Tuesday, November 30.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CHISHOLM.

(*Ante*, vol. xxiii. p. 539, 13 R. 773.)

Process—Amendment of Record—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

This was an action by the Caledonian Railway Company against John Chisholm for payment of £8105, 17s. as due to them for the carriage of sacks during a period of years for which there had been a contract between the parties. The various charges for carriage which made up the sum sued for were contained in an account produced with the summons. The Court having, as previously reported, repelled the plea that the triennial prescription applied, and allowed proof, the pursuers lodged a new account, and craved to have it substituted for that produced with the summons. The defender craved to have the new account withdrawn from the process. The change proposed involved the striking out and putting in of items, and a consequent alteration in the amount charged for freight. The amount claimed in the new account was restricted to the amount sued for under the conclusions of the action.

The Act 31 and 32 Vict. cap. 100, sec. 29, provides that "the Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made; provided always, that it shall not be competent by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." . . .

The Lord Ordinary refused the pursuers' motion, and found it unnecessary to dispose of the defender's, and granted leave to reclaim. The pursuers having reclaimed, the Court recalled the interlocutor and allowed the amendment, reserving all questions of expenses.

Counsel for Pursuers—Balfour, Q.C.—Johnstone—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defender—Sol.-Gen. Robertson, Q.C. — Pearson — Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Tuesday, November 30.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

KEILLER *v.* MAGISTRATES OF DUNDEE.

SCOTT *v.* MAGISTRATES OF DUNDEE.

Burgh—Foreshore—Title of Magistrates to Challenge Claim to Property in Foreshore.

The proprietor of lands within a burgh brought a declarator of property of the foreshore *ex adverso* of these lands against the magistrates of the burgh (and also against the Crown, who did not defend), and produced as his title a disposition to the foreshore dated in 1884. This disposition was deduced from a barony title which did not include the foreshore *per expressum*, and on which possession of the foreshore had not followed. *Held* (1) that as the inhabitants of the burgh had been in use from time immemorial to resort to the foreshore in question for the purposes of recreation, the magistrates had a title to challenge the defenders' alleged right of property; and (2) that on the titles produced he had failed to instruct such a right. Defenders therefore *assoilzied.*

Burgh—Foreshore—Possession.

A proprietor of land within the extended area of a royal burgh, who held a conveyance from the Crown dated in 1853 "of all right, title, and interest of Her Majesty, her heirs and successors," in a portion of the foreshore *ex adverso* of the property, lying between high-water mark and a line of railway formed along the foreshore, *held*, in a declarator at his instance against the magistrates, (1) to have a right of property in this piece of foreshore, but (2) to have no title to exclude the inhabitants of the burgh from resorting thither for purposes of recreation, they having so used it from time immemorial.

Act 1 *and* 2 *Will. IV. c. xlvi—Act to Extend Royalty of Dundee.*

Held that this statute did not transfer the property of the foreshore of the extended royalty of Dundee from the Crown to the community, but that it gave the magistrates a title to administer it and use it for public purposes, subject to the limitations attaching to the right of the Crown itself.

In 1846-47 the Dundee, Perth, and Aberdeen Railway Junction Company, under parliamentary powers, constructed a line of railway between Dundee and Perth along the north bank of the river Tay. Where the line left Dundee it was carried on an embankment which passed to the south of the open piece of ground called Magdalen Green, and thereafter below high-water mark along the foreshore of the river for a considerable distance to the west. The effect of this was to cut off from the estuary of the Tay the portion of the foreshore lying to the north of the line, except so far as the tidal waters of the river obtained access to it, which happened at first by means of culverts or openings in the embankment (which were filled up at the date of this action), and afterwards solely by percolation through the embankment. The

water inside or to the north of the line ebbed and flowed very much as it did to the outside or south of the line, there being no water at all to the north of the line at and for some time before and after low-water. The subjects called Binns of Blackness, belonging to Mr Keiller, the pursuer of this action, were situated on the north side of the Tay to the west of Dundee, and extended down to and (as he averred) included the foreshore *ex adverso* of them lying to the north of the said embankment. On each side of the Binns was a line of villa residences with grounds and gardens, which extended from Magdalen Green on the east to a point considerably to the west of the pursuer's property. The owners of the houses to the west of the Binns had extended their east and west boundary walls down to the railway embankment, so as to exclude all access by others to their respective portions of the foreshore. Among those who had done so was the former proprietor of the property called Binrock, which lay immediately to the west of Binns, and which Mr Keiller had purchased some little time before he acquired Binns. The effect of the eastern wall of Binrock running down to the embankment was to make it impossible to pass along the shore beyond this point without crossing to the south or seaward side of the line. None of the proprietors to the east of Binrock, and between it and Magdalen Green, had enclosed the foreshore between their lands and the embankment. Mr Keiller, however, having bought the estate of Binns in 1884, proceeded to enclose the piece of foreshore *ex adverso* of it by running down his east boundary wall to the railway, when an application for interdict was presented against him in the Sheriff Court of Forfarshire by the Magistrates and Town Council of Dundee, who alleged that a right-of-way and sundry other privileges existed in favour of the inhabitants of Dundee or the public over the said piece of foreshore. After a proof, the Magistrates having abandoned that part of the petition which alleged a right-of-way, the Sheriff found the Magistrates entitled to a possessory judgment, and granted interdict against Mr Keiller enclosing the piece of foreshore.

Mr Keiller appealed to the Court of Session, and the Second Division on 22d January 1885, after hearing counsel, superseded further consideration of the case *in hoc statu* to allow Mr Keiller, if so advised, to bring an action of declarator.

