Mansfield in the case of *Ross* v. *Bradshaw* (1 Blackstone, 312-14), of Lord Denman in *Swete* v. *Fairlie* (6 Car and Payne, p. 1), and of Lord Chief-Justice Cockburn, in *Fowkes* v. *Manchester and London Assurance Company* (3 F. and T. 440). I do not suggest these as decisions opposed to those quoted by the pursuers. But I think that the dicta of these distinguished Judges are more appropriate to the immediate question before us than are some of the judicial remarks on which the pursuers rely,—remarks made in cases of a very different description.

The observations of the Judges in the case of *Fowkes* relate to the question on which, in my humble opinion, this case ought to turn. I must again remind you that the pursuers' counsel maintained that the intention of the parties, even of both the parties to this policy, is of no consequence, but that the words must be construed and enforced strictly. I cannot think that proposition well founded in law or in equity. In a consensual contract the true intent and meaning of the parties must be ascertained if possible. Chief-Justice Cockburn, in the case of *Fowkes*, says that the intention of the parties is to be ascertained, and that the words are to be construed *contra proferentem*,—that is, against the framers, the Insurance Company. The other Judges express the same opinion; and Chief-Justice Cockburn follows up his remark by saying, that the true sense of the agreement is 'that in which it would be understood by a layman,' meaning an unlettered man.

Now it does not appear to me possible, according to reason or justice, to hold that this poor widow, Mrs Foster, meant to peril her insurance on the absolute verity of a statement of fact which she made according to her belief and her consciousness, and of which she could not otherwise have personal knowledge. Nor can I, in justice to the pursuers, suppose that they meant to entrap her into a warranty, and that they intended that she should so peril her insurance without meaning it. That would be a fraud. I cannot believe it. The intention is thus against the warranty on both sides.

One of your Lordships put the question during the argument, whether the pursuers maintained the same law in regard to a congenital disease of the heart, unknown and unsuspected during life, and only ascertained on *post mortem* examination. If I do not mistake, the answer was, that such congenital disease would be within this warranty. If the pursuers' argument is well founded, no life-policy could have been validly effected at any time by such a person, though he may have lived for many years, and on his death the policy would be declared void, and all the premiums forfeited. It is often said that heart disease is more common now than formerly, and if the pursuers' proposition is sound in law, it is right that the proposition and the law should be known.

I do not mean to say that I have felt this question free from difficulty. The argument for the pursuers has been no less able than urgent; and there have occasionally been judicial remarks made in England on the enforcement of warranty, which, if applied to this case, might create difficulty.

But, on the prior question, Whether there is in this contract an absolute warranty against this disease, known or unknown, I think there is no authority opposed to the case of *Hutchison*.

According to my conviction, there is no such warranty here. Justice and equity and good faith forbid it, and it is relief to my mind to feel satisfied, as I do, that no authority in point of law has been adduced clear enough and strong enough to compel me to decide against the good faith of the policy, and in favour of the Insurance Company.

I think that on both grounds of action the defenders are entitled to absolvitor.

LORD JERVISWOODE concurred.

Counsel for Pursuers—Solicitor-General (Clark), and Asher. Agents M'Ewen & Carment, W.S.

Counsel for Defenders—Lord Advocate (Young), and Balfour. Agents—Melville & Lindesay, W.S.

Friday, January 24.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

SIR ANDREW AGNEW *v.* THE LORD ADVOCATE.

Property—Foreshore—Grant by the Crown—Possession.

A. possessed certain lands under grant from the Crown "with part and pertinent." He had from time immemorial exclusive possession of the foreshore *ex adverso*. *Held* that the possession was conclusive as to the extent of the grant.

This was an action of declarator, raised at the instance of Sir Andrew Agnew of Lochnaw, Bart., against the Lord Advocate, as acting for the Commissioners of Woods and Forests.

The pursuer averred that (cond. 4) "The several lands mentioned in the summons are all included in the said Crown charters and deed of entail, and are upon the sea-shore. The portions of the shore mentioned in the summons, and extending between the several boundaries there specified, have for time immemorial, or at all events for a period greatly exceeding forty years, been in the exclusive possession of the pursuer and his ancestors as part and pertinent of their said estates. They have constantly and without challenge dealt with the said shores as their own property, and from time immemorial, or at least for upwards of forty years, have exercised their proprietory rights by acts of possession of every kind of which the subject was capable. Amongst the said acts have been taking gravel, sand and stones from the shore, and preventing others from doing so, boring for coal and freestone, erecting and using saltpans on the foreshores, using the shores for landing and embarking persons, cattle, and goods, taking wrack and ware, and letting for a rent to others the right of doing so. The said possession has been exclusive of any possession on the part of others." And further (cond. 5) "From time immemorial, or at all events for more than forty years, the pursuer, the said Sir Andrew Agnew, and his predecessors, proprietors of the said lands and others foresaid, have, by virtue of their said writs and titles, possessed the oyster beds, scalps, or fisheries on the shores between high and low-water mark of ordinary spring tides *ex adverso* of their whole lands above mentioned, and also the salmon fisheries in the sea *ex adverso* thereof, and that exclusively, continuously, and without any lawful interruption made to them therein. They have, during the whole of the said period, by themselves, their tenants, and others deriving right from them, taken oysters from the

whole of the said shores, and have also fished for and taken by all lawful modes salmon and other fish of the salmon kind in the sea *ex adverso* of the said lands." None of the titles contained any express grant of the foreshores or fishings. The pleas of the pursuer were as follows:—"(1.) The shore *ex adverso* of the lands and barony libelled is the property of the pursuer in virtue of the titles by which the said lands and barony are held, and he is entitled to decree in terms of the first conclusion of the summons. (2.) The shores libelled having been possessed for time immemorial, or at least for forty years, by the pursuer and his predecessors, under the said writs and titles, as part and pertinent of his said estates, the property thereof belongs to the pursuer, and he is entitled to have the right of property confirmed as concluded for. (3.) The pursuer has, in virtue of the foresaid titles—and *separatim*, in respect of the said titles followed by the possession condescended on—the sole and exclusive right to the oyster and salmon-fishings upon and *ex adverso* of the shores of the said lands, and he is entitled to decree declaring his said rights as concluded for." And those of the Crown were—"(1.) The Crown not having made any grant to the pursuer or his predecessors or authors of any of the subjects claimed, the defender ought to be assoilzied. (2.) The writs founded on not constituting a title in themselves to the portions of foreshore claimed, nor to the oyster and salmon-fishings *ex adverso* of the several lands mentioned in the summons, and prescriptive possession not having been had of any of the said subjects, the defender is entitled to be assoilzied from the conclusions of the summons, with expenses." By a minute, the pursuer subsequently abandoned the conclusions in the summons as to rights of oyster fishings and salmon, reserving to himself the right to bring a new action relative to these rights.

The Lord Ordinary on 31st July 1872 pronounced the following interlocutor and note:—

"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds, that by interlocutor of 20th January last, the Lord Ordinary, in respect of the minute for the pursuer No. 14 of process, allowed him to abandon the conclusions of the present action relating to oyster-beds, scalps, or fisheries, and that these conclusions are accordingly now to be held as having been abandoned; Finds, in regard to the remaining conclusions of the action, that they have not been opposed on the part of the defender, except in so far as they relate to the shore of the sea between low and high water mark of ordinary spring tides *ex adverso* of the pursuer's lands libelled; Finds it sufficiently established by the titles produced, and by the possession which has been had under them by the pursuer and his predecessors for forty years prior to the institution of the present action, or for time immemorial, that the shore of the sea above low water mark of ordinary spring tides *ex adverso* of the lands libelled belongs to the pursuer, subject always to and under reservation of the right of the Crown to, or in, the same for public uses, as accords with law; Therefore, subject to and under reservations of said right in the Crown, finds and declares in terms of the conclusions of the summons, so far as the same have not been abandoned, and decerns: Finds the pursuer entitled to expenses, allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—This case involves some points of great importance and of general interest, touching the rights of proprietors having estates adjacent to the seashore, on the one hand, and the rights of the Crown and the public, or the Crown for the public, on the other.

"It was not disputed, but, on the contrary, expressly conceded, on the part of the Crown, as defender in the present case, that the shore, or foreshore, as it is called, that is, the ground between low and high water mark of ordinary spring tides, is alienable, subject always to certain uses, such as the anchoring and ballasting of vessels, passage, and others, which must always remain vested in the Crown for the public; and, on the other hand, it was expressly stated on the part of the pursuer that he did not, and could not, claim the shore in dispute except subject to the right of the Crown therein for all such public uses as those referred to, and that he had no objection to that right being reserved in the most ample manner. In this view of the matter it is probably of little practical importance whether the radical right of property of the particular pieces of shore ground immediately in question in the present case is to be held to be in the Crown or in the pursuer, for it does not appear that any uses of these pieces of ground have been contemplated, or could well be taken, by the Crown and public greater or more than the pursuer has expressed his readiness to concede, and has stated that he always has conceded. It is possible, however, that in other places, and in different circumstances, or even in the places now in dispute, the foreshore might, as was suggested on the part of the Crown, be of considerable value in respect of the discovery of minerals underneath the same, independently altogether of the ordinary public uses which have been reserved.

