Thursday, July 20.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

BROWN *v.* THOMSON.

Lease—Game Tenant and Agricultural Tenant—Joint Right of Two Persons in One Subject, how to be Exercised—Act 43 and 44 Vict. c. 47 (Ground Game Act 1880), sec. 6, "except in Rabbit-holes."

Section 6 of the Ground Game Act 1880 forbids the setting of spring traps for rabbits by the occupier of the land "except in rabbit-holes." *Held* that the occupier is only entitled to set spring traps within the roof of the rabbit-hole, and is not entitled to set them in the "scrape" formed by the rabbit before going below ground.

Observations on the mutual relation of the game tenant and the agricultural tenant.

Opinion (*per* Lord President) that a tenant who had right to kill rabbits was not at common law entitled to set traps except within the rabbit-holes.

The Act 43 and 44 Vict. c. 47 (Ground Game Act 1880) is entitled "An Act for the better protection of occupiers of land against injury to their crops from ground game."

The preamble is as follows:—"Whereas it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game."

It is enacted by section 1 that "Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon concurrently with any other person who may be entitled to kill and take ground game on the same land, provided that the right conferred on the occupier by this section shall be subject to the following limitations." These limitations are that the occupier and all persons authorised by him in writing shall be the only persons entitled under the Act to kill ground game; that the person so authorised shall be a member of his household, or in his ordinary service, or *bona fide* employed by him for reward in killing ground game. By section 2 it is provided that where the occupier is entitled otherwise than under the Act to kill ground game, and he gives a title to another person to kill it, he shall nevertheless retain and have as incident to and inseparable from such occupation the same right to kill ground game as is declared by section 1. By section 5 the occupier is not to be entitled under the Act to kill ground game on his land where at the date of the Act that right is vested by contract in another person, until such contract expires, and in Scotland when the right is vested by law or otherwise in another person than the occupier at the passing of the Act, the occupier is not to be entitled to kill ground game during the currency of the lease held by him at the date of the passing of the Act, or during the currency of a contract made before the passing of the Act whereby another person is entitled to kill ground game on the land. Section 6 provides as follows—"No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall for the purpose of killing ground game employ spring traps except in rabbit-holes, nor employ poison, and any person acting in contravention of this section shall on summary conviction be liable to a penalty not exceeding two pounds." For the purposes of the Act the words "ground game" are declared by section 8 to mean hares and rabbits.

Robert Thomson was tenant under a lease, beginning in 1872, of the farm of Burnside of Mabie, in the stewartry of Kirkcudbright, the property of Mr Kirkpatrick Howat. The right to kill rabbits was not reserved to the landlord in the lease.

John Brown of Manchester was tenant under Mr Kirkpatrick Howat of the right to game on Mabie, including the right to kill rabbits so far as the proprietor could grant it. His lease was for five years, beginning on 6th April 1879. By his lease the agricultural tenant's rights were reserved.

In November 1880 Brown presented a petition in the Sheriff Court at Kirkcudbright to have Thomson interdicted from interfering with his keepers in entering on the farm of Burnside of Mabie for the purpose of pursuing and taking game and rabbits; and second, to have him interdicted "from, by himself or others having his authority, employing spring traps for the purpose of killing rabbits on his said lands and farm except in rabbit-holes."

Thomson opposed this second prayer of the interdict, pleading that under his common law right to kill rabbits he was entitled to kill them in the same manner as he had been then doing, and that the Ground Game Act 1880 did not alter his common law right. The Sheriff-Substitute (Nicolson), however, granted interdict, and the Sheriff (Macpherson) adhered to the interlocutor of the Sheriff-Substitute.

The present process was a petition at Brown's instance against Thomson for breach of interdict. The pursuer founded on the interdict formerly granted, and averred that the defender had broken it by having in October 1881 set on the farm a number of spring traps for rabbits elsewhere than in rabbit-holes. The defender denied the pursuer's averments, and stated that he had let the right of trapping rabbits to a contractor, who exercised the right on his own responsibility.

The Sheriff-Substitute allowed a proof, but on appeal the Sheriff found "that the petition does not set forth a relevant complaint of breach of interdict against the respondent," and dismissed it accordingly.