Mr Keiller then raised this action, and called as defenders the Provost, Magistrates, and Town Council of Dundee, the Caledonian Railway Company, William Crockatt, who had held in trust for the railway company certain pieces of land at the point in question, and the Lord Advocate on behalf of the Commissioners of Woods and Forests. The only defenders who appeared were the Provost, Magistrates, and Town Council of Dundee. The conclusions of the action were for declarator that "All and whole that piece of ground . . . bounded as follows, viz., by the Perth Road on the north; by subjects belonging to the pursuer now known by the general name of Binrock on the west; by the line . . . now of the Caledonian Railway on the south; and partly by subjects . . . now belonging to Mrs Jane Chalmers or Scott, and also partly by ground reclaimed from the river Tay, now belonging to Mrs Scott on the east parts; which subjects above described comprehend (firstly) all and whole" certain lands, the pursuer's title to which was not disputed; and (secondly) "that area or piece of ground extending to 2 roods and 30 poles imperial measure or thereby, lying between the said subjects 'firstly' above described and the line formerly of the Dundee and Perth and Aberdeen Railway Junction Company, now of the Caledonian Railway Company, which area or piece of ground formerly formed part of the shore or *alveus* of the river Tay, but has since the formation of the said line been reclaimed, and now forms part of one common subject along with said subjects 'firstly' above described," pertained heritably in property and belonged exclusively to the pursuer, and that the defenders had no right or title in or to the said subjects or any part thereof, or to exercise any right of property therein, and that the pursuer was entitled to enclose the same or any part thereof at his pleasure;" and that neither the defenders nor the inhabitants of Dundee nor the public "have any right-of-way or of recreation or bathing, or any other right, servitude, or privilege in, to, or over the said subjects or any part thereof." There was a further conclusion for interdict against the Provost, Magistrates, and Town Council of Dundee interfering with the pursuer in enclosing the said subjects, or in exercising his rights of property therein.

The pursuer averred that his property, including the foreshore of the Tay *ex adverso* thereof, was a part of the barony of Blackness. The subjects first described in the conclusion of the summons were part of 7 acres and 5 falls which were feued by David Hunter of Blackness to George M'Lagan by feu-charter dated 21st July 1807. In said charter they were described as "part of the lands and estate of Blackness," and as bounded "by the sea-flood on the south." By missives of sale dated 2d September 1847 these 7 acres 5 falls were sold by George M'Lagan to William Scott on behalf of the Dundee, Perth, and Aberdeen Railway Junction Company, and in 1854 the eastmost part of them (extending to a little over 2 acres, being the subjects first described in the conclusions of the summons) were sold to David Hunter of Blackness, the disposition being by Charles M'Lagan (grandson and heir-at-law of George M'Lagan), with consent of the said William Scott and the railway company. Besides the said subjects, extending to 2 acres 3 roods and 15 poles, there was also conveyed by the said disposition 'my, the said Charles M'Lagan's, and our, the said the Dundee and Perth and Aberdeen Railway Junction Company's, rights to the shore or *alveus* of the river Tay *ex adverso* of said ground above disponed, extending south to the line of the Dundee and Perth and Aberdeen Railway Junction, and measuring 2 roods and 30 poles or thereby,' being the piece of ground second described in the conclusions of the summons, and the piece of ground in controversy in this action. It lay, as appears from its description in the title above quoted, to the north or seaward of the other piece of land, and between it and the railway line, and was the piece of ground covered by the tide when it percolated through the embankment as above explained.

In the years 1849, 1850, and 1851 certain negotiations took place between the Commissioners

of Woods and Forests and the owners (including Mr Crockatt, who was believed at that time to have represented the said railway company as then owner of the ground now in dispute) of the different properties lying along the river to the west of Magdalen Green for the purchase of the shore ground or *alveus* of the Tay *ex adverso* thereof, and following upon these dispositions were in several instances granted by the Commissioners of the pieces of ground *ex adverso* of the said properties in favour of the respective proprietors. None was in fact granted to Mr William Crockatt, as he had not at that time made up a title to the said ground, and although asked to do so when the present question arose, the Commissioners declined to make any such grant during the dependence of these proceedings.

The immediate title of the pursuer to the subjects was a disposition dated May 1884 by the trustees of Mr Hunter of Blackness, in which the subjects were described as bounded "by the line formerly of the Dundee and Perth and Aberdeen Railway Junction Company, now of the Caledonian Railway Company, on the south." There was no dispute between the parties that so far as language was concerned the disputed ground was included in this conveyance if the granters, Hunter's Trustees, had any power to give it. The pursuer also stated that by virtue of the original Crown grant of the barony of Blackness, and immemorial possession thereon, the rights of his authors in these lands, and of himself, included the right to the foreshore *ex adverso* of his feu.

The defenders in their answers and statements of fact denied that the estate of Binns was a part of the barony of Blackness, or that there had been any exclusive possession of the subjects by the pursuer or his authors, and averred — "From time immemorial the inhabitants and public of Dundee have possessed and used the river and foreshore opposite the said lands of Binns of Blackness without objection for purposes of passage, bathing, and recreation. The said foreshore is now and has been a public place beyond the memory of man, and is and has been used and enjoyed by the public from time immemorial for the purposes of walking, bathing, and recreation. It adjoins and is entered from the streets of the burgh and the Magdalen Green, also a public place, and is within the royal burgh and parliamentary burgh, and is under the jurisdiction of the municipal and police authorities."