"The question, therefore, which was discussed before the Lord Ordinary was, not whether the foreshore is alienable, but whether it is, or is not, to be held as having, so far as claimed by the pursuer in the present case, come to him from the Crown, and now belongs to and is possessed by him as part of his estate, subject to the reserved right in the Crown for public uses. It was not said for the pursuer, and certainly no title-deed or other evidence has been produced or referred to by him to the effect, that the foreshore was ever transferred to him or to any of his predecessors by express grant. But his contention was—1st, that the mere fact of his lands abutting on, or lying adjacent to the shore is sufficient, under his titles — which are neither bounding nor otherwise in their terms exclusive of the shore, but are of the most comprehensive character, and contain, beside the specific lands conveyed, clauses of parts and pertinents in the most ample and unqualified terms—to give him the right claimed; 2d, that his barony title, with its clauses also of the most ample and unqualified nature, of parts and pertinents, is at any rate sufficient to infer, and must in law be held to include in itself, a right to the foreshore; and 3d, that at any rate, and in the least favourable view for the pursuer that can be taken of his case, it must be held that, in virtue of his titles, and the possession which has followed on them, his right to the foreshore, as claimed by him, has been sufficiently established.

"In the view which the Lord Ordinary has taken of the proof, it is unnecessary to determine whether the first two of these pleas are in themselves, and irrespective of the state of the possession, sound or

not; although certainly, as will be afterwards seen, some of the authorities and precedents go the length of supporting the affirmative. The Lord Ordinary's judgment in the present case is founded on a combined view of the pursuer's titles and the possession which is proved to have been had under them.

"There can be no doubt, the Lord Ordinary thinks, that the proof preponderates greatly in favour of the pursuer. He thinks, indeed, that it establishes all the exclusive, immemorial possession on the part of the pursuer and his predecessors that could have been expected, or that could well have been had, considering the nature of the subject—shore ground having no peculiar advantages—and the public uses to which such ground must always be liable, let the proprietory right to it be whose it may. It appears to the Lord Ordinary to be satisfactorily established by the pursuer, not only that he and his predecessors have for time immemorial been in the possession and occupation of the foreshore in dispute, and have taken from it stones and sand for the building and repairing of houses and dykes, and for the making of roads and walks, and wrack and ware for the manuring and cultivation of the lands, whenever and as often as occasion required. Not only so, but the Lord Ordinary thinks it is also proved that, while such has always been the nature of the possession of the pursuer and his predecessors, by themselves, their tenants, and dependants, it has also been proved that the advantages derived from such possession have been valuable, and uniformly treated as such by all concerned. Accordingly, the tenants on the Lochnaw estate appear to have taken their farms and paid additional rent on that footing and assumption. On the other hand, the proof shows that the advantages now referred to were not possessed by the public generally, or by any party or parties at all other than the pursuer and his predecessors, and their tenants and dependants; but, on the contrary, that all others were challenged and prevented in various ways and at various times—in short, as much and as often as circumstances required—from interfering with the exclusive possession which it is clear the pursuer and his predecessors have all along had, and understood and believed they alone had right to. At the same time, it must be acknowledged that there is some evidence of acts of possession by other parties; but, having regard to the whole proof, the nature of the subject, and all the circumstances, the Lord Ordinary has felt himself unable to attribute such acts of possession to any right of property in, or asserted by, these other parties. He thinks, on the contrary, that they have been sufficiently accounted for, where not mere trespasses, on the footing of having been allowed by the pursuer and his predecessors from feelings of good neighbourhood, or on other grounds in no degree derogating from the paramount right of ownership and of possession which he must hold to have been all along in the pursuer and his predecessors.

"The Lord Ordinary may add that he did not understand at the debate that the Crown seriously disputed the state of the possession to be very much of the character now described. What was maintained by the Crown seemed rather to be that the acts of possession and enjoyment proved by the pursuer were more calculated to support rights of servitude than a right of property. The Lord Ordinary, however, cannot think so. It appears to him that the acts of possession and enjoyment referred to were far to numerous, varied, and exclusive in their character to be limited to servitude rights merely. The possession and enjoyment established to have been had by the pursuer and his predecessors must be looked at as a whole; and so looking at them, the Lord Ordinary is unable to draw from them any other conclusion than that they show the pursuer and his predecessors to have dealt with the shore *ex adverso* of their lands as belonging to them in property, subject, it may be, to the burden of certain public uses, and not as having merely a variety of servitudes over it, as property belonging to the Crown or some other party.

"Having regard, then, to the fact that, while the pursuer's admitted property, held by him under Crown titles, and, so far as the present question is concerned, to a large extent under a barony title, lies adjacent to the sea, and that there is nothing to be found in the titles by way of reservation, or a bounding description or otherwise, to exclude the shore, the Lord Ordinary is of opinion that, under these titles, fortified and explained as they are by the possession which has been had under them, it must be held that the shore in dispute belongs to the pursuer, subject to those uses of which the public, and the Crown for the public, cannot be deprived. It may be, he thinks, very fairly presumed that such was the object and intention of all concerned when the pursuer and his predecessors obtained right to their lands from the Crown, and it is not easy to discover any good or substantial reason for its being otherwise. It is obvious that there has been no intention, when the pursuer's Crown titles were granted, to convey the shore between low and high water *ex adverso* of his land to some party other than the pursuer or his predecessors, or that intention would have been long ago carried out. It is scarcely conceivable, indeed, what object or interest any party other than the pursuer and his predecessors, whose lands lie adjacent to the shore, could have had in obtaining a right by itself, and unconnected with any other property whatever, merely to the shore in question. And it is also inconceivable that the Crown could have had any real or substantial interest in witholding from the pursuer and his predecessors, as the owners of the adjacent lands, a right of property in the shore, the public uses thereof being necessarily reserved.

"In accordance with and in confirmation of these views, arising from the nature and terms of the pursuer's titles and the other facts of the case, the weight of authority appears to be decidedly in his favour. Thus Lord Stair (2. 1. 5), in treating of things which cannot be appropriated by any one in particular, but are common to all, such as the sea, navigable rivers, and others, alludes to shores in the following passage of his Institutions:—'So all nations have free passage by navigation through the ocean, in bays and navigable rivers: and have also the benefit of stations or roads and harbours in the sea and rivers; and have the common use of the shores for casting anchors, disloading of goods, taking in ballast, or water rising in fountains there, drying of nets, erecting of tents, and the like. Yet doth the shore remain proper, not only as to jurisdiction, but as to houses or works built thereupon, and as to minerals, coals, or the like found therein, and so is not in whole common, but some uses thereof only.' Except, therefore, as regards the public uses here referred to by Lord Stair, it is clear, at least on his authority, that the shore is alienable

by the Crown, and may be appropriated by a private individual; and, for the reasons already adverted to, the Lord Ordinary must hold that it was conveyed, and was intended to be conveyed, to the pursuer and his predecessors under their Crown titles. This view is further supported by Lord Stair in another passage of his work (2. 3. 60), where he states that lands being disponed as here, with parts and pertinents, 'all is carried thereby that falls under the denomination of the lands disponed, *a cœlo ad centrum*, and all that in the disposition was accustomed to follow it, not only as servitudes, but even contiguous parcels of land which were not known as *distincta tenementa* or parts of any other tenement, except what the law reserves or the express provision of the superior;' and although the learned author goes on to observe that the law reserves 'all those things which are called *regalia* or *jura publica*,' he nowhere, that the Lord Ordinary can discover, says that the shore, so far as it may be appropriated by individuals, is *inter regalia*.

"The authority of Mr Erskine (Institutes, 2, 6, 17) while generally to the same effect, is even more unequivocally for the pursuer as regards the matter in question, for he says that 'by our constant practice the proprietors who border on the sea enclose as their own property grounds far within the sea mark;' and he refers to the case of *Bruce*, Nov. 25, 1714, M. 9542, where it appears to have been expressly found that 'sea-greens are not *inter regalia*,' and that 'the sea-greens might belong to the neighbouring heritors as part and pertinent without a special grant.'

"Mr Bell, again, in his Principles, states the law in almost the very terms of the Lord Ordinary's finding in the prefixed interlocutor. After some explanations in regard to the shore, which it is unnecessary to specify, he says (sec. 642)—'It is not, as in England, held to be property reserved to the Sovereign, but presumed to be granted as part and pertinent of the adjacent land, under the burden of the Crown's right as trustee for the public uses.' And in the next section (643) he goes on to state that "the shore, so far as capable of appropriation, may in England be part of the manor of a subject. In Scotland it may be conveyed by the royal grant, subject to the public use; and grants of the adjacent land are under that implied burden.' And the doctrine thus stated Mr Bell goes on to support and illustrate in various ways, all tending to show, in conformity with the Lord Ordinary's judgment in the present case, that the owner of the lands adjacent to the shore is, in the absence of an excluding boundary or reservation, or other qualification or limitation in his title, to be held to have right also to the shore, but subject to what must always be held to be the reserved right of the Crown as trustee for public uses. Nor can the Lord Ordinary find that Mr Bell, any more than Lord Stair or Mr Erskine, says that the shore is one of the *regalia* which cannot be carried by a clause of parts and pertinents, but can only be carried by an express grant or by a barony title combined with prescriptive possession. The passages in his Principles to which reference has already been made show very clearly that he entertained no such opinion.

"In addition to the institutional writers who have now been referred to, many decided cases to the same effect were cited in argument to the Lord Ordinary, and amongst others the following:—

The Magistrates of Culross v. *the Earl of Dundonald*, 15th June 1769, M. 12,120, where it was decided that a Crown charter of lands described as bounded by the sea conveyed to the grantees the right to the beneficial occupancy of the shore, in preference to an after Crown grant purporting specially to convey the sea-shore as reserved Crown property.

