others, as the same are set forth in a Charter of Confirmation in favour of Alexander M'Lean of Ardgour, dated 25th March 1786, by the Commissioner for John, then Duke of Argyll; in Instrument of Sasine in favour of the Duke of Argyll, dated and registered 13th May 1848; in Instrument of Sasine (No. 28 of process), in favour of the defender, recorded on the 11th January 1856; and in Charter of Confirmation by the Duke of Argyll in favour of the defender, dated 28th January 1860: *Tertio,* Finds that under the titles to the lands and barony of Ardgour, as above set forth, the defender and his predecessors have, for upwards of forty years, and for time immemorial, enjoyed the exclusive possession of the same, including therein that portion of the said lands and barony which is bounded by the sea, and in particular of the seashore thereof, in so far as the same lies between high and low water-mark of ordinary spring-tides, and have enjoyed such possession by means of letting to, and through the use of the same by their tenants in the lands adjoining the shore; by appropriating and using, through the tenants foresaid, and otherwise, the seaware growing or cast upon the shore; by the feeding of cattle and sheep on the same; by the erection of fences running across the seashore between high and low water-mark as aforesaid; by the taking of gravel therefrom for the formation of roads and the like; and of stones for the purposes of building houses and others; for the beaching of vessels employed for the removal of timber cut from said lands and barony of Ardgour; letting the salmon-fishings on the shore, and by the erection of stake-nets thereon for the purposes of such fishing. And, *finally,* with reference to the foregoing findings, Assoilzies the defender from the second declaratory conclusion of the Summons, and from the petitory conclusion thereof: Finds it unnecessary to dispose of the first declaratory conclusion of the Summons, and therefore dismisses the same, and decerns: Finds the defender entitled to the expenses of process; of which allows an account to be lodged, and remits the same to the Auditor to tax and to report,

(Signed) CHARLES BAILLIE.

Note.—This case relates to a subject of much importance, as respects the interest of the Crown on the one hand, and of the proprietors of lands which are situated on the seashores of the country, on the other.

The primary contention on the part of the pursuer, on behalf of the Crown, is, that the defender has no right under his title to what is denominated in the record and pleas as the foreshore; and which, as explained, the Lord Ordinary understands to be the seashore as lying between the high and low watermarks of ordinary springtides.

What, then, is the legal character of the title of the defender on which he here rests his defence? It flows from the Duke of Argyll as his superior; and under the terms of a contract (No. 11 of process), betwixt Archibald Lord Lorne and Allane M'Cleane of Ardgour, dated 19th December 1631, the latter binds himself to make "dew and lawfull resignacione of All and Haill the landis and barony of Ardgoure underwrettene, viz." Then follows an enumeration of the subjects embraced in the barony. In a Charter of Confirmation in favour of the deceased Alexander MacLean of Ardgour, dated 26th March 1786, and in another charter of the same character, in favour of the present defender, the subjects to which the same relates are set forth, as "All and Whole the lands and barony of Ardgour underwritten, viz." (here follow the several lands), "with castles, towers, fortalices, manor-places, houses, biggings, milns, miln lands, multures, woods, fishings, as well in the salt water as in the fresh, tofts, crofts, annexes, connexes, dependencies, parts, pendicles, doves, dovecots, tenants, tenandries, and services of free tenants, banks, meadows, forests, and all their pertinents, lying within the Lordship of the Isles, and of old within the Sheriffdom of Inverness, and now within the said Sheriffdom of Argyle, because the said barony of Ardgour is now united and annexed to the said Sheriffdom of Argyle by Act of Parliament."

The Instrument of Sasine in favour of the defender is No. 28 of process, and applies to "All and Whole the lands and barony of Ardgour and others underwritten, viz.," and so forth.

There is thus in the person of the defender, as in those of his predecessors and authors, a distinct title of barony, which beyond doubt embraces the whole of the lands lying adjacent to the seashore, which here forms the subject of contention.

But does that title extend over and include the seashore within the limits above mentioned, or does it not? It is maintained, as the Lord Ordinary understands the argument of the pursuer here, that nothing short of express grant from the Crown, or at least a title to a barony, followed by certain specific acts of possession, will suffice to carry the shore to the grantee in the adjacent lands.

In the first place, the case is one in which the defender holds the subjects, the shore of which is in dispute, under a title of barony.