They also claimed the disputed piece of foreshore as falling within the extended royalty of the burgh under their charters and Acts of Parliament. On this point they stated their contention thus — "By royal charter granted by King Charles I., dated the 14th September 1641, and written to the seal and sealed 3d February 1642, the King confirmed the ancient charters and rights of the royal burgh of Dundee, and of new gave, granted, and disponed to the provost, bailies, councillors, and community of the burgh of Dundee and their successors, the whole burgh of Dundee, with lands, tenements, rights, privileges, jurisdiction, and others thereto pertaining, together with the immunities, privileges, and liberties of the Water of Tay within the liberties therein specified, and also the salmon-fishings and other fishings on the north side of the said Water of Tay between the Burnmouth of Invergowrie on the west, to the rock called Kilcraig on the east, all or more particularly enumerated and contained in said charter. The said boundaries include the river opposite the lands of Blackness. Following on said charter and accompanying precept of sasine, the provost, bailies, councillors, and community of Dundee were on 22d February 1642 duly infeft in the said burgh and other subjects, fishings, rights, and privileges. The said charter and relative precept of sasine were ratified by the Parliament of Scotland by an Act of Ratification bearing date 12th July 1661." . . . "By Act of Parliament 1 and 2 Will. IV. cap. 46 (23d August 1831), the territories of the royal burgh of Dundee were extended towards the western boundary, and by this extension the lands of Blackness opposite the river were included in the royalty. By section first it is declared that the whole territory, comprising the ancient royalty of the burgh and the additional territory comprehended within the limits described, so added and annexed, shall be, and the same are thereby united and incorporated into one royal burgh under the name of the Royal Burgh of Dundee, and the burgh so enlarged shall be in the place of the ancient burgh, and shall enjoy in every respect the same rights and privileges as the ancient burgh then enjoyed or was entitled to enjoy."

The pursuer pleaded—"(1) In virtue of the titles and of the possession which followed thereon, the pursuer is proprietor of the subjects in question, including the whole ground southward to the railway company's property. (2) There being no right-of-way, and no right, servitude, or privilege in the defenders or the inhabitants of Dundee or the public in or over the pursuer's property, or any part thereof, he is entitled to have decree of declarator and interdict."

The defenders pleaded—"(1) The averments of the pursuer are not relevant to support the conclusions of the summons. (2) The pursuer having no right or title to the foreshore of the river Tay wherever the sea ebbs and flows, or to reclaim or enclose the same to the exclusion of the defenders and the inhabitants of Dundee, the defenders are entitled to absolvitor. (3) The defenders have by their charters and Acts of Parliament, and possession and use following thereon, a sufficient title and interest to oppose the conclusions of the summons. (4) The defenders and the inhabitants of Dundee having from time immemorial used and possessed the said foreshore for the purposes specified, the pursuer has no right to the interdict craved in the summons."

A proof was allowed, and the import thereof, especially as regards the condition of the ground in question, appears from the Lord Ordinary's opinion.

The Lord Ordinary (Lord M'Laren) pronounced this interlocutor:—"Finds that the pursuer has not established a title to the foreshore, being the subjects second described in the conclusions of the action: Finds that the defenders do not dispute, and have not disputed, the pursuer's title to the subjects first therein described: Therefore assoilzies the defenders from the conclusions of the action so far as applicable to the subjects second described, and

decerns: *Quoad ultra* dismisses the action and decerns.

"*Opinion.*—The pursuer Mr Keiller has instituted this action of declarator in consequence of having been interdicted at the suit of Magistrates of Dundee from enclosing the portion of the Tay which is situated *ex adverso* of his villa at Dundee. The subject in dispute is insignificant in extent, and I should imagine of no value to anyone except the pursuer. Its enclosure would not stop the way to any place, because the proprietors lying to the west—that is, in the direction leading from the town—have already enclosed their portions from high-water mark to the embankment of the railway which skirts the shore, and have thus completely barred all passage to the west. The subject in dispute, although called the foreshore, has no frontage to the sea, because the railway embankment lies between it and the estuary. While in a sense it is land over which the tide ebbs and flows, it appears that the tidal waters get access to and from it only by percolation through the stones of the railway embankment, and between this embankment and mean-tide there is a deposit of several feet of sewage and other mud, which is doubtless left by the receding tide, and accumulates there in consequence of its flow being obstructed by the railway embankment. Between mean-tide and high-water there is a narrow belt of shingle or gravel over which the public have been in use to walk, but as I interpret the evidence this particular corner of the seashore is much less in request as a place of public recreation since it has been hemmed in between the embankment and the walls of the adjacent property in the manner described. One of the witnesses described it as a 'dirty hole,' and no one speaking of the property in its present condition has said anything to the contrary. I think that the pursuer's wish to enclose and embank this ugly corner is very natural, seeing that the Magistrates of Dundee, who claim a right in it, have utterly neglected it, and have allowed it to become a receptacle for rubbish and a place offensive to the eye and senses. I should therefore very willingly have given decree in favour of the pursuer if I could have found any legal ground for a decision in his favour, because it sometimes happens that zeal for public rights is in excess of the occasion for its display, and I am inclined to think that it is so on this occasion.

"I am, however, of opinion that the pursuer is not entitled to the declaratory decree which he is seeking, because the titles which he produces give him no right to the foreshore.

"The original grant, which is dated 21st July 1807, describes the property as bounded 'by the sea-flood on the south,' and this bounding characteristic is repeated in the subsequent investitures. The disposition in favour of the pursuer also contains a conveyance of 2 roods and 30 poles (being the ground in dispute), which it is said formerly was part of the shore or *alveus* of the Tay, but has since been reclaimed. The deed is dated May 1884, and unless the granters of the deed had a right to the 2 roods and 30 poles their insertion of the subject in the title-deed is of no value whatever. Evidently they had no such right. They are the trustees of Mr Hunter of Blackness, who feued out the property in 1807, and afterwards reacquired it. But Mr Hunter's Crown title does not give him the foreshore, and it is as clear as possible on the evidence that neither he nor his feuar have acquired it by prescriptive possession, because the possession or use (such use as the seashore admits of) has all along been on the part of the public. There is evidence that the pursuer has sought a title from the Crown. But the officers of the Crown, on it being brought to their knowledge that the town claimed a right in the seashore, very properly declined to proceed further until the question should be settled, and the draft conveyance was rejected when tendered in evidence. It will thus be seen that I look upon this declaratory action as the assertion of a heritable right by a person who has not a title to the property which he claims.