"*Note.*— . . . The statement of facts is little more than an echo of the interdict, without specification enabling the defender to prepare for his defence.

"The breach of interdict is said to have been committed by the respondent 'or others,' but not a hint is given as to how many others, or who any of them are, nor of what part of the lands the traps complained of were found upon. If traps were found, the petitioner must have been in a position to specify the *locus* more definitely

than by simply repeating the words of the interdict."

The pursuer appealed to the First Division of the Court of Session, and on 11th March 1882 their Lordships of that Division recalled the Sheriff's interlocutor and remitted to the Sheriff to allow the parties a proof of their averments. A proof was accordingly led, when it appeared that the traps of the person (M'Teer) to whom the defender had given written authority to trap rabbits on his behalf, and who paid defender a sum of money for the right to do so, were set for the most part, not within the roof of the rabbit-holes, but in the "scrape" or hollow scooped out by the rabbit in making the hole properly so called. This scrape varied in length according to the nature of the ground, and the traps set in them ranged from 16 inches to 7 inches from the point at which the roof of the hole began. A large body of evidence was adduced by the defender to show that the way in which the traps were set was the only effectual means of trapping rabbits, and that it was not possible to set ordinary rabbit traps in holes without widening the holes with a spade, in which case "it would not be a rabbit-hole." These witnesses deponed that they themselves always, both before and after the Ground Game Act, set their traps at rabbit-holes much in the manner in which it had been done on the defender's farm, and that prior to that Act traps had been also set in places called "fancy holes," *i.e.*, places where the rabbits scrape without making any hole properly so called.

The pursuer's evidence was to the effect that it is quite possible to set traps successfully within the hole covered by a roof, and that the manner in which the traps complained of were set was dangerous to dogs, and had been found to injure hares and winged game, the latter of which frequented "scrapes" made by rabbits.

The Sheriff-Substitute found it not proved that spring traps had been employed by the defender or anyone authorised by him since the date of the interdict elsewhere than in rabbit-holes, and assoilzied the defender. He added this note:—The question appeared before the proof was led to be simply one of fact. It turned out instead to be a question of interpretation—a question not as to whether the defender had done certain things, but as to the meaning of a statutory term, a term used, I believe, for the first time in a statute, and depending for its interpretation on questions of English language, natural history, and common sense.

"The section of the Ground Game Act above referred to (sect. 6) provides that 'No person having a right of killing ground game, under the Act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; *and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit-holes*, nor employ poison," &c. The words in italics are alone in question here; and the question raised by the proof really is, *What is a rabbit-hole?* The word is not to be found in any dictionary, so far as I know; but the word 'burrow,' which is nearly synonymous, is defined by Johnson, 'The holes made in the ground by conies,' and I know no better definition elsewhere. Some explanation is thus required. A rabbit-hole or burrow may be described as a tunnel bored into the ground, the mouth of which, before the hole becomes circular and wholly covered, is a hollow or trench, varying in depth and length according to the quality of the soil and the lie of the ground. According to one skilled witness in this case (M'Naught), the distance from the part where the rabbit began to burrow to the mouth of the hole varied, in the holes examined, from 1 foot 6 inches to 4 feet 3 inches. Another skilled witness (Straiton) says that the extent to which a rabbit scoops out is 'sometimes 5 or 6 feet in a steep place.' The depth of the excavation below the natural surface of the ground varies in like manner, beginning with an inch or two and ending in a foot, and sometimes more, at the mouth of the tunnel.

"The question here is, Is the preliminary trench a part of the rabbit-hole, or is the term to be held as strictly limited to the portion of the burrow which is covered by a roof? The former of these is the defender's interpretation, the latter the pursuer's.