"*Innes* v. *Downie*, 27 May 1807, Hume's Decisions, p. 552, where it was held that a bank of shelly-land contiguous to the sea-shore, and covered by the sea in ordinary tides, was not *inter regalia*, but a pertinent of the adjacent lands. The report of this case is particularly valuable for the opinion it contains of Lord President Islay Campbell, to the *effect that* the shore with its adjuncts, such as sea-weed and the like, are not *inter regalia* in the sense of being inalienable, but must in the general case be held to belong to the proprietor of the adjacent lands as pertinents thereof without a royal grant, provided always he do not impede the uses of navigation, which is the single restraint of his right.

"*Campbell* v. *Brown*, 18th Nov. 1813, F.C., and *Boucher and Others* v. *Crawford*, 30th Nov. 1814. F. C., where it was found that proprietors whose lands are described in their titles as bounded by the sea were entitled to gain ground therefrom so far as not inconsistent with the rights of the public.

"*M'Allister* v. *Campbell*, 7th February 1837, 15 S. 490, where it was held that an infeftment in lands adjacent to the sea, 'with parts, pendicles, and pertinents,' was a good title, combined with an allegation of possession, to prevent encroachment on the shore by another for the purpose of taking away shells, sand, wrack, and ware, and whose plea, that a party whose title did not contain an express grant of the shore, nor describe his lands as bounded by the sea, had not condescended on any title in virtue of which he could prescribe a right to the sea-shore, was repelled. This case is also valuable for the explicit statement of Lord Gillies, to the effect that 'the Court could not hold the shore to be reserved out of a Crown grant wherever it was not expressly inserted in it,' but that, on the contrary, 'the conveyance of an estate which is notoriously bounded by the sea conveys the shore as effectually as if the words bounded by the sea were in the charter.'

"*Patterson* v. *Marquis of Ailsa*, 11th March 1846, 8 D. 752, where it was also held that the proprietor under Crown titles of lands adjacent to the sea, although his titles did not contain any express grant of the sea-shore *ex adverso* of his lands, or of wrack or ware, had a sufficient title to resist an action by another party having lands lying near but not adjacent to the sea-shore, concluding for right to gather wrack and ware thereon. In this case the Lord Ordinary (Wood), in the note to his judgment, which was unanimously adhered to by the Court, appears to have entered into a very full and discriminating examination and review of all the authorities and precedents up to that time bearing on the question determined in the present case, and showed very conclusively, as the Lord Ordinary thinks, that the result here arrived at is right. It is true that the Lord Justice-Clerk (Hope) in that case reserved his opinion how far the Marquis of Ailsa, who obtained the judgment, was to be held as having a full proprietary right to the shore, or merely to the sand, wrack, and ware; but the Lord Ordinary must own that, looking at the opinions of all the judges in the case, as well as the prior decisions, he is unable to see any suffi-

ci ent ground for drawing any such distinction; and at any rate, he thinks that the proof in the present case, which has been already noticed, is amply sufficient to remove all ground for the distinction, supposing that room for it might otherwise be considered to exist.

"*Lord Saltoun* v. *Park and Others*, 24th Nov. 1857, 20 D. 89, where it was held that a proprietor of lands forming a barony bounded by the sea, although not mentioned as the boundary, had right to the sea-weed and ware, and that an averment on the part of farmers and residents in different parishes, that they and the public had been in use to take the sea-ware and sand for upwards of forty years, was not relevant. The Lord Ordinary (Ardmillan) in this case *in terminis* decided, in accordance with the opinion expressed by him in the note to the interlocutor, that a royal grant to lands, whether erected into a barony or not, and whether stated to be bounded by the sea or not, if *de facto* bounded by the sea, comprehends the shore with its adjuncts of sea-weed, etc. And although the Court, under a reclaiming note, limited the judgment to a right to sea-weed and ware cast on the shore, which was all that was necessary for the case, they expressed no opinion to the effect that the Lord Ordinary's findings were in themselves erroneous or ill-founded in law.

"There comes next the judgment of Lord Jerviswoode in the case of *The Lord Advocate* v. *Maclean of Ardgour*, 23d May 1866, 38 Jurist, 584, and 2 Scottish Law Reporter, 25, where the very question now determined by the Lord Ordinary in the present case was directly raised as between the Crown and a subject, proprietor of lands adjacent to the sea-shore, and decided in favour of the latter. It is true that the judgment in that case is that of a single judge only, not reviewed and affirmed by the Court; but it is also true that, although the decision was wholly adverse to the Crown, it was acquiesced in. Not only so, but the report in the Law Reporter bears that, although a reclaiming note was boxed for the Crown, and sent to the roll, it was afterwards refused before it came out for advising, on a note being lodged for the Crown desiring that it should be so. There was in that case, as here, a proof of the state of the possession, and the Lord Ordinary held it to be entirely with the private party. But here also there has been a very full proof, the import of which the Lord Ordinary, for the reasons already given, holds to be with the pursuer, the private party.

"And, lastly, there is the recent case of *Hunter* v. *the Lord Advocate and Others*, 25th June 1869, 7 Macph. 899, where, although it was held not to be indispensably necessary to decide the question determined in the present case, yet the circumstances were such as to raise questions very closely approaching to it, and as to which, consequently, remarks fell from some of the judges which are of value here. In particular, Lords Deas, Ardmillan, and Kinloch, as the Lord Ordinary reads their reported opinions, appear to have entertained and expressed views very much in accordance with the principle upon which the Lord Ordinary has proceeded in deciding the present case. Lord Kinloch (911) expressed himself as follows:—'I entertain a decided opinion, to the expression of which I think the parties entitled, that, according to our law, the sea-shore is not *in patrimonio principis* more than are the adjacent lands. In legal theory the Sovereign is proprietor of all lands to which no one else can show a title. When the Crown gives off land locally situate on the sea-shore, I am of opinion that, whether the title declares the sea to be the boundary or not, there is thereby given off a right to the sea-shore as part and pertinent of the lands. The right is and can only be granted subject to the public uses of the shore for navigation, fishing, passage, recreation, and the like. And to the effect of maintaining these uses there may theoretically be said to be a trust vested in the Crown.'

"With such authority in the law of Scotland as that which has been now referred to, the Lord Ordinary does not see how he could allow himself to be much influenced by the partial quotations which were made to him, as the result doubtless of much elaborate inquiry and learned research by the junior counsel for the Crown, from the reports of cases decided in the English Courts, and from the works of English, French, American, and other foreign authors. It is by the law of Scotland the Lord Ordinary must be governed, and when that law is clear, as the Lord Ordinary, on the strength of the authorities and decided cases to which he has referred, holds it to be, it is not only unnecessary, but would be idle, to enter into any examination of the law of other countries upon the subject. He must be allowed to say, however, that one, and, as it seems to him, about the most valuable of the English decisions to which he was referred on the part of the defender, appears to be strongly adverse rather than favourable for him. The Lord Ordinary alludes to the case of *The Duke of Beaufort* v. *the Mayor, etc. of Swansea*, 9th Feb. 1849, 3 Welsby, Harlstine, and Gordon's Exchequer Reports, pp. 413-15, where it was held that the sea-shore between high and low water mark may be parcel of the adjoining manor, and that where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence to show that such sea-shore is parcel of the manor.

"The Lord Ordinary may also explain that he has not adverted to many cases and authorities even in the law of Scotland which were cited in the argument, because they appeared to him to be not only not directly in point, but to have merely a remote and inferential bearing on the question which has now been determined. He thinks it right, however, to notice in a few words the well-known case of *The Officers of State* v. *Smith*, as decided in this Court, 11th March 1846, 8 D. 711; and *Smith* v. *The Officers of State*, as decided in the House of Lords, 13th July 1849, 6 Bell, 847; for, besides having a bearing on the points involved in the present case, it elicited to some extent the opinions on these points of Lords Brougham and Campbell in the House of Lords. The judges who took part in the judgment in this Court were Lord Wood, as Ordinary who merely referred to the judgment he had previously pronounced in the case of *Patterson* v. *the Marquis of Aisla*, which has been already noticed as unequivocably favourable for the pursuer in the present case; the Lord Justice-Clerk, and Lord Medwyn, who reserved entirely their opinion on the question what is the true nature of the Crown's right to the sea-shore in circumstances similar to those which occur here; and Lords Cockburn and Moncreiff, the former whom appears to have expressed himself as holding that, even in such circumstances, the radical and dominant right of property must be held to be in the Crown. But Lord Moncreiff appears, on the

other hand to have expressed himself very distinctly to be of an opposite opinion, viz. that a barony title, or even an ordinary Crown title, to lands adjacent to the sea, with parts and pertinents, carries the property of the sea-shore, subject to a trust right in the Crown for public uses. And although in the Court of last resort, Lords Brougham and Campbell stated that they reserved their opinion on that question, as unnecessary to be decided, the former noble and learned lord is reported (p. 496) to have observed, in the course of his remarks, that he took the same view of the matter as Lord Moncreiff.

"The defender, it is true, founded, *per contra*, on the remark of Lord Campbell (p. 501), 'that whatever may be the effect of the grant of a barony described to be upon the sea-shore, there is no foundation in law for the position that the simple grant of a piece of land will pass the sea-shore by which it happens to be bounded.'

"But the Lord Ordinary must own that he is unable to see how this incidental observation of Lord Campbell can be held to affect the present case, where the pursuer does not merely and simply hold lands adjacent to the sea-shore, but holds them under a barony and other Crown titles, with parts and pertinents, followed by possession and occupation of the shore for time immemorial.