"I am not satisfied that the defenders (the Magistrates of Dundee) have a title to this bit of seashore. Their case stands thus—The ancient royalty of Dundee is vested in the Magistrates by charters dated before the Union, and which, besides containing express grants of the harbour and pertinents, contain expressions importing a concession of liberties and privileges of a wide and undefined character over the waters of Tay. Under those charters the Magistrates have without dispute prescribed or acquired the property of the foreshore *ex adverso* of the ancient royalty, and have formed a part of it into a public promenade.

"By an Act of Parliament of the present reign the royalty was extended, and with respect to the extended royalty the Act of Parliament makes a concession of the like liberties and privileges which had previously been given in connection with the ancient royalty. The defenders say that this is to be interpreted as a title to the foreshore.

"If I were considering the argument founded on this title in a question with the Crown, I should most probably have to consider along with it certain adverse arguments which would be pleaded with more effect by the Crown than by the present competitor. It would be said that the acquisition of the foreshore of the ancient royalty was either by prescription or by usage explanatory of the meaning of an ancient grant. Neither of these grounds would apply to the Act of Parliament extending the royalty. Nevertheless, I am of opinion that a burgh title, whether constituted by charter or by Act of Parliament, is a title *ejusdem generis* with a barony title. It is a sort of barony or regality flowing from the Crown, and as such is a good title on which to prescribe a right to foreshore. It is in evidence that the burgesses have been using the foreshore of the extended royalty exactly as they have used the other foreshores within their domain; and while I am not in a position to decide that they have acquired it, because there is no declarator at the instance of the burgh, I am of opinion that the Magistrates have produced something which they may reasonably represent to be a title, and which, whether it is or is not a valid title, is at least sufficient to entitle them to be heard on this question.

"The case is indeed reduced to this narrow issue. The pursuer's action for want of a title must fail unless he can show that the defenders have no title to contest his conclusions. There are cases no doubt where the pursuer of a de-

claratory action may prevail in respect of the mere want of interest on the part of the defender. But in this case, so far as I see, the defenders have the better title of the two. They have their Act of Parliament and the possession of the seashore. The pursuer has nothing. I am therefore of opinion that the pursuer has failed in his case, and that the defenders are entitled to be assoilzied."

The pursuer reclaimed, and the case was continued to allow of another action at the instance of Mrs Scott against the Provost, Magistrates, and Town Council of Dundee about the piece of foreshore immediately adjoining to that forming the subject of Mr Keiller's action, and which was still pending in the Outer House, being decided there so that the two actions might be afterwards taken up together in the Inner House. This action related to a piece of ground adjoining that in dispute in Keiller's case. It also was within the royalty as extended by the Act of 1831, was part of the Barony of Blackness, and lay within the embankment of the railway, and was covered by the percolation of the tide through the embankment. It lay to the east of Keiller's ground, and the pursuer, as in that case, desired to enclose it down to the embankment. She also founded on its being part of the Barony of Blackness, and on the possession following on the Crown grant of barony to Hunter of Blackness, and on the possession following thereon. But she also founded—this being the difference between her case and Keiller's—on a title consisting of a grant of the ground in question, dated 5th November 1852 and recorded 9th February 1853, by the Commissioners of Woods and Forests in favour of the authors, Lithgow and others, of her late husband, this has been duly recorded.

The subjects were described in the grant by the Commissioners in the following terms, viz., "All and singular the right, title, and interest of Her Majesty, and her heirs and successors, of, in, to, and over that piece of ground, shore, or *alveus* of the river Tay now either wholly or partially under water, or as the same may be embanked or filled up, containing 74 poles or thereby, according to a measurement furnished by the said Mrs Lydia Stewart or Lithgow and the other disponees above-named, and extending from the ancient high-water mark *ex adverso* of the present property of the said Mrs Lydia Stewart or Lithgow and the said other disponees, southwards to the north limit of the Dundee and Perth Railway Company's embankment on the south, and bounded as follows, viz., on the north by the said Mrs Lydia Stewart or Lithgow and the said other disponees' present property, as the same is described in an instrument of sasine in their favour, dated the 8th day of August and recorded in the Particular Register of Sasines for Forfarshire on the 16th day of September, both in the year 1829; on the south, to within 15 feet of the top forming line of the said railway company's embankment or property, as the same was conveyed to them by the Crown by disposition dated 6th August 1847; on the east, by that portion of the said foreshore or *alveus* disponed or to be disponed or conveyed by me [the Commissioners granting the disposition] to Mrs Adamson and others; and on the west, by that portion of the said foreshore or *alveus* disponed or to be disponed and conveyed by me to Mr William Crockatt, merchant in Glasgow, all as delineated on a plan or sketch hereto annexed, and subscribed by me as relative hereto."

The pursuer averred as to the possession of the subjects—"The pursuer's said husband had acquired all the said subjects in 1869, and in the course of that year he enclosed part of the said subjects second described [*i.e.* the disputed piece of foreshore] by building a substantial retaining wall, which still exists. The part of the said subjects so enclosed on the south, east, and west parts was 23 feet in width or thereby, and this was thereby thrown into the subjects first above described, and has ever since been possessed as part thereof. The tide at high-water of ordinary spring tides rises about 18 inches on the said retaining wall, and before the wall was built it flowed over the said space of 23 feet or thereby. A door was left in the wall when the same was built, which has been used exclusively by the pursuer and her predecessors for access to and from their remaining subjects. There is also a sewer led from the house and offices to the said wall which carries all the pursuer's domestic sewage, and discharges it through the wall upon the subjects second described."