"After much consideration and personal inspection of rabbit-holes I have adopted the former as the more correct and fair interpretation of the term as used in the Ground Game Act. Looking to the purpose for which the Act was intended, to its definition of 'ground game,' and the absence of a definition of a 'rabbit-hole,' I consider it right to give the latter term the most liberal interpretation of which it is susceptible, in harmony with the chief purpose of the Act and with common sense. The Act is designated 'An Act for the better protection of occupiers of land against injury to their crops from ground game,' and it proceeds on the preamble that 'it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game.' By 'ground game' the Act means 'hares and rabbits,' the latter of which are not game. The 'further provision,' made to enable the farmer to protect his crops from rabbits which he had the right to kill before is not much, and the right to kill them is fenced with restrictions that did not exist before. It is a trite principle in the interpretation of such restrictions in remedial statutes that they are to be interpreted liberally, and in consistence with the main purpose of the statute. The restriction now in question is, that spring-traps for the purpose of killing rabbits shall not be employed 'except in rabbit-holes.' The restriction was undoubtedly made with a view to prevent the injury or destruction of winged game and hares, caused by the setting of rabbit-traps in the open field, 'in runs' and in 'fancy holes' or 'scrapes,' as had been frequently done before. Thenceforth they were to be set only in the places which are the rabbit's proper home. The open field, where hares and winged game chiefly go, was thenceforth prohibited to the rabbit-trapper. That protection to them being secured, the question comes, Was the restriction intended still further to limit the right of the farmer, and still further to secure protection to winged game and hares, even when they intrude into the proper home of the rabbit? Hares and pheasants, as the

proof shows, seldom go near rabbit-holes. Partridges, on the other hand, are fond of going at certain times (in spring Straiton says), to bask and rub themselves in the dust of rabbit-holes, and they are of course liable to be caught in traps set there. The proof of injury sustained in this respect by the pursuer is very limited. One partridge was got in the defender's traps before the interdict was granted. Since the interdict the pursuer has shot hares and partridges which were found to want a leg. There is no proof, however, that these hares and partridges, the number of which is not specified, were caught in the traps of M'Teer [the rabbit-trapper employed by the defender]. But it is proved that traps set by the pursuer's servants, in plantations where the defender has no right to set them, have been set in the way complained of. Admitting the risk to which partridges are exposed from traps set in any place to which they can go, the question is, Whether the restriction imposed on the farmer, in the exercise of the one effectual method for keeping down the creatures that do most injury to his crops, is to be interpreted in the way most disadvantageous to him, for whose special benefit the Act was intended, for the sake of obviating another possible injury of very small consequence in comparison? To that question I answer, No. If the facilities for trapping rabbits were meant to be so restricted as the pursuer thinks, it would seem that the protection of a few partridges from untimely injury or death was considered by the Legislature of more importance than the effectual repression of rabbits. I cannot believe that, or accept an interpretation of the most important restriction in the Act which if correct would indicate that the Act has been misdescribed in its title, and might be called instead 'An Act for the better protection of sportsmen against injury to their game from occupiers of land.' . . . . . .

"The diameter of a rabbit-hole that has not been widened by some other means than the boring of the animal itself is about 4 inches, and the breadth of an ordinary trap when set is about 5 inches. To say, therefore, that it is possible to set a rabbit-trap with any chance of catching a rabbit within the tunnel of a rabbit-hole as made by the creature itself, is to say that which is hard to understand. It is, in fact, a defiance of the elements of natural history, of geometry, and of common sense. The rabbits, though a 'feeble folk,' are intelligent, and well known to be very cautious, timid, and suspicious—all the more because they are feeble; it is the armour which Providence has given them. They make their hiding-places underground as secure from the intrusion of any other creature as they can, and they are particularly careful not to make the entrances wider than is absolutely necessary for themselves. I believe they sometimes even do their best to make them as inaccessible or invisible as possible, so that when a rabbit-hole is wide enough at the mouth to admit of having a trap set in it, and carefully covered with dust, as is necessary, that is possible only where the hole has been widened by digging, scraping, or weathering, otherwise than by the animal itself. The pursuer's witnesses Middleton and Morrison both admit that they 'sometimes' enlarge the holes with a spade before setting the trap. How the trap can ever be set properly and covered with earth in a hole not so enlarged without awakening the suspicion of the rabbit is quite inconceivable. The 'rabbit-hole' contemplated by the Ground Game Act must be the hole made by the rabbit itself, and not the hole as widened by trappers, dogs, or any other means. The Act cannot be held to have meant that to obviate the risk of a straggling hare or partridge putting its foot in a trap it must either be thrust uselessly into the darkness of a narrow tunnel or be set in a carefully widened hole which the rabbit never made and will naturally regard with just suspicion. Such an interpretation of the Act, instead of additional protection to the farmer, gives great additional protection to the weak but cunning creatures which are his great enemies, and against whose ravages the Act was expressly intended to protect him.