"After a full and careful consideration of the present case in all its features, and especially of the pursuer's Crown titles, defined and fortified by the possession which has followed on them, the result at which the Lord Ordinary has arrived is, that the pursuer is entitled to decree as concluded for by him, under reservation of the Crown's right in trust for public uses. It is unnecessary, and it would be difficult, if not impossible, for the Lord Ordinary now to state or define with exactness what these public uses are, for that question has not been raised in the present case, and was not discussed or argued by the parties. It is left to the public, or to the Crown for the public, to vindicate and protect the reserved rights, whatever they may be, when and in whatever circumstances it may be thought necessary or desirable to do so."

Against this interlocutor a reclaiming-note was presented on behalf of the Crown.

For the defender and reclaimer it was argued—Two questions arise here—(1) That of title alone; (2) That of prescriptive possession, combined with such grant as the titles give. There is nothing in the titles but a grant of lands and pertinents *de facto* bounded by the sea. These were erected into the barony of Lochnaw, but there are no grants of barony pertinents, nor is there any expressed sea boundary. The Lord Ordinary proceeds upon a title combined with possession, not a title by itself alone.

On a question of title alone the law has not hitherto been fixed by decisions or otherwise—various important dicta either way are to be found, but the point has never yet arisen with the Crown as really involving the rights of foreshore. It is not very material whether the grant is of lands or of barony, as the latter includes only the necessary and appropriate lands, &c. belonging to the barony. Mere erection into a barony does not extend the proprietor's rights of property. It is not disputed that at one time this foreshore belonged to the Crown, but does the alienation of the lands by the Crown include an alienation of the foreshore? The shore clearly is not land in an ordinary sense. The proprietor has a right to the foreshore as a breakwater, and if the baron has the *privilege* of taking sea-ware without necessarily importing a right of property in the shore, it follows that a mere grant of barony does not *vi termini* convey the foreshore. The Crown grants are not like those of a subject; a great difference exists between the two—for a granter being a subject has no right and proper interest to interfere with his grantee. The Crown is not to be held to part, save expressly, with that whereof they are trustees for the public, and by retaining which they could better preserve the rights and uses of the public. "Lands" in a grant like this, on a fair construction, cannot be held to carry "foreshore" by mere force of title.

The question then comes to be, has Sir Andrew acquired by exclusive possession for the prescriptive period a right to the foreshore. Have the acts on his part proved this? There is no question of enclosure, nor of gaining ground; the shore has been always as much open as it ever could be. But what are Sir Andrew's own acts? Have they been such as cannot be attributed to anything but a right of property? It is argued for the pursuers (and to this argument the Lord Ordinary has in his interlocutor given effect), that the acts of possession have been all that the subject possessed admitted of, but this the Crown does not admit. All the rights exercised by Sir Andrew have fallen short of being exclusive rights, with exception perhaps of the licenses given to cut kelp. The rights of the public have been, with that exception, only as extensive as those of the proprietor of the adjoining lands. Acts of possession must amount to an assertion of a right of property. If there is no grant the Crown still remain proprietors, for otherwise a question might still arise from this kind of possession, although there existed a grant with an exclusion of foreshores.

Authorities—(1) (Institutional Writers)—Balfour's Practicks, p. 626; Bell's Principles, 1st ed., § 641, last ed., § 641-3, § 739, § 746; Duff's Feudal Conveyancing, p. 65, § 49, p. 63, § 47; Erskine, ii, 1, 6; ii, 6, 17; ii, 6, 18; ii, 6, 1 and 3; ii, 6, 14; ii, 9, 14; ii, 9, 16; ii, 9, 17; Hendry's Conveyancing, p. 196, § 568; Menzies' Lectures, 3d ed., p. 547; More's Notes on Stair, cc. § 19; Ross' Lectures, vol. 2, p. 176; Stair, ii, 1, 5; ii, 3, 45; ii, 3, 67; ii, 3, 69; ii, 7, 5.

(2) (Scotch Decisions)—*Aikman*, 8 S. 943; *Berry*, 3 D. 205; *Brown*, M. 14,542; *Commissioners of Woods and Forests* v. *Gammell*, 13 D. 854; *Fife's Trustees*, 8 S. 326; *Garden*, M. 14,517; *Reay* v. *Falconer*, M. 5151; *Innes*, Hume's Decisions, p. 553; *Leslie*, M. 14,542; *Saltoun*, 20 D. 89; *Meldrum*, M. 12,152; *Nicol*, 22 D. 335; *Officers of State* v. *Smith*, 8 D. 711, H.L., 6 Bell, 487; *Paterson*, 8 D. 752; *Scrabster Harbour Trustees*, 2 Macph. 884; *Wolfe Murray*, Dec. 8, 1808, F.C., p. 36.

(3) (English Authorities)—*Attorney-General* v. *Burridge*, 10 Price, 350; Bracton, ii, 12, 4 and 5; Callis on Sewers, 65, 66; Davie's Report of Irish Courts, 152, 153; *Duke of Beaufort*, 3 Welsby, 413; Hall's Essay (on Sea-shores), pp. 2-5, 34-36; Kent's American Law, p. 560; Wheaton, p. 355; Phear, p. 87—(on Rights of Water).

For the pursuer it was argued—(1) It is not denied that the foreshore is capable of becoming private property, and here there is unbroken pos-

session upon an ample title for time immemorial, or at any rate for a period exceeding the forty years of the long prescription. (In support of this Counsel dwelt at length on the evidence of the various witnesses as taken in the proof.) (2) There is, quite apart from possession, a title implying a grant of the foreshore even supposing that possession were not proved. These two views must be regarded, however, as separable rather in law than in fact, as the proprietor of a large property adjacent to the sea will usually, as he did in this case, possess the foreshore. The property in the shore *ex adverso* of the lands naturally accompanies that of the lands themselves, subject always to the defined uses of the public. Here for centuries there existed a possession, not until recently disturbed, and it is inconceivable that a separate grant of the shore should likewise be a requisite. Were there no tide it would be admitted that the sea would be the natural boundary of the barony, and the existence of a tide does not alter the case.

The defender asserts that this foreshore is not land, it is merely an accessory of the sea, defined by nature, by the tide. Authority alone can decide this, and reference to the municipal law. Admittedly the Crown might or might not grant this subject—this foreshore—in granting lands. They might even give the adjacent estate to one person, while they gave the foreshore to another. Presumptions, however, may be appealed to, and whether derived from the general principles of law; the history of the transaction by which the Crown granted the lands in question; the nature of the subject; the consequences of regarding the foreshore from one or other point of view;—they all point in favour of the pursuer.

It is urged that the practice both of England and America gives the foreshore absolutely to the Crown, unless there be an express grant, but to follow such guidance here in Scotland would be unsafe; and even in England it seems, to say the least, to be subject to numerous exceptions.

Supposing there were now at issue a question of public policy, a question as to whether the foreshore could be alienated at all, then the authority derived from such instances would have more weight; when, however, it is merely a question of presumption as to whether the alienation (admittedly possible) has or has not taken place, then such examples fail to have influence.

In our own law the authority is clear, and it has been admitted that it was not until the case of *The Officers of State* v. *Smith*, that even a *doubt* interposed. That admission, undoubtedly, must be understood to have had reference rather to decisions than to the opinions expressed by institutional writers, but as a proposition it is true of both. (Here the several dicta of these writers, as at the passages quoted below, were read by Counsel, and their bearing on the subject considered.)

When we come to the decisions, it is found that the early cases were, without exception, either between competing proprietors, or between proprietors and the public who sought to enlarge the category of the public uses of the shore, those rights under burden of which the proprietors enjoyed their own —*Innes* v. *Downie*.

The present claim of the Crown is entirely a new one, and the very fact of its never having been previously advanced affords the strongest proof that it is utterly without sound foundation. It is urged that the Crown might lie by whatever the position of other parties as to *res judicata* might be. But we maintain that the Crown are bound to attend to the due protection of the public uses of the shores. (The various cases were then quoted by Counsel.)

What has actually been decided amounts to this, that the proprietor has a series of exclusive rights against the public. In virtue, then, of what does he possess such rights? Why are they in him rather than in any one else? They are not servitudes. For example, the right of cutting ware for the purpose of manufacturing and selling kelp, not for the use of an adjoining tenement, is inconsistent with the nature of a predial servitude—(Lord Benholme in *Mactaggart* v. *Macdonall*)—and why should they be spoken of as parallel with servitudes or privileges? Undoubtedly the property of the shores resides somewhere—is in some one. This right, treated as an innominate and partly negative one, is nothing more and nothing less than property—property merely subject to those burdens of public use which the peculiar nature of its position has superinduced.

Authorities—(INSTITUTIONAL WRITERS)—Bell's Principles, 4th ed., § 641; Craig, i, xv., 13, 15; i, xv., 17; Erskine, ii, 1, 5; ii, 1, 6; ii, 6, 17; Stair, ii, 1, 5; ii, 3, 60; ii, 3, 61.

(DECISIONS)—*Boucher*, Nov. 30, 1814, F.C., 64; *Campbell*, Nov. 18, 1813, F.C., 444; *Commissioners of Woods and Forests* v. *Gammell*, March 6, 1851, 13 D. p. 854; *Innes* v. *Downie*, May 27, 1807, Hume, 552; *Ker* v. *Dickson*, Nov. 28, 1840, 3 D. 154; *Macalister* v. *Campbell*, Feb. 7, 1837, 15 S. 490; *Nicol* v. *Blaikie*, March 23, 1859, 22 D. 335; *Paterson* v. *M. of Ailsa*, March 11, 1846, 8 D. 752; *Saltoun* v. *Park*, Nov. 24, 1857, 20 D. 89; *Officers of State* v. *Smith*, March 11, 1846, 8 D. 711, H.L., 6 Bell, App. 487; *Baird* v. *Fortune*, H.L. April 25, 1861, 4 Macq. 127 (Lord Wensleydale's opinion, p. 147, last paragraph); *Mactaggart* v. *Macdonall*, 5 M. 534 (Lord Benholme's opinion, p. 547); *Magistrates of Culross* v. *Dundonald*, M. 12,810; *Duchess of Sutherland* v. *Watson*, 6 M. 199; *Smart* v. , 3 Paton App. 606; *Lord Advocate* v. *Maclean*, 1865, 38 Jur.