The pursuer craved decree of declarator that she was proprietor of the lands described in her summons, including (second) the piece of foreshore land in dispute, that neither the defenders nor the public had right-of-way or of recreation, bathing, or any servitude or privilege in the subjects, and she sought interdict against the defenders interfering with her proceeding to enclose the disputed ground or any part thereof.

The defence was the same as in Keiller's case, the defenders, however, pleading with regard to the grant by the Commissioners of Woods and Forests—"the alleged grant by the Commissioners of Woods and Forests does not affect, and *separatim* is incompetent to prejudice or affect, the rights and uses of the public and of the inhabitants of Dundee over the said foreshore.

After proof, the import of which appears from the Lord Ordinary's interlocutor and note, the Lord Ordinary pronounced this interlocutor—"Finds that the pursuer has not established her averments to the effect that the defenders and the inhabitants of Dundee have not a right-of-way or of recreation or bathing in or over the subjects second described: Assoilzies the defenders from the last declaratory conclusion of the action, and from the conclusion for interdict, and decerns: Finds it unnecessary to proceed further in the cause: Finds the defenders entitled to expenses, &c.

"*Opinion.*—This case, like the previous action, Keiller against the Magistrates of Dundee, relates to the property and use of the foreshore *ex adverso* of the pursuer's residence, which is within the extended royalty of Dundee. I understood that the present case is to be considered by the Inner House along with the case of Keiller, which is at present depending there on a reclaiming-note against my interlocutor. It is therefore unnecessary that I should enter on a review of the evidence, which is substantially to the same effect as the evidence adduced in the case of Keiller.

"The chief distinction between the cases is, that

Mrs Scott, the present pursuer, is in a position to found upon a Crown title to the piece of foreshore in dispute. Their title is a disposition by the Commissioners of Woods, Forests, and Land Revenues, dated 5th November 1852 and recorded in the Register of Sasines 9th February 1853. In the case of Keiller I held that the pursuer had no title, real or formal, to the foreshore in dispute, and that he was not *in titulo* to challenge the use of the shore by the public or the community of Dundee. In the present case the pursuer has a formal title flowing from the Crown. But prescriptive possession has not followed upon it, and it is for consideration whether the defenders, the Magistrates of Dundee, by prior grant followed by possession have not acquired a right to the use of the shore within the royalty which is inconsistent with the concession of the unqualfied right claimed by the pursuer.

"In the former action I expressed the opinion that the community of Dundee by their charters and possession had acquired the right to all the foreshore *ex adverso* of the ancient royalty to which individual burgesses could not establish a patrimonial right. I see no reason to alter that opinion. In that case I did not offer a positive opinion on the questions whether a similar right existed in relation to the foreshores opposite the extended royalty, or whether a right less than property had been acquired by the community—I mean the right of using the shore as a place of public recreation for the inhabitants? In the present case it is necessary to consider these questions. The title of the community to the extended royalty is the Act of Parliament (local and personal) 1 and 2 Will. IV. c. 46, passed in the year 1831.

"It appears to me that the title acquired by the Magistrates and Council under this Act of Parliament is essentially an administrative title, and it is not necessary that I should enter on an analysis of its provisions to support this opinion. The royalty was extended because the area occupied by the inhabitants of this flourishing community had extended, and it was desirable that the authority of its Magistrates and its governing body should be extended so as to embrace the whole of the actual town. In one respect the extension of the royalty is a title less favourable to the acquisition of foreshore than the Crown charters by which the ancient royalty is constituted. The Act of Parliament does not contain a dispositive clause, or words vesting the royalty *modo et forma* in the Magistrates and Council. The royalty is extended, but only, as I understand, for administrative purposes, and I have difficulty in conceiving how a purely administrative title can be a foundation for the acquisition of a proprietary right in foreshore or waste land within the royalty as extended.

"I think, however, that it is a reasonable construction of the Act of Parliament that it transferred from the Crown to the community the right of administration and use of the shore within the royalty for public purposes, subject to the limitations which attach to the title of the Crown connected with the uses of navigation. It has been held that the title of the Crown to the seashore is an absolute title, and not a mere trust for the public, and it is convenient that it should be so treated, otherwise the Crown would not be able to give a title to railway companies, burghs, or other promoters of work of public utility. But the greater title includes the less, and it is always in the power of the officers of the Crown to allow the foreshore to be used as a place of public resort where the public interest points to this kind of use as the necessary and appropriate use in the locality.

"In the case of *Smith* v. *The Officers of State*, 8 D. 718, the title of the Crown was sustained as a good title to support the immemorial use by the public of the Portobello Sands in the vicinity of Edinburgh. Nor is there any instance, so far as I know, of the Crown asserting its right of property to deprive the inhabitants of a populous place of their customary use of the seashore. The extension of harbours may be said to be an exception, but it is one of those exceptions which prove the rule. In such cases where the seashore has been immemorially used by the inhabitants of a town as a place of public resort, I think it may fairly be held that the Crown has abandoned the shore to the use of the public, retaining only the naked property, and possibly a right to resume for the uses of navigation. This is only applying to the title of the Crown the principle that has been often applied to the case of superiors who are held upon evidence of immemorial use to have dedicated to the use of the public unenciosed commons, links, or waste grounds which the community of feuars have been permitted to appropriate.