What, then, is the character of the right so held? Lord Stair, dealing with the question as to what is carried by an infeftment of lands (2, 3, 59), says, "The law reserves all those things which are called *regalia* or *jura publica*, which the law appropriateth to Princes and States, and exempteth from private use, unless the same be expressly granted and disponed by the King; and if the superior be a subject, if he have any of these *regalia* from the King, they remain with his superiority unless he expressly dispone them to his vassal; and the superior may have them from the King either expressly in a tenement holden of the King, or tacitly, where the lands are erected by the King to him in a barony or any higher dignity, whereby many of these *regalia* are comprehended *baronia*, being *nomen universitatis*. Yet that will not comprehend all." And the author proceeds to point out certain exceptions to which the Lord Ordinary deems it unnecessary here to refer. Mr Erskine, who (2, 6, 18) expresses an opinion that Lord Stair carries the effect due to a grant of barony higher than it should truly extend, states that "barony is, in the language of our law, *nomen universitatis*, that includes under it all the different subjects or rights of which it consists though they be not expressed, and incorporates them so strongly together as to make them *unum quid*, one individual right." And Professor Bell in his "Principles" thus condenses the result of the authorities bearing on this point:—"As the name of the barony is *nomen universitatis*, a charter or disposition of the barony not only conveys all the lands and separate portions included in the barony, but all the pertinents belonging to it. And among those pertinents held to be conveyed, if not excepted, are such *regalia* as have been granted to or conferred on the baron."

If, then, the title with which the defender is vested as one of barony be of this broad and comprehensive character, the question which seems here to present itself next in order for inquiry is, What are the subjects which here truly fall within, and what are excluded from, the barony so vested in the defender?

In the determination of the question thus put, the Lord Ordinary thinks it his duty to look to the proof, and to endeavour to read the titles, and to obtain light on the matter of right from the past possession of the subjects as had by the defender under these titles. As respects this matter, the proof stands clear of, and free from, any contradiction. Such as it is, the possession has been solely with the defender and with those whose possession is, in a legal sense, truly his.

Again, as respects the character of this possession, the Lord Ordinary has been unable to see that it can be said to be otherwise than as complete as the nature of the subjects would admit of, and such as must be traced to, and connected with, a right of property, and with that only.

On the part of the pursuer, it was with much ingenuity argued that each of the uses had by the defender of the seashore, taken severally, was truly of the nature of a servitude over the property of another, and were this mode of argument legitimate and admissible, it might go far to support the case of the pursuer. But the Lord Ordinary cannot think that the facts are to be so considered or dealt with here. It appears to him that the true aspect in which to regard the possession had by the defender and by his tenants on the lands is to take it as a whole, and to endeavour to draw from the contemplation of that possession the conclusion whether it is such as is to be traced to a right of property *in* the subject, or to several and separate rights of servitude exercised *over* the subject, while the property remained with another.

So viewing the matter, the Lord Ordinary cannot hesitate to adopt the views urged on the part of the defender. He is not aware of any case in which an accumulation of separate uses have been traced to a right of servitude rather than to a right of property, where the title of property held by the person exercising such uses was habile and

sufficient in its own structure and terms to warrant the possession.

The defender, and those acting in his right, dealt with the sea-shore, so far as here in question, truly as a subject vested in him, and held by the tenants and others in the occupation of the lands under and through his right. This possession has been prescriptive, and, under the terms of the Statute 1617, must enure to the benefit and support of the right of the defender.

Is there then any law, as laid down by the institutional writers, or as established by decision, which strikes against the validity of the title and the sufficiency of the possession so had by the defender?

The Lord Ordinary has examined the cases and *dicta* of authors, as quoted both from the law of England and of this country. As respects the former he hesitates to apply them lest he should mistake their import and effect. But he has been unable to see anything in the principles of the law of England bearing on the question at issue which at all militates against the argument of the defender.

Again, as respects the law of Scotland, while it cannot be held to be as yet clear on this point—for had it been so the Lord Ordinary and the parties might have been saved this discussion—the Lord Ordinary thinks all the principles of that law tend against the contention of the pursuer here, and for the defender. And although it may be true that the course which the case of the Officers of State *v.* Smith, 8 D. 711, and the same case, Smith *v.* the Officers of State, as decided in the House of Lords, 6 Bell's App. p. 487, took, was such as to create doubt as to the law applicable to such questions as that now mooted, yet in truth and reality the judgment there as actually pronounced does not in any material respect affect the question here raised, and, indeed, having regard to the relative position of the parties in that case, as distinguished from that which those here occupy, could scarcely do so.