(ENGLISH AUTHORITY)—Hale dejure maris; Hargrave's Tracts, ed. 1787, part i, cap. vi, pp. 25-28; *D. of Beaufort* v. *Mayor of Swansea*, Feb. 9, 1849, 9 Welsby, &c. Exch. Rep. 413.

At advising—

LORD JUSTICE-CLERK (after stating the nature of the action and the terms of the titles) proceeded—On the case thus presented, I am of opinion:

1. That the ground in question is capable of being transferred from the Crown to a private proprietor, under such titles as those on which the pursuer founds.

2. That as these titles contain no specific description of the component parts of the lands conveyed, and as no specific boundary of the barony or lands is expressed in them, the extent of the barony and lands can only be determined by the state of possession.

3. That it has been sufficiently established by the propf that the pursuer and his authors have, for time immemorial, possessed the ground in dispute as part of the barony of Lochnaw, or of the other lands comprehended in the titles produced.

On the first and second propositions little controversy can arise. In some views of the case the

barony title may be supposed to have an advantage in the argument; but both propositions seem to be well founded, provided the third be a correct deduction from the facts proved. If it be so, this is sufficient for judgment in the present case, and may render superfluous the consideration of some more speculative points. But as we were told from the Bar that the suit was intended to raise for judgment the general nature of the beneficial right in the foreshore, I shall shortly explain the steps which I reach the question of possession, on which the case, in my opinion, entirely turns.

It would be hopeless within any moderate compass, and is altogether unnecessary, to analyse the large list of authorities on this subject. I prefer rather to state their import briefly, and to endeavour to extract from them the general principles to which a consideration of them ought to lead. With some modifications, which I shall explain, I concur in the views of the Lord Ordinary—I agree with him in thinking that most of the elementary principles on which questions of this class depend have been fixed by a series of well-weighed judgments, pronounced by the highest authorities in Scottish conveyancing. We have little or nothing which is new to learn in this department of jurisprudence. English analogies may mislead us; for although in such a case as the present, if I rightly understand them, they would probably lead to the same result, there are important distinctions between the systems on this subject, as Mr Bell well points out in his principles. The safest guides we have are to be found in the decisions of the great feudalists of the two last generations; and they leave nothing which is material undetermined.

The nature of the right which the Crown has with us in that portion of the soil or territory of the realm which is subject to the flow and ebb of the tide is clearly fixed. It is settled in this country that the sea itself below low-water mark, with the soil which it constantly covers, is, as a general rule, *extra commercium*. It is one of the *regalia majora* as far as the national dominion extends, and is not capable, in general, of becoming the property of an individual, but is held in trust by the Crown for the community.

Some uses and incidents of the sea, and even in some special circumstances the soil itself, may be appropriated—as in the case of harbours, minerals, salmon-fishing, and even, as was found in the case of the *Duchess of Sutherland*, mussel beds; but still, as a general proposition, it is true that the sea and its bed are inalienable, and are not ordinary subjects of commerce.

With the ground above low-water mark it is different. It also is vested in the Crown as regards all the public uses of navigation and such like to which it is subject, and to that extent is inalienable. But as the land is ordinarily capable of being beneficially used, so, subject to the public uses, it is simply part of the soil of the kingdom, remaining like all the rest of the land vested in the Crown until granted out, and when granted out, held under the Crown as its feudal superior. Lord Stair, in the passage quoted by the Lord Ordinary, expresses himself with his usual precision. The shore, he says, "remains" proper. It does not "become" proper, but remains so, subject to, and notwithstanding of, the public and inalienable rights over it. That is to say, in its patrimonial character, and as respects its beneficial enjoyment, it is held by the Crown, and conveyed by the Crown, as other land is held and conveyed.

Of course, therefore, the right of property in the shore can only pass from the Crown to a subject by a crown-charter; and such charters, when granted, will be construed according to those feudal rules with which we are familiar. The fact that all the land in Scotland holds of the Crown, and that the Crown investitures are regularly renewed, renders this a subject with which our conveyancers are specially conversant. No light can be thrown on this subject from such *dicta* as that of Lord Stowell in the case of the *Elsebe*, in reference to a crown-gift of prize-money, although probably the principle contained in it is of general application. This is a question of feudal grant, depending exclusively for its solution on feudal principle, and involving elements both of technicality and fact which can only be judged of according to the rules of our own system. But there is no specialty attaching to crown-charters of the land above low-water mark which does not apply to crown-charters relating to other land. The same presumptions apply to both. The soil, no doubt, is subject to certain public uses; it is, in itself, of little profit to the owner, but it has no exceptional or peculiar character as regards the mode of transferring it.

It is certainly not among the *regalia minora*, and therefore is not one of those beneficial rights of property vested in the Crown which, from their rarity or value, cannot be carried without an express grant. Indeed, as regards its patrimonial character, it is not *inter regalier* at all. This is matter of express decision. Lord President Campbell, in the case of *Innes* v. *Downie* (Hume, 552), in the note of his opinion preserved on his Session papers, says, "Property of the land adjacent to an heritor's shore is not a *regalia*. Rocks, with sea-weed and the like, are pertinents of the adjoining property, without a royal grant." Lord Moncreiff, in the case of *Ker* v. *Dickson* (Nov. 28, 1840, 3 D. 160), thus states the law: "The Lord Ordinary adopts the opinion of President Campbell in the case of *Innes* v. *Downie*, May 27, 1807, as reported by Baron Hume, which, besides being of high authority in itself, appears to be in perfect agreement with all the other authorities, that the sea-beach or rocks within flood mark are not *inter jura regalia*, but subjects of private property for all purposes not inconsistent with the public uses." Lord Justice-Clerk Hope, in the case of the *Marquis of Ailsa* v. *Patterson*, stated the law in similar terms. From its nature, indeed, the seashore, covered twice a-day by the tide, possesses nothing in itself of that character of special value which characterises the *regalia minora*. Its only value arises from its being an accessory of the sea as regards its public uses, and of the land as regards its capability of being used to private profit.

But it follows that if the shore be not *inter regalia*, it may be transferred by the same forms as any other land may be transferred. And so it has now been clearly settled that if land be granted by the Crown, and be described in the conveyance as bounded by the sea, the grantee has right down to low-water mark. This was decided in the first of the cases of the *Mags. of Culross* in 1769, in a question with Lord Dundonald, who had a posterior express grant of the seashore; and after the opinions of Lord Glenlee in the case of *Brown* v. *Campbell*, of Lord Medwyn in the case of *Ker* v.

Dickson, and of Lord Justice-Clerk Hope in the case of *Nicol* v. *Blaikie*, as well as the analogous cases of *Smart* in the House of Lords and *Berry* v. *Holden*, the rule may be considered as fixed.

It has been, however, maintained by the pursuer that it is to put his right on too low a level to assimilate it to ordinary property in land; that the seashore is an accessory of the adjacent land; and that the right of the adjacent land, if it have not an excluding boundary, necessarily carries it. In the case of *Smith* v. *Officers of State*, Lord Campbell is reported to have said that "there is no foundation in law for the proposition that the simple grant of a piece of land will pass the seashore by which it happens to be bounded." On the other hand, Mr Bell, in his Principles, states the result of the decisions, in contrast with the law of England, to be this. He says (642) the seashore "is not, as in England, held to be the property reserved to the Sovereign, but presumed to be granted as part and pertinent of the adjacent land, under burden of the Crown's right as trustee for the public uses." In my opinion, both views are too unreservedly expressed. On the one hand, there is very high authority in the direction of Mr Bell's view. A note of two cases reported by Tait indicates the opinion held by the lawyers of last century on the subject:—(Brown's Suppl. 5, 557) "In determining a cause concerning an oyster fishing between *Ramsay of Prestwick* and *The York Building Co.*, the Lord President gave it as his opinion that the *alveus maris* properly so called, and which is constantly covered with water, belongs to the Crown for behoof of the public—30th Nov. 1763. But as to the shore within the flood mark, covered at flood and bare at ebb, it would appear that it remains the property of the contiguous heritor, subject to the common uses of navigation. So argued as to lime rocks—Summer 1772, *Sir John Neill* v. *Dirleton*." The same doctrine was expressed by Lord President Campbell in the case of *Innes* v. *Downie*, by Lord Meadowbank in the case of *Campbell* v. *Brown*, by Lord Gillies in the case of *Macalister*, 15 S. 490, and by Lord Corehouse in the case of *Suttie*, 15 Sh. 1037. It was again distinctly repeated by Lord Kinloch in the case of *Hunter*, decided last year.

These authorities are among the highest in this department of our jurisprudence; and it is idle to speak of their opinions as *obiter dicta*. They were in all these cases the grounds of judgment. Nevertheless, I incline to think that Mr Bell's conclusion from them is too broadly expressed. As applied to the present case, they must be taken with two important qualifications. In the first place, these opinions were not delivered in any question with the Crown. Where they related, as the three last cases did, to questions between a subject-superior and his own vassal, the true construction of the Crown grant could not arise. If the vassal had clearly no right to the shore by the terms of his grant, he was not in a position to challenge with effect that of the superior. On the other hand, if the superior, having right to the seashore, feued out the lands adjoining the shore without any excluding boundary, it might be fairly maintained that the vassal's right was co-extensive with that of his author.