"In the present case there is evidence, to my mind clear and conclusive, of the use of the seashore within the extended royalty for the whole period subsequent to the Acts of Parliament—a period considerably exceeding that of the long prescription. The people who have used the shore are the community of Dundee, the grantees under the Act of Parliament. Taking this use into account as explanatory of the grant of the extended royalty, my view is, as I have stated in the outset, that the Act of Parliament constitutes a good title of administration, enabling the Magistrates and Council to maintain and to regulate the use of the sea-shore by the inhabitants so far as the royalty extends.

"If the Act of Parliament does not confer that right upon the Magistrates and Council, then I am of opinion that the Crown, while retaining the property, has abandoned the use of the foreshore to the inhabitants of Dundee, and is thus disabled from granting anything more than a naked property to the pursuer, whose title will therefore not prevail against the use which the inhabitants have enjoyed for purposes of health and recreation."

The pursuer reclaimed. The two actions were then heard together.

Argued for the pursuers in both actions—The ground in question was no longer foreshore. It could no longer be used for the purposes of navigation and fishing, and these primary rights being incapable of exercise, all subordinate rights, *e.g.*, of recreation and bathing, must be held to have fallen—Bell's Prin., secs. 645 to 647. This case was clearly distinguishable from the *Portobello* case (*Smith* v. *Officers of State*, 8 D. 711; Bell's App. vi. 487). There was no open tract of sand, and the use had by the public had been very occasional. The use for bathing even, which was principally founded on, had for long been confined to very young persons, and had all but become impossible

owing to the confined and dirty state of the ground. So far as the ground was otherwise frequented by the public, their presence on it must be attributed to their belief (now admitted to be unfounded) that they had a right-of-way over it. Besides, the pursuers had no interest to interfere, and such beneficial use as the subjects were susceptible of had been enjoyed by them. Moreover, the pieces of foreshore in dispute being portions of a barony, possession and use of a part of the barony was tantamount to use and possession of the whole, and the right to pass to Magdalen Green from another part of the barony further to the east had been already vindicated—*Magistrates of Dundee* v. *Hunter*, 6 D. 12, and 20 D. 1067; *Lord Advocate* v. *Lord Blantyre*, June 19, 1879, 6 R. (H. of L.) 72; *Lord Advocate* v. *Lord Lovat*, February 27, 1880, 7 R. (H. of L.) 122. The pursuer Keiller showed a title of property from Hunter of Blackness. Hunter being infeft in a barony was presumably, until challenged by someone with a title to do so, in right of the foreshore *ex adverso* of it. The original conveyance by him to the pursuer's author gave a "sea-flood" boundary, and this conferred a right to the foreshore. If not, then the right remained in Hunter, and his successor had recently conveyed it to the pursuer himself. If it was not Hunter's, then it belonged to the Crown, or a disponee of the Crown, but the Crown had been called as defender, and had not appeared to dispute the pursuer's claim to the property. No one but the Crown, or a disponee of the Crown, had a title to challenge it—*Cameron* v. *Ainslie*, 10 D. 446; *Cuthbertson* v. *Young*, 12 D. 521; *Colquhoun* v. *Paton*, 21 D. 996; *Pirie* v. *Rose*, February 1, 1884, 11 R. 490; *Young* v. *North British Railway Company and the Lord Advocate*, December 8, 1885, 13 R. 314 (Lord Young). *In Scott's case alone*—The grant by the Commissioners of Woods and Forests —*i.e.*, by the Crown—conferred an undoubted right of property on the pursuer. The Act of 1831 (1 and 2 Will. IV. cap. xlvi.) conferred no right of property in the foreshore on the defenders. Its language was not habile to effect a feudal transfer of land. Moreover, there was no mention in it of the Crown formally assenting to the conveyance of its property to the defenders —Maxwell on Statutes, pp. 161-7; *in re Cuckfield Burial Board*, L.J., 24 Chan. 585; *Scrabster Harbour Trustees* v. *Sinclair*, 2 Macph. 884. The right of use alleged by the defenders to the foreshore was just a *jus spatiandi*, which was not known to the law of Scotland as a right capable of being acquired by the public over the property of a private individual—*Dyce* v. *Hay*, 11 D. 1266, and 1 Macq. 305; Rankine on Land Ownership, 294; *Magistrates of Edinburgh* v. *Magistrates of Leith*, July 10, 1877, 4 R. 997. The foreshore, although within the boundaries of the extended royalty, was not, in the proper sense of the term, a public place within burgh. It was not part of the common good administered by the magistrates for behoof of the burgesses, and this case therefore was in a different category from the *Musselburgh* and similar cases—*Sanderson* v. *Lees*, 21 D. 1011, and 22 D. 24; *Home* v. *Young* (*Eyemouth*), 9 D. 286; *Magistrates of Earlsferry* v. *Malcolm*, 7 S. 755; *Cleghorn* v. *Dempster* (*St Andrews*), M. 16,141; Dow's App. ii. 40; Rankine on Land Ownership, pp. 296, 299. In these cases the use was held to be the exercise in a particular way of an already existing though not strictly defined right. In the present case there being no such relation between the pursuers or their authors and the public of Dundee as that of magistrates and burgesses, and there being no other title or right to which the public could refer their use, it must be attributed to mere tolerance, for it had been held that the foreshore is not a public place to which the public as such are in all circumstances entitled to resort — *Darrie* v. *Drummond*, 3 Macph. 496; *Scott* v. *Drummond*, 4 Macph. 819, and 5 Macph. 771; *Duncan* v. *Lees*, December 13, 1870, and June 20, 1871, 9 Macph. 274, and 9 Macph. 855. Bathing was not a public right at common law, nor was it a right capable of being acquired by prescription —*Blundell* v. *Cotteral*, 5 Barn. & Ald. 268. The pursuers were at least entitled to declarator that they had the right of property in the foreshore, though subject to certain uses by the public of Dundee.