"On these grounds I have come to the conclusion that there has been no breach of the interdict and no violation of the Ground Game Act by the defender, or the man authorised by him, by the setting of traps in the way described; according to my interpretation of the clause in question, they were set 'in rabbit-holes'. There has been, so far as I have been able to ascertain, no decision as yet pronounced on the point in question by any Court of authority, so that I have not had the advantage of any legal light on the subject.

"The distance at which, according to my interpretation of the Act, it may be lawful to set a trap outside the roof of the rabbit-hole will depend on the distance to which the actual burrow of the rabbit under the surface extends."

On appeal the Sheriff adhered.

The pursuer appealed to the First Division of the Court of Session. The arguments fully appear from the judgments.

The Court made avizandum.

At advising—

Lord President—The shape in which this case comes before us—a petition to have the defender punished for breach of interdict—is a somewhat inconvenient shape in which to ask the Court to decide the meaning of a statute which is not applicable to the Stewartry of Kirkcudbright only but also to the whole of the United Kingdom. I must say that in deciding the case I attach little or no importance to the evidence which has been led. I put to myself the question, What is the meaning of the words of section 6 of the statute founded on? It was said in the course of the argument that this is a statute intended for the benefit of the agricultural tenant, and that is quite true. That, indeed, we know from the preamble of the statute, and it is also clear that a great privilege is given to occupiers of land for agricultural purposes by this Act, since by the first section of it it is provided "That every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon concurrently with any other person who may be entitled to kill and take ground game on the same land." That right is to be subject to certain limitations, which are then enumerated. Then it is afterwards provided by section 6 that "No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first

hour after sunset and the commencement of the last hour before sunrise; and no such person shall for the purpose of killing ground game employ spring traps except in rabbit-holes, nor employ poison; and any person acting in contravention of this section shall on summary conviction be liable to a penalty not exceeding two pounds." Thus the agricultural tenant is entitled to kill ground game to secure his crop, and that as "an incident to and inseparable from the occupation of the land." But it could hardly be expected that the privilege would be conferred upon him, and above all that it should be declared to be inseparable from his occupation of the land, that is, that every such occupier must have the right whether he wish it or not, and cannot put it away from him, without very stringent conditions as to the mode in which it is to be exercised. Now, the conditions imposed by this 6th section are plainly of a most important character. There are three things positively forbidden by it — the use of firearms at night, the employment of poison, and the employment of spring traps except in rabbit-holes. All of these prohibitions are equally important. The use of firearms by night is obviously a very dangerous thing, and was prohibited on grounds of public policy, and the prohibition of the use of poison rests on the same grounds. The last prohibition (in the order in which I have taken them) —that directed against the use of spring traps except in rabbit-holes—appears to everyone who is in the least acquainted with the matter of ground game or with sporting to be just as important in the interest of the parties, who are declared to be in the very first section of the statute in the position of being concurrently entitled, along with the occupier of the land, to kill the ground game and all the other game upon the land as either of the others are. Now, when this privilege is thus given to the occupier of the land, there is one rule of law which seems to me to be plainly applicable to the case, and that is the rule that where there are two persons having a right to the use of the same subject, the two rights must be so exercised that the one shall not be permitted to destroy or extinguish the other. The right of each must be fairly used, so that the other shall have his fair share of the subject. The two parties here are the agricultural tenant and the game tenant, and the right of the former depends on this statute. The right of the game tenant is a right which he acquired apart from this statute, but it is a right of a kind which is not far to seek. It is the right of shooting the game on this farm, and that implies the use of dogs and the preservation of winged game. Now, is it not quite clear that the setting of spring traps in open ground and not in rabbit-holes would be a complete prevention of the use of that right of the game tenant? If the traps in any field are put, not in, but out of the rabbit-holes, how is he to set his dog to hunt the field? The dogs would certainly get into the traps and be seriously injured, and similarly pheasants and partridges would be injured by traps set outside the rabbit-holes. Thus, to construe the statute in the way for which the respondent contends would be to sacrifice the interests of the one party to the interests of the other. That is a mode of dealing with concurrent rights which the law rejects altogether. But further, the Legislature has left very little room for doubt here. There is an express prohibition against spring traps except "in" rabbit-holes. That word does not mean or include anything outside rabbit-holes. No doubt it was said that we might so construe the statute as to make the "rabbit-holes" extend beyond the place to which the roof of the hole goes, so that the scrape which the rabbit makes before making a hole in the proper sense should be held to be part of the rabbit-hole. I cannot so construe the Act, for the reason that I think that would be to defeat the very object of it, which was, it is quite plain, to prevent the traps from catching winged game and from injuring the dogs of the sporting tenant. And one can see quite well that other things were also contemplated by the Legislature. How would the respondent's construction suit in a hunting country—Would not both foxes and dogs be in constant danger from these traps? Thus I think that "in rabbit-holes" means inside and not outside it—that it must be held to mean the part covered by the roof, so that the object of the statute may be carried out and the rights of parties interested preserved.