But, secondly, I imagine that this doctrine can go no further in a question with the Crown than to establish that a grant from the Crown of lands lying on the sea-coast may include the shore if there be no words which exclude it, provided the state of the possession indicate that such was the nature of the grant. And this leads me to point out how important this element of possession is to the practical solution of this question.

The seashore in its natural state is capable of beneficial possession; and to the extent to which it is so, it may be assumed that it has always been beneficially possessed. But there is no example of the Crown using the shore in its natural state for purposes of profit. Indeed, without possessing ground above high water mark the property of the shore would be generally useless for beneficial purposes, at least for most of them. Neither is there any example of a gift of the shore to any one excepting to the proprietor of land contiguous. Nor, in general, has there been inserted in Crown titles any words which could limit the right of the grantee in this respect. In small portions of the coast, considered favourable for purposes of navigation, the Crown may have so expressed its grants as to exclude the shore; but in general the land round the shores of this island has been granted out in large baronies, like that now in question, or to burghs which are seaports; and in both it may be inferred that the beneficial occupation of the shore had accompanied their occupation of the dry land.

We may thus easily see how the real question which the Court had to consider in these cases was, how far the title would support a possession which in most of them was not doubtful, and which in few of them was disputed. Along the coasts of Scotland, especially in the west, the possession of the sea-shore by adjoining proprietors was, during last century, practically universal. A large and lucrative manufacture, that of kelp, was carried on by means of its occupation; and the crop was reaped periodically, as regularly as and more profitably than on land. The Crown never pretended right to interfere with the owners in this use of the shore, simply because it never had occurred to the Crown to be doubtful that the charter to the land included the shore also, and this accounts for the fact that throughout the series of decisions in question it seems to have been assumed that the Crown had and could have little interest in the matter, excepting as trustee for the public.

Accordingly, in almost all the cases in question, even where the possession was not introduced as an essential element, the existence of it was apparent. The case of the *Magistrates of Culross* v. *Cochrane* well illustrates this. In that case Lord Gardenstone said, "the right of the town of Culross is a grant from the Crown confirmed and explained by possession. The subject of the grant is bounded by the sea. If this does not comprehend the shore there is a valuable property still in the hands of the Crown which is supposed to be in the subjects having estates on the coast—I mean the sea-ware all round Scotland. On the other side the grant is of a later date, and there has been no possession." It will be found on examining the cases that in none of them has the title to the sea-shore been sustained excepting where it either appeared or was assumed that possession followed upon the grant. On the other hand, if no possession was ever had by the vassal or his predecessors which could truly indicate that the shore was included in his titles, I should hold that it was not included in his titles; as I should, in the case of any other adjoining strip of ground which he had never pos-

sessed, or which had been possessed by others. The more the uses of the shore are accessory to those of the land adjoining, the more significant would the absence of possession become. Cases may no doubt occur in which the surface of the shore is incapable of beneficial possession, and in which there may be valuable minerals beneath the surface. In such a case, I should think the shore not included in a general grant of the adjoining soil, as there would then be nothing to indicate that it was so. In the great majority of cases, at all events, possession will be sufficient to determine the right. In the present case I think the proof of possession is as complete as the nature of the subject and the circumstances admitted of—in other words, that the pursuer and his authors have had the full beneficial occupation of the shore in question, and have possessed it without challenge for time immemorial for all the purposes for which it can be used. I think it unnecessary to go at length into the evidence, as I concur in the views of the Lord Ordinary in regard to it, and have arrived at my conclusion without much difficulty. In regard to the Loch Ryan shore, where the sea-ware is most abundant, the proof of possession is strong; as there the benefit to be obtained from it was material, and formed a not unimportant element of profit to the proprietor as well as the tenants on his estate. I am not moved by the argument that all the acts spoken to might be as well referred to a right of servitude as to one of property. I think that where land has been occupied without challenge in every way in which it can be beneficially used by the vassal, and not used at all by the superior, or by any one else, the presumption is against servitude and in favour of a right of property being the title of possession. I think so, especially in a grant from the Crown, for it is more reasonable to presume that the possession was consistent with the grant than that a right had been acquired against the Crown by prescriptive use beyond its limits. Reference has been made to the case of *Lord Saltoun* in support of this argument, but it lends it very slender assistance. There was no proof of possession in that case, which was decided on the title, which granted certain privileges in regard to sea-ware on which the Court thought it sufficient to proceed; and they thereby waived the question of right which the Lord Ordinary had decided in favour of the proprietor.

But in the present case there is the less reason for raising this point that in one respect the possession is free of all question. The manufacture of kelp on the sea coast was carried on as a regular trade, not as an adjunct to the neighbouring farms, with which indeed it had no connection whatever. In this instance, as in all the other instances round the coasts of Scotland, the commercial manufacture of kelp was a direct assertion and enjoyment of the right of property in the shore which produced the sea-ware. There can be no doubt from the leases produced that this traffic on the Lochnaw shores existed for nearly a century, or that even now the sea-ware is an important addition to the tenant's possession.

In regard to the coast opposite the Irish Channel, and that opposite the Solway Frith, as the sea-ware was less abundant, the acts of possession were fewer. But they seem to have been all which the nature of the shore admitted of. Sea-ware was collected, although in a smaller quantity, from the west coast, and stones were quarried within flood-mark on the side next the Solway, as they were also on the Loch Ryan side, and to some extent on that of the Irish Channel. Sand and gravel were also taken from the shore all round the property. I hold it also to be proved that this possession was maintained and asserted as exclusive, although trespassers not unfrequently found their way there.

I think the proof for the Crown entirely fails to displace the testimony for the pursuer. The acts of taking ballast and beaching boats are truly incident to navigation, and the evidence regarding the oyster-fishing, to which it was believed that Sir W. Wallace had right, is entirely beside the present question.

On the whole, I think the pursuer is entitled to decree in terms of the summons as now restricted, and that on the ground, not that the right to the sea-shore has been acquired by prescriptive possession, but that the possession is conclusive as to the extent of the grant.

Lord Cowan—The summons concludes to have it declared by decree of the Court, "that the whole soil or ground of the shore of the sea above low-water mark of ordinary spring tides *ex adverso*" of the lands specified and belonging to the pursuer, "pertain heritably in property and belong exclusively to the pursuer as proprietor of the said respective lands."

The lands referred to are described in articles 1st and 2d of the condescendence. Those in article 1st were erected and incorporated into a barony of Lochnaw, conform to charter under the Great Seal, dated March 1699, the said lands having long previously been held by the family of Agnew under Crown titles. The lands mentioned in the 2d article had also been held for a very long period by the family under Crown titles, but it is not alleged that these lands have ever been erected and incorporated into a barony. None of the Crown-charters or relative deeds contain any express grant of the foreshore; but the several lands mentioned are *de facto* upon the sea-shore, and although no sea boundary is set forth in the title-deeds, it is undoubted that the lands extend along the shore of Loch Ryan on the one side for about five miles, and on the other side along the shore of the Irish Channel for several miles. A copy of the Ordnance Survey map produced with the summons shows the situation of the pursuer's lands and estate to be as now generally described.

The 4th article of the condescendence avers that, in virtue of their Crown-charters and relative deeds, the pursuer and his ancestors have been in possession, for time immemorial, of the portions of shore adjoining to and forming the boundary of their lands, as part and pertinent of their estates, and have constantly, and without challenge, dealt with the shore as their property, by exercising various proprietary rights and acts of possession of every kind of which the subjects are capable.

The summons and record contain assertions of the pursuer's right to the whole oyster beds or fisheries on the shore, and to the exclusive right and privilege of dredging and gathering oysters from the said shore above low-water mark, and also of the whole salmon-fishing in the sea *ex adverso* of his lands. The conclusions of the summons to this effect, however, have been abandoned by the pursuer, with consent of the defender, as

appears from the minute No. 14 of process, referred to in the interlocutor of the Lord Ordinary of date 20th January 1872. The only question for decision under this record has regard to the rights asserted by the pursuer to the foreshore.

The action is directed against the Lord Advocate as representing the Crown; and the defences stated are twofold: *First*, that the Crown, not having made any grant to the pursuer or his predecessors of any of the subjects, the defender ought to be assoilzied; and, *second*, that the writs founded on, not constituting a title in themselves to the foreshore claimed, have not been followed by prescriptive possession to the effect of conferring on the pursuer, under these writs, that right to the foreshore which he claims.

The questions thus raised for the decision of the Court are, in the *first* place, the effect of the Crown-charters as regards the foreshore *ex adverso* of the pursuer's lands and estate (there being no sea boundary expressed in the titles) in carrying right thereto to the grantee, irrespective of possession; and, *second*, assuming the Crown grants to afford sufficient title for prescriptive possession of the foreshore, Whether such possession has been proved as will suffice to establish the right in the grantee? or, to state this last matter in another way, Whether the grant of lands contained in the pursuer's baronial title and other Crown-charters has been so explained, by proof of exclusive prescriptive possession of the foreshore, as to carry right thereto as effectually as an express grant?

Two preliminary observations may be made as essentially affecting the argument, viz.: (1) That it is not disputed by the Crown, but on the contrary it is at the basis of their case, that the foreshore, subject to the public trusts with regard to it under which the sea and its shore are vested in the Crown, may be conveyed in property to a subject; and (2) that the Crown-charters founded on by the pursuer, although containing no special or express grant of sea-shore, may be explained by possession of the foreshore sufficient in endurance, and as exclusive and complete in its character as the subject admits of, will carry the proprietary right thereto as much as a special or express grant from the Crown.