Argued for the defenders—Certain rights in the foreshore are vested in the Crown for behoof of the public, and the public, when challenged to do so, were entitled to defend these, especially when the foreshore was near a large town, and there had been a constant use of it by the inhabitants—*Officers of State* v. *Smith*, *supra*. The foreshore was in no sense private property, but was a public place, and if the public could legally get to it they were entitled to walk or recreate on it and bathe from it. *Jus spatiandi* was a recognised servitude. It is capable of being acquired even over private property—*Magistrates of Dundee* v. *Hunter*, 20 D. 1067. Much more over ground like foreshore, especially when the foreshore, as here, was a public place within burgh—*Musselburgh* and other cases, *ut supra*, and as cited in Rankine on Land Ownership, p. 299. The measure of the public's right in such a case was just the extent of the use it had enjoyed. The proof clearly showed that the inhabitants had made every use of the ground in question that it was susceptible of. The pursuers had failed to show that they have any title of property. There was no evidence of their lands being part of the barony of Blackness. But if there was a barony title which did not in express terms include it, it gave no right to foreshore apart from possession, and there was no evidence of possession by either of the pursuers. The Crown grant of Mrs Scott was not a proper feudal disposition. Prior to its being made, moreover, the defenders had acquired the property of the foreshore. Their old charters, which had been judicially construed, conferred a right to the foreshore of the original burgh—*Smart* v *Magistrates of Dundee*, 3 Pat. App., and 8 Brown's Cases in Parliament; *Jamieson* v. *Police Commissioners of Dundee*, Dec. 10, 1884, 12 R. 300. By the Act of 1831 the boundaries of the burgh were extended so as to include, *inter alia*, the foreshore in question. The Act also conferred the same rights *quoad* the extended territory of the burgh as it had in the old, and therefore a right of property in the added foreshore. The action of the Magistrates in connection with the foreshore had in very many instances been in accordance with this interpretation of the Act. Even if the pursuers had a right of property, it would be burdened with the uses which the public for time immemorial have enjoyed; and if that were so,

then the pursuers must in these cases wholly fail, because there was no conclusion for a simple declarator of property.

At advising—

The opinion of the Court was delivered by

THE LORD JUSTICE-CLERK — Your Lordships have these cases of Keiller and Scott upon cognate subjects, and they are now ready for advising. In regard to Keiller's case there are two actions, one an application for interdict at the instance of the Magistrates of Dundee against Mr Keiller, and the other a declarator at his instance of his alleged right. The subject-matter of this discussion, which occupies a good deal of print and occupied a good deal of discussion, really lies within a very narrow compass. The Dundee and Perth Railway obtained Parliamentary powers for the construction of a line along the north bank of the Tay from Dundee, and in the operations following out that Act of Parliament they went right through the foreshore at one particular point of the bank, and that point is now under discussion. They cut off a portion of the ground that was covered only at high-water. It was cut off from the Tay by the line of railway. Whether by arrangement or otherwise, which seems very doubtful, the tide ebbed and flowed within this portion which was then cut off from the Tay, and it does so still, so that it remained foreshore, although there is an embankment on the line of railway between it and the river. Apparently there are a variety of proprietors along the bank in front of whose property the railway runs, and these proprietors have been ornamenting their residences, and in various ways endeavouring to make use of that old portion of the foreshore which lay between them and the railway. In the two questions that we have before us—namely, Keiller's case and Scott's case—the point is whether they have not gone beyond their right. Mr Keiller derives his right from Mr Hunter of Blackness. The rights granted by the Blackness estate have been more than once the subject of judicial examination in questions of this character. Keiller, I think, acquired his land since the date of the construction of the railway. He was proceeding with certain operations which would have intercepted any person going along this ground which I have described from Magdalen Green eastwards, and which was beyond Mr Keiller's property; and it is maintained by the Magistrates of Dundee that the Magistrates have had from time immemorial the right of going along that piece of ground for the purpose of recreation—along this portion of the shore, although cut off from the actual foreshore by the railway embankment. It is also maintained of course that Mr Keiller had no right to perform any operations which should put an end to the recreation which it is said the public enjoyed, and so interrupt that enjoyment. Accordingly the Magistrates of Dundee brought a process of interdict against Mr Keiller, and in that process they prevailed, and the Sheriff granted interdict to a certain extent, not altogether to the full extent claimed. The Sheriff however affirmed the right of the Magistrates, representing the community, to prevent those operations. That interlocutor has been appealed to this Court. In the meantime Mr Keiller raised an action of declarator for the purpose of having it declared that he has a right to this portion of the foreshore, and concluding that it should be found and declared "that neither the defenders nor any of them, nor the inhabitants of the burgh of Dundee, nor the public, have any right-of-way, or of recreation, or of bathing, or any other right, servitude, or privilege in, to, or over the said subjects or any part thereof." The question is, which of these pleas is to prevail? Has Mr Keiller acquired a right to this portion of ground, consisting of former sea-shore, or are the Magistrates to have their alleged right in retaining the use and enjoyment of it, which they say they have always had, and thus prevent the destruction or interruption of the right of passage and recreation which they say has existed for so long? The Lord Ordinary has decided in favour of the Magistrates in the case of Keiller, and he has substantially found that Keiller has no title to the sea-shore whatever, and that consequently he is not entitled to perform the operation in question, he not being the proprietor of the ground on which he proposed to construct the works which would have prevented the continuance of the enjoyment which the public have had. I concur in that view. I think Mr Keiller has no right to the sea-shore. I think he or his predecessors had no right whatever to the sea-shore before the construction of this railway, and the construction of the railway does not seem to have in any way enlarged the right of the adjoining proprietors. Mr Keiller makes his claim upon two grounds. He says his title from Mr Hunter of Blackness describes his rights as bounded on the south by the sea-flood, and he says that that makes out that he may follow the waters of the Tay down to low-water mark. There is little doubt that that is the law as regards sea boundary in the proper sense, but I rather think the boundary known as boundary by the sea-flood excludes the party from going beyond high-water mark. That is laid down in many cases, and I think in one of the most recent—at least a comparatively recent case—the case of *Hunter* in 1869—a very strong opinion was expressed that such was the effect of a boundary by the sea-flood, although the Court found in that case, which related to titles in terms very much like that in question, that Mr Hunter of Blackness, the granter of the titles, had no right to get between his own disponee or vassal and the sea-shore. The second ground upon which the claim of Keiller is maintained is, that the ground is part of the barony land which had been disponed by Hunter's trustees to him. That may be. It is possible that it is part of the barony, although I see no evidence that it is so. But a barony title is of no service at all without possession, and the one thing that is clear in this case is that neither Keiller nor his authors have ever had possession of the foreshore in any way whatever. The barony title must have the effect of sustaining possession which has been enjoyed. I do not say that even prescriptive possession is necessary where there is a barony title. But that specialty, the mere fact that this was part of the barony ground, would not avail, and it seems quite settled that there never was any pretension on the part of the proprietor of Blackness that he had possession of the foreshore adjacent to his land in a sense that would convey this right to the present disponee. Therefore I have come to the conclusion that Keiller has no right to the privilege which he claims here, and I quite con-