We have a quantity of evidence in the proof to the effect that spring traps cannot be set "in" rabbit-holes, and that rabbits cannot be caught in that way. If that is so in the Stewartry of Kirkcudbright, I venture to say it is not the case in any other part of Scotland or of England. Anyone who knows the matter practically, knows quite well that it not only can be done in that way, but that it is the most practical way of catching rabbits. Rabbits are usually caught when coming out of their holes, and if the trap is set, as I think the statute intends, it is sure to catch the rabbit, whereas if it is set some distance away from the mouth of the hole, the rabbit may turn to right or left and avoid it. If therefore the farmers of this district are so stupid that they cannot trap the rabbits in the way intended by the statute, they must suffer for it, but I cannot extend the recognition of their stupidity to other parts of Scotland. On the whole matter, then, I have no doubt of the intention of the Legislature, which is patent on the face of the statute, and that we must give effect to this application for punishment for breach of interdict. But I do not suppose that this farmer with his ideas on the subject really intended to break the interdict, and I am for fining him in one shilling and for giving expenses to neither party.

Lords Deas and Mure concurred.

Lord Shand—It appears from the evidence in this case that the respondent set traps in open grass and turnip fields, and at a distance of 7 to 16 inches from what is popularly known as the mouth of the hole, while on a former occasion he set them even further away. The respondent says that from the point at which the rabbit begins to scrape is all open ground for his traps. That is not a sound view of his right. The statute means that the traps shall be within the roof of the hole. Plainly the statute means to benefit the agricultural tenant, and he may kill the ground game by shooting, netting, or trapping it, or in any other way. But some limit is placed upon him. He must respect the right of the landlord or game tenan, twho has a right concurrent with his. Section 6 contains certain limitations which must be read in a reasonable sense. Poison is prohibited

that dogs and winged game may be protected, and the same purpose is in view when we come to the prohibition here in question. It is according to reason that it means inside the hole, and not on the way to it, and if the respondent's view had been that of the Legislature we should have found the word "at" instead of the word "in."

I was somewhat struck at one time by the evidence led on two different days to show that traps could not be set in the way for which the appellant contends, but it is plain that it can be done even if it is sometimes necessary to make the mouth of the hole wider.

LORD PRESIDENT—There is one argument which I forgot to mention, and the mention of which may prevent misunderstanding. It was contended that if the construction which we have adopted were put upon the statute the defender would be worse off than at common law. At common law, and assuming the rabbits to have been left to the tenant, he would not have been entitled to place the traps as he has done; so far from that being his right, he might have been interdicted from doing so.

The Lords sustained the appeal, found that the respondent had committed a breach of interdict, and fined him in the sum of one shilling.

Counsel for Appellant—Trayner—W. Campbell. Agents— J. & J. Galletly, S.S.C.

Counsel for Respondent—D.-F. Macdonald—Burnet. Agent—Knight Watson, L.A.

Thursday, July 20.

FIRST DIVISION.

BUCHANAN *v.* LORD ADVOCATE (AUCHINTORLIE).