On the first of these questions it is clear that by the law of Scotland the proprietory right to the *solum* of the sea-shore is in the Crown, as much as the *solum* of the sea itself adjoining the coast. This is laid down by all the authorities. There are important public purposes and uses to be served, which can be secured by means only of the right to the shore being held radically vested in the Crown. Still, subject to such public uses, it is not disputed that the Crown may convey the *solum* of the shore in property; and the differences that exist and to be found in the opinions of lawyers, have regard rather to the question, whether an express grant of the sea-shore be necessary to carry the right where the lands given out by the Crown are *de facto* sea-bounded, than to the question whether the shore is in *patrimonio principis* and alienable. Now, that is the case to be here dealt with; and, apart from possession having followed, I hesitate, notwithstanding the passage in Mr Bell's Principles quoted in the Lord Ordinary's note, to affirm that even the pursuer's baronial title can be held by itself to convey to him the proprietary right to the sea-shore. That opinions have been expressed to a different effect by eminent Judges is true; but this occurred in cases to which the Crown was no party, and where the only question to be decided was between parties holding opposing grants from the Crown. On a careful revision of the authorities and decisions, and specially of the recent cases of *Smith* v. *Officers of State* and of *Gammell*, I am unable to form any other opinion than that, failing a special grant of an express boundary by the sea in the Crown title, and failing proof of possession, any right of property in the shore can be asserted by the proprietor as against the Crown. And, altogether, I do not think that the doctrine of Balfour (Balfour's Practicks, p. 626)—one of the earliest of our Institutional writers—has been in any essential respects departed from: "Na man havand landis pertenand to him lyand adjacent to the sea, may mak stop, troubill or molest the king or his lieges, to win stanes, quarrel, or ony uther thing to his awin profit or commoditie within the flude mark of the sea foiranent the saidis landis, except he quha stoppis the uther be speciallie infeft within the said flude mark, alsweill as without the samin;" and for this doctrine he refers to a case, *The King* contra *The Laird of Seafield*, 29th July 1500. The doctrine laid down at so early a period was in substance that which the late Baron Hume—one of our most esteemed lawyers, who filled the Chair of Law in this University now half a century ago—taught his pupils. Having attended his lectures, of which I have preserved full notes, I can safely say that he held it indispensable, where the proprietor had only a general title from the Crown, that to give him right to the shore he should have enjoyed immemorial and undisputed possession.

That lands held under Crown charters which are *de facto* sea-bounded, though the title does not contain a boundary by the sea, carry with them as part and pertinent certain privileges or servitude rights in relation to the adjoining shore, is a proposition which has been repeatedly recognised in the decisions of the Court. Thus in the case of *Paterson* v. *the Marquis of Ailsa*, March 11, 1846, it was found, in the circumstances set forth in the interlocutor of the Court, that, although the Crown title contained no express grant of the sea-shore *ex adverso* of the lands, or of wreck and ware,—the proprietor had title and right to prevent other parties who had no special title from gathering and appropriating sea-weed or ware *ex adverso* of the lands. And to the same effect was the case of *Macalister*, 7th February 1837, where the proprietor of an estate on the sea-coast, being infeft in lands with parts, pendicles, and pertinents, but without an express grant of shore, his title to prevent the public from carrying off shell, sand, wreck, or sea-ware *ex adverso* of his lands, followed by possession, was recognised. It will be observed that prescriptive possession was there alleged, so that, although a strong opinion was expressed by one Judge (Lord Gillies) to the effect that the conveyance of an estate which is sea-bounded *de facto* conveys the shore as effectually as if the words "bounded by the sea" were in the charter, the decision of the Court was simply to sustain the title, and to remit to the Lord Ordinary to proceed with the cause,—in other words, to inquire into the state of possession as alleged. And the more recent case of *Lord Saltoun* v. *Park*, 1857 (20 Dunlop, 89), went no further than to recognise the exclusive right of the proprietor of lands held under baronial title which were bounded by the sea *de facto*, to the sea-weed

and ware cast on the shore *ex adverso* of his lands, and to prevent it being carried away by others; no special infeftment with an express grant of wreck and ware was considered to be necessary to carry as a pertinent to the proprietor the privilege of collecting sea-ware *ex adverso* of his lands, that being a right (as was thought) inherent in the grant of lands *de facto* bounded by the sea. Lord Saltoun's right of property in the sea-shore it was found unnecessary to determine in that case, although an opinion was expressed by the Lord Ordinary (Lord Ardmillan) that the pursuer had vested in him the property of the sea-shore. The important matter as regards those cases, however, in so far as the practical issue of the present case is concerned, is that in none of them was it doubted that the title founded on by the proprietor might be the foundation of prescriptive possession of the shore, to the effect of vesting it in the proprietor, subject to the public uses.

But while I venture, contrary to the views that have been stated by lawyers whose opinions are entitled to the highest respect, to doubt whether it can be held that the property of the sea-shore is carried to a subject without express grant, merely because of the lands contained in the charter being *de facto* sea-bounded, it is certain,—and indeed the Crown do not dispute the proposition,—that use and enjoyment of the shore by such possession for the prescriptive period as a proprietor with a special grant would exercise, will suffice to explain the Crown grant, and confer on the grantee a right as effectual as if the shore had been specially conveyed by the charter. And this being so, I do not think it at all necessary to enter further into the more general question, being satisfied that the possession which has been instructed is sufficient to carry to the pursuer the right which he asserts in the conclusions of his summons.

As regards the *character* of the possession which will have the effect of giving right to the adjoining proprietor,—Sir Matthew Hale, after stating the law of England to be that the ground between the ordinary high-water and low-water mark does *prima facie* belong to the king, although such shore may be, and commonly is, parcel of the manor adjacent, and so may belong to a subject, proceeds to state—(Hargrave's Tracts, p. 27)—"And the evidences to prove this fact are commonly these:— Constant and usual fetching gravel and sea-weed and sea-sand between the high-water and low-water mark, and licensing others so to do; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand," and such like. I do not know that any better description of the kind and extent of possession that will suffice to support the right here in question could be given. The law of Scotland may in this respect be held to be well defined in the words I have quoted. Not, however, that all of the possessory acts stated can be expected to be found to have existed in every locality. It must be sufficient that all the possession has been had and enjoyed of which the shore adjoining the lands is capable in any reasonable sense.

There are decisions in reference to rights connected with the shore, where, although the royal grant was held sufficient title to lead to inquiry into the exclusive possession alleged, was found not established by proof, and the proprietor's claim consequently disallowed. The case of the *Duke of Portland*, November 1832, (11 Shaw, p. 14), with regard to the right of lobster fishing, and that of the *Duke of Argyle*, December 1859, (22 Dunlop, 264), in reference to mussel fishing, may be cited as examples. On the other hand, in the case of the *Duchess of Sutherland*, January 1868, (6 Macph. 199), while the necessity of a special grant of mussel fishing was negatived by the Court, a general title to the lands with fishings was held a good title to mussel fishings if fully supported (as it was in that case) by exclusive prescriptive possession.

What, then, is the evidence of possession or of use and enjoyment of the shore between high-water and low-water mark, on which the pursuer founds, and what is the extent of these possessory acts as appearing from the proof?

1. From the earliest date it is established that, under his baronial title and other charters, the pursuer and his tenants have all along the shore, on both sides of his estates on Loch Ryan and the Irish Sea, been in the habit of gathering sea-ware, and of using it in the cultivation of their farms.

(2) The granite boulder stones to be found along the coast have, after being quarried or cut on the shore, been used for the purposes of the estate, in the erection and repair of buildings and dykes upon the farms along the shore: and it is specially proved that these stones were largely used in the erection of Lochnaw Castle and offices between the years 1820 and 1830,—the stones being dressed on the beach in sheds erected for the purpose. The evidence of John Crawford, Thomas Moreland, and A. H. M'Lean is specially referred to as to this matter.

3. As regards the sea-ware and weed growing on the rocks or washed up by the tide, the use of it has not been confined merely to the gathering of what was to be found upon the shore, but the ware has been made the subject of special appropriation and patrimonial benefit by the pursuer and his predecessors.

Thus, in the first place, as appears from the documentary evidence prior to 1830,—when the manufacture of kelp from sea-ware became no longer the subject of profit,—various tacks, dated in 1715, 1759, and 1799, were granted to individuals, conferring on them right, as lessees of the proprietor, "to cut down and intromit with the wreck within the loch of Lochryan and the bay of Crugeltone," being parts of the barony of Lochnaw, "and to draw and carry the saids wreck yearly to the shore side or next dry ground, and to win and cause burn the same thereupon," with power to the tenant to sell the same as his own property. The three tacks produced, granted in the years foresaid, are respectively for twenty-one years. And in reference to this profitable use of the sea-ware as kelp, there is explanatory parole evidence given especially by the old witnesses, Thomas Moreland, William M'Miken, and Alexander Martin, and others. And these witnesses state that when the sea-ware was let for the manufacture of kelp, the tenants of the farm adjoining the shore were allowed only to gather what was drifted on the land by the tide.

In the second place, the farms on the estate have been let to the tenants in more recent times with special liberty contained in the leases to take the wreck and to cut it opposite their several lands, and to use the same as manure for their farms, but in no other way; and from the parole

evidence, it appears that in consequence of this privilege the farms on the estate have been let at a higher rental than they would otherwise have been. See M'Lean's evidence, and that of M'Cubbin and the other tenants, besides the witnesses already named.