The modern authority which appears to bear most directly on the point at issue is to be found in the Opinion of the Second Division of the Court, as delivered by the Lord Justice-Clerk in the case of Nicol *v.* Blaikie, Dec. 23, 1859, to which the Lord Ordinary shall here simply refer.

The Lord Ordinary does not understand the defender to maintain his private right in the sea-shore as other than subject and subservient to the public right in the sea for purposes such as navigation and fishing.

At all events the Lord Ordinary has no idea that by assoilzieing the defender from the present action, he does more than to find that the right of property as claimed on the part of the Crown cannot be supported against that of the defender.

(Initd.) C. B.

A reclaiming-note was boxed for the Crown; but after the case had been sent to the roll a note was lodged by the pursuer craving the Court that the reclaiming-note should be refused. The interlocutor of the Lord Ordinary has accordingly become final.

Agent for Pursuer—D. Horne, W.S.
Agent for Defender—Wm. Peacock, S.S.C.

WILSON *v.* WILSON.

Husband and Wife — Adultery — Separation and Aliment. A wife whose husband commits adultery may sue him either for separation and aliment or for divorce.

This was an action of separation and aliment at the instance of a wife against her husband. It was founded upon maltreatment, and one act of adultery, committed in August 1864, which was admitted on record by the defender.

The defender averred that in October 1855 the pursuer had unjustifiably deserted him, returned to her father's house, and has ever since, notwithstanding repeated solicitations from the defender, refused to return and perform her conjugal duties. This was denied by the pursuer.

The defender pleaded that the pursuer having deserted him she was not entitled to aliment, and that she not having been treated with cruelty, as alleged, she was not entitled to decree of separation.

The Lord Ordinary (Ormidale), on 22d February 1866, found the action irrelevant, in so far as regards the allegation of cruelty, and *quoad ultra* allowed a proof. This interlocutor became final.

After a proof his Lordship pronounced an interlocutor, in which he "finds that it is proven that Hugh Wilson, the defender, has been guilty of adultery, committed by him with Jessie or Janet Megget, mentioned in the libel and proof, in or about the months of July and August 1864: Finds that the pursuer has not been living with, and has not been supported by the defender since the said adultery was committed: Therefore finds that Alison Pow or Wilson, the pursuer, has full liberty and freedom to live separate from the said Hugh Wilson, her husband: Decerns and ordains him the said Hugh Wilson to separate himself from the said Alison Pow or Wilson, pursuer, *a mensa et thoro*, in all time coming: Decerns and ordains the said Hugh Wilson, defender, to make payment to the said Alison Pow or Wilson, pursuer, of the sum of £12 yearly, for aliment to her, during their joint lives." His Lordship added the following

"*Note.*—In support of this action for separation and aliment, the pursuer stated two grounds—1st, That the defender had been guilty of adultery; and 2d, That he had otherwise ill-used her. In regard to the latter ground, the Lord Ordinary, by a former interlocutor, held that the pursuer's statements were irrelevant, and in regard to the former he allowed her a proof which she has accordingly adduced.

"It is clear on the proof that the defender has been guilty of adultery; but the defender's counsel maintained in argument, that although adultery was a good ground for the fuller remedy of the divorce *a vinculo*, it did not warrant the lesser remedy of separation and aliment. It was, however, at the same time conceded on the part of the defender that if the defender had committed adultery with a domestic servant or other inmate of the house in which he and the pursuer resided, that would not only have been a sufficient ground for a divorce, but also for a decree of separation and aliment. The distinction thus suggested is not one which recommends itself to the Lord Ordinary, and he is of opinion, on principle as well as authority, that the husband's adultery, whether committed within or without the dwelling-house of the spouse, is an equally good foundation for a decree of separation and aliment at the instance of the wife as for a divorce *a vinculo*. He can see no reason for holding that the offending husband is to be allowed to dictate to his wife the redress she is to demand, and to maintain that she must divorce him, the very object which he had in view, and was desirous to obtain, and so be allowed to derive the benefit of his own misconduct, of not only being made free to marry his paramour, but also to relieve