GEILS *v.* LORD ADVOCATE (DUMBUCK).

Property — River — Foreshore — Barony Title— Possession—Evidence.

A barony title to lands along a tidal navigable river, clothed with possession of the foreshore, constitutes a valid right of property in the foreshore, although the title does not expressly or by necessary implication contain a conveyance of it.

Property—Prescription—Statute 37 *and* 38 *Vict. cap.* 94 (*Conveyancing* (*Scotland*) *Act* 1874), *sec.* 34.

Held that the period of prescription introduced by this statute is applicable to cases of acquisition of a right of property in parts and pertinents by prescription.

These were two actions of declarator of right to foreshore on the north bank of the Clyde in the parish of Wester or Old Kilpatrick. The pursuer in the one case was Mr Buchanan of Auchintorlie, in the other Mr Geils of Dumbuck. Both these properties at one time formed parts of the barony of Colquhoun. Mr Buchanan, the pursuer in the Auchintorlie case, founded upon the following titles:—The barony of Colquhoun, according to a charter of resignation in favour of Archibald Edmonstoun of Duntreath, dated 26th July 1732, the earliest charter preserved, is described as "Comprehenden terras de Mains, Miltoun, Midletoun, Overtoun, Nethertoun, Chapletoun, Barnhill, Connelltoun, Dunerboak, Auchintorlie, Spittle, et Dunglass, cum maneriei loco de Dunglass molendino terris molendinariis multuris et ejusd. sequelis piscationibus et lie zairs in fluvio de Clyde, cum omnibus aliis earundem pertinen cumq. decimis rectoriis et vicariis totarum predict. terrarum molendini terrarum molendinariorum piscationum aliorumque predict." In 1812 the pursuer's predecessor acquired from Sir Charles Edmonstoun of Duntreath the lands of Dunglass, part of the barony of Colquhoun, the description in the disposition being "All and Whole the farm and lands of Dunglass and Little Mill, Castle, and shore ground thereof, with the whole houses situated thereon, bounded on the north by the other lands of the said Archibald Buchanan, on the south by the Clyde, on the east by a feu of the estate of Auchintorlie, belonging in property to Walter Allan in Little Mill, and on the west by Mr Buchanan's lands of Smallburn, lying the said lands hereby feued within the parish of Old Kilpatrick and county of Dumbarton; together also with my right not only to the fishings in Clyde opposite to the said lands now feued, but also my right to the fishings opposite to the lands of the said Archibald Buchanan, to the west between the lands now feued out and my lands of Dumbuck and Milton, possessed by James Brock." In 1835 the pursuer acquired the lands of Chapeltown, also part of the barony of Colquhoun, the description in the instrument of sasine following on a Crown charter of resignation in his favour being "Totas et integras terras de Connelton, terras de Chappelton, terras de Meikle Overton, et unam quartum partem de Miltoun de Colquhoun per dict. Archibaldum Buchanan de Auchentorlie olim possess. cum piscationibus et lie Zairs in fluvio de Clyde et tota alia pertinen. earundem cum decimis rectoriis et vicariis dict. terrarum omnes jacen. intra Parochiam de Wester Kilpatrick et vicecomitatem de Dumbarton."

In addition to these titles the pursuer produced a renunciation executed in his favour in 1828 of a lease of Dunglass granted by Sir Archibald Edmonstoun in favour of Mr Dunlop of Garnkirk, and to which William Dixon, who executed the renunciation, had acquired right. This lease described the ground contained in it as "All and whole that piece of ground at Dunglass, including the ground within the walls of the old castle, and the rock itself upon which the old castle stands, together with the ground going under the name of the shore-grass then last possessed by Robert Miller, tenant in Dunglass."

The pursuer contended that under his titles he had a right of property extending to the *medium filum* of the Clyde, and at all events including the ground *ex adverso* of his estate, and lying between high water-mark and low water-mark. He also averred that the ground between high water-mark and low water-mark had been possessed by him as his property for more than forty years. He averred that he and his predecessors "have constantly and without challenge dealt with the said shores and banks as their property, and have from time immemorial exercised their proprietary rights by acts of possession of every kind of which the subject is capable. In particular, they have by