cur with the Lord Ordinary in his view of the evidence. I think the ground has been used for the purpose of recreation by the inhabitants of Dundee from time immemorial, and I think that the Magistrates are entitled, in this particular contention, to represent the community. Therefore, upon all these grounds I concur in the view that the Lord Ordinary has taken. He has to a certain extent, by the judgment which he has pronounced, concurred in the judgment which the Sheriff pronounced in the process of interdict, and he has assoilzied the defenders in the process of declarator.

Lords Young, Craighill, and Rutherfurd Clark concurred.

Lord Justice-Clerk—In Scott's case the view I take depends entirely on that which makes it differ from the case of Keiller. Mrs Scott or her predecessors applied to the Woods and Forests, and obtained a Crown right to the foreshore. To that extent therefore my observations in the last case would not apply. She has a title; but then I think that title is burdened with the established rights of the inhabitants, and that the Magistrates of Dundee, as representing the inhabitants, are entitled to exercise all the rights which they have previously acquired. I do not think the right of the Magistrates under the Act of 1831 is a title to land or a title to real rights. It is a title of administration solely. I refer to the Act by which this portion of the ground along the Tay was brought within the municipality, and the Magistrates' right of administration was extended over it, subject of course to that right. I am inclined to sustain Mrs Scott's title as far as that ground is concerned. Only she must not limit or interrupt the rights acquired by the inhabitants.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court pronounced an interlocutor refusing the reclaiming-note in both actions, and adhering to the interlocutors of the Lord Ordinary; and in the appeal in the process of interdict, dismissed it in respect of the decision in the action of declarator.

Counsel for Reclaimers — Pearson — Guthrie —Macfarlane. Agents — Henderson & Clark, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C. — Gloag — Hay. Agents — Drummond & Reid, W.S.

HOUSE OF LORDS.

Friday, July 30.

(Before Lord Chancellor (Herschell), Lord Blackburn, and Lord Fitzgerald.)

TOSH AND OTHERS *v.* NORTH BRITISH BUILDING SOCIETY AND LIQUIDATOR.

(Reported in Court of Session—under the name *Carrick and Others* v. *North British Building Society in Liquidation—ante*, vol. xxii. p. 833, and 12 R. 1271, July 10, 1885).

Friendly Society—Building Society—Winding-up —Rights of Borrowing Members and Non-Borrowing Members—Allocation of Loss inter se.

The directors of a benefit building society which had both borrowing and non-borrowing members, and had sustained losses which absorbed the profits allocated to members of both classes, issued a circular to the members which brought its operations to a close, and subsequently it was ordered to be wound up by the Court. The rules provided that borrowing members (who had to give heritable security for their advances) could redeem their bonds either (1) by giving three months' notice that they renounced their shares and paying the amount of their advances, under deduction of instalments paid and interest thereon, or (2) by payment of the whole sum borrowed, retaining their shares; and that when their payments into the society, together with the share of profits, were equal to the amount advanced, then their payments and membership of the society should cease. There were no outside creditors to be settled with in the winding-up. *Held*, in a Special Case stated to have the allocation of losses *inter se* decided on (*rev.* judgment of First Division), that the question was not one to be decided on the maxim that one who shares the profit should share the loss, but on the effect of the contract contained in the rules; that the case was ruled by the decision of the House of Lords in *Brownlie* v. *Russell*, March 9, 1883, L.R., 8 App. Cas. 235, and 20 S.L.R. 481, and *therefore* that the borrowing members were entitled to have their securities discharged in terms of the rules, and not bound to share the losses of the society.

As fully appears from the previous reports, the First Division of the Court of Session held that the case was not ruled by *Brownlie and Others (Liquidators of Scottish Savings and Investment Society)* v. *Russell*, March 9, 1883, *ante*, vol. xx. p. 481, and 10 R. (H.L.) 19, and that borrowing members ndebted to the society at the time of the issuing of the directors' circular, by which the business was practically brought to an end on 13th May 1882, were liable to bear a share of the losses sustained by the society in proportion to the sums standing at their credit respectively on their shares as at 11th April 1882, being the date when the society in respect of a report by a valuator on their securities as at that date, passed a new rule "that all payments received from borrowing members due from and after 11th April