And farther, in the third place, the evidence given by several of the witnesses establish that parties not tenants on the estate, but strangers, were prevented from interfering with and taking away the sea-ware and also stones from the shore; while in one instance, in the year 1850, interdict was obtained from the Sheriff of the bounds against a party who had been collecting and gathering wreck and sea-ware, aad carting off the same, and which no doubt had the effect of deterring others of the public from repeating the offence.

That certain of those acts apply only to Loch Ryan was said to limit their effect. I do not think so. Having regard to the baronial and other Crown-charters under which the pursuer and his predecessors have for centuries been vested with the whole estates as a *unum quid*, there is no good ground for the distinction pointed at.

Such, then, substantially is the evidence which the pursuer has led of the possessory acts on which he relies; but throughout the proof there are also statements in reference to sand and gravel taken from the shore by the pursuer and his tenants, and their constant use of these materials when required for the estate.

On the part of the Crown, again, there has been evidence led to the effect of some persons having occasionally taken sand to make mortar for buildings, especially from one part of the shore, and also of occasional gathering of sea-weed by the occupiers of houses adjoining the shore for the use of their gardens or other small possessions. It is evident that these acts were not done in exercise of any right, and are to be explained either from their not being noticed by or known to the proprietor and his tenants, or, if known, from being tolerated as of no serious innovation on their proprietary rights. It has also been proved by the Crown that it has been, and is still, the practice of vessels bringing cargoes of coal and lime for the farmers and others in the locality to run their vessels on the beach for the discharge of their cargoes, and also for such vessels taking sand from the shore for ballast; but it is obvious that this custom is among the public uses to which every grant of shore is inherently subject. Although the Crown may in express terms give the property of the shore, the grant does not divest the Crown farther than is consistent with those public uses of it as regards navigation or otherwise, to secure which the Crown still remains trustee for the public. This beaching of vessels, therefore, or taking of sand for ballast, cannot affect the right of the pursuer, any more than it would had his Crown title contained an express grant of shore. Whether by grant or by possession, the property in the shore can be taken only subject to those public uses of which the Crown is the guardian.

One other matter has been the subject of proof by the Crown, viz., the possession and enjoyment by other parties than the pursuer of the oyster fishing in the loch of Loch Ryan; but this does not appear to be of any material moment. Supposing the right to the oyster fishings to be with General Wallace and not with the pursuer, it is a right which, as has been expressly found in other cases, may be the subject of a separate grant. It is in no way inconsistent with the proprietary right to the shore being in the pursuer for every other purpose. Hence it cannot be alleged that decree, in terms of the conclusions of the summons as now restricted, can in any way affect the right in General Wallace, or in any other party, to these oyster fishings. Whether the Crown-charter would have been a good title to prescribe a right of oyster fishing, if followed by prescriptive possession of such fishing, may or may not be doubtful; but as the pursuer has not had such possession, and, at all events, as he has now departed from that part of his action, I think the defence on this ground also does not rest on any substantial ground.

Lord Benholme—I have listened with great interest to the opinions that have been delivered. They appear to me substantially, if not in every particular, to coincide; and for that reason, and because I could not hope either in fulness or precision to emulate their perfection, I shall confine myself to one or two simple observations on the result at which they both appear to have arrived. I think it is of great importance that we should now agree in stating as our opinion, that where an estate is on the seashore, held by titles that do not by express grants or specific boundary extend the right of the proprietor beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land. That was doubted apparently in some cases, where distinguished Judges have given opinions that might appear to tend in a contrary direction; but to these cases we know that the Crown was not a party, and that it is only in later times that this matter has been at all made the subject of Crown investigation; and, so far as I can discover, the Crown have successfully maintained the negative of that proposition which I have just stated, that there is no presumption in favour of a proprietor, who by his mere position, without express grant, or definite boundary, or distinct possession, maintains his pretensions to the property of the shore. This is a very important principle, and I am glad that we all agree, as I understand we do, in the assertion of it. But there is another principle equally important, and extremely interesting to proprietors upon the shore, and that is, that even in such a case as I have supposed, possession may affect the pretensions of the party, and that a possession long continued, and of a certain definite description, may ascertain by explanation, if not by prescription, that a proprietor is entitled to the seashore. The nature of that possession which will so entitle the proprietor to the seashore has perhaps not hitherto been made the subject of so many decisions as would entitle us to define exactly what its extent or limit is; but this I will say, that a possession for a series of years—nay, in the case before us, of centuries—of the right of cutting from the rocks sea-ware for the purpose of manufacturing kelp, is one of the most decisive symptoms of property that can well be imagined in the shape of possession. I am old enough to recollect when that was a very valuable right; and, as your Lordship has mentioned, it was invariably enjoyed by the proprietor whose boundary was by the rocks that bore sea-weed. The kelp shores, especially on the west of

the island, afforded a very large portion of the rent; and it was a great loss to such proprietors when, by the introduction of Spanish barilla, the kelp was thrown out of use. I may mention as a curious fact in regard to these shores, that they were capable of a certain cultivation; and I know a part of the shore which was let by a proprietor to a tenant who employed a species of cultivation by chipping the rocks, so as to obtain an artificial surface more favourable to the growth of the seaware—to the attraction of the seed, I suppose, and the introduction of the weed into the rocks—than before that operation took place. Here, then, was a regular crop; and the foreshore was made as subservient to that artificial use as the land itself. In the present case there is the most complete evidence of this kind of possession, which is a species of enjoyment in itself almost decisive. The enjoyment of mere waif and stray cast upon the shore is very different, and much less important. In the case of *Saltoun*, I think there was the one and not the other; and we made some alteration on the Lord Ordinary's interlocutor, or at all events expressed our opinion that the Lord Ordinary's views had gone rather too far, in holding that without possession there could be a presumption of property in the seashore. I do not think that I ought to weaken the effect of what has fallen from your Lordship and from Lord Cowan by repeating in detail the principles upon which this case is to be decided. I think by adhering to the Lord Ordinary's interlocutor, and by the observations made in the judgment we are pronouncing, our view of this part of the law is made very definite and clear.

Lord Neaves—This is a very important case, and I concur in the result at which your Lordships have arrived. The seashore is certainly in some respects a peculiar territory. In one sense it is *inter regalia*, that is, so far as is necessary for the uses of the public—so far as it is vested in the Crown for those uses. *Quoad* these, it is inalienable, but, subject to this limitation, there is no doubt that it may be alienated, and I am inclined to agree with the Lord Ordinary that the foreshore (that is to say property subject to the uses I have mentioned), in so far as it is alienable, is not *inter regalia*.

I am inclined to hold that the shore would not by necessary implication pass, in the general case, along with the lands, but I think it probable that this is to be presumed from the mere fact of there being general uses which require to be preserved.

The other matters, with the exception of the cutting of kelp, may be less characteristic of property. I refer to such things as the taking of sand, &c., but from the conjunction of all of these uses we must infer property, and not an aggregate of servitudes.

Counsel for Defender—Lord Advocate (Young), Q.C., Solicitor-General (Clark), Q.C., and T. Ivory. Agents—Murray, Beith, & Murray, W.S.

Counsel for Pursuer—Millar, Q.C., and D. Crawford. Agents—Skene, Webster, & Peacock, W.S.

Wednesday, February 5.

FIRST DIVISION.

Dean of Guild Court, Glasgow.

LANG *v.* BRUCE.

Dean of Guild—Glasgow Police Act, 1866, *sec.* 325 *—Proprietor—Obligation to fence.*

A proprietor of a mill-lade had failed to fence it upon being required to do so by the Master of Works under the Glasgow Police Act, 1866. The Procurator Fiscal therefore presented a petition to the Dean of Guild, praying him to grant warrant for execution of the work, to ascertain the cost, and to decern therefor against the proprietor. The Dean of Guild ordained the proprietor to fence the mill-lade. The Court *held* that under the statute the Dean of Guild had not power to ordain the proprietor to erect the fence, but remitted to him to grant warrant for the execution of the work, and to decern against the proprietor for the cost, in terms of the 325th section of the said Act.

This was a petition presented to the Dean of Guild by Mr Lang, procurator-fiscal of the Dean of Guild Court of Glasgow, against Mr Robert Bruce, paper maker there. The petition set forth that the defender was the proprietor within the meaning of "the Glasgow Police Act, 1866," of a "land or heritage" namely a mill-lade, which was not properly fenced, and was accordingly dangerous; that the Master of Works appointed under the Act had given notice to the defender in terms of the Act to fence in the mill-lade, but that the defender had failed to do so, and had lodged no objections. The petitioner therefore prayed his Lordship "to grant warrant to cite the said Robert Bruce, defender, to appear before you to be heard on this petition and application; and thereafter, upon resuming consideration thereof, to grant warrant to execute the said work, as specified in the said notice; and thereafter to ascertain and fix the cost thereof, and decern against the said defender for the same; to award the expenses of this application and subsequent procedure against the said defender, and decern therefor,—all in terms of and to the effect provided for in the said Act before referred to and hereby founded on, particularly the 321st, 325th, and 384th sections thereof."

In answer, the defender admitted that he was the proprietor of the mill-lade, but denied his liability to fence it. The road was formerly a statute labour road and was then fenced by the Road Trustees, and the defender averred that since the road had come within the municipal boundaries, and under the charge of the Police Board of Glasgow, they, and not the defender, were bound to fence the road.

The Dean of Guild pronounced the following interlocutor:—"Find that, independently of the provision of the Police Act (384) requiring the defender, as proprietor of the lade in question, to protect the lieges from danger arising from the open and exposed state of the lade, which is admitted to be his property, he is bound to do so at common law; and accordingly ordain him to enclose the same in terms of the notice by the Master of Works produced; or, in his option, remit, *first*, to Mr James Cruickshank, one of the inspectors of Court, to visit