Tuesday, November 15.

SECOND DIVISION.

HAGART *v.* FYFE.

Title—Part and Pertinent—Forshore—Interdict. A lessee of a portion of shore ground of the River Clyde proceeded to enclose the ground for the purpose of storing floating timber, whereupon a feuar, whose feu did not extend down to the river, but was *ex adverso* of it, and who had been accustomed to use the shore-ground for shooting and boating, pulled down the pallisades which had been erected. The granter of the lease was proprietor of lands, the conveyance to which contained no boundaries by the sea or seashore, but he offered to prove that *de facto* the lands were situated on the bank of the river, and bounded by it, and that the clause of parts and pertinents included the shore *ex adverso*. *Held*, in an action of interdict at the instance of the lessee, that he had not instructed a title which entitled him to prevail in a possessory question, without establishing his right by an action of declarator.

This was an application for interdict at the instance of the lessee of four acres or thereby of the shore of the Clyde, situated principally below high-water mark in the neighbourhood of Port-Glasgow. The lease was granted for the purpose of a timber pond being constructed upon the shore ground. The construction was commenced by driving posts into the shore, when they were cut down by Mr Robert Fyfe, a feuar in the close vicinity of the banks of the river Clyde (though not bounded by it), *ex adverso* to whose feu the pond was sought to be constructed. The present petition was at the instance of the lessee, and sought to restrain the respondent by interdict from cutting down or destroying the posts or paling of the pond, or interfering with its construction; and the question which the action raised was, whether the lessee's author possessed any title to grant the lease of the shore-ground between high and low-water mark in question.

Hagart's author, Mr Hair, was proprietor of the lands of Nether Auchinleck, with the parts, pendicles, and pertinents thereof, which are described as bounded, "with the low-water mark opposite to the said lands upon the north."

The petitioner's author also acquired by purchase, by a separate title, the superiority of the said lands, and obtained a Prince's Charter of Adjudication in his favour, dated 1st February 1869. The petitioner alleged that his author Mr Hair had been in possession and occupancy of the shore-ground in question, for storing timber, without objection for at least seven years.

The respondent Mr Fyfe was proprietor of a small feu, between which feu and the river Clyde, there ran a strip of land which belonged to the petitioner under the lease. There was a clause in the feu-contract by which the petitioner's author was taken bound not to erect any house upon this strip of ground which would intercept the view of the feuar. He alleged that he had used the foreshore for shooting and boating, and that the proposed timber yard would prevent the exercise of these rights.

The petitioner pleaded—(1) "The title of the petitioner's author carries all right as far as low-water mark, subject to any right competent to the Crown for public uses, and therefore he was entitled to grant the tack founded on—*M'Allister* v. *Campbell*, 15 D. p. 490; *Paterson* v. *Marquis of Ailsa*, Bell's Decisions, vol. 8, pp. 752, 756-7-8-9, March 11, 1846; *Lord Advocate* v. *M'Lean*, Jurist, vol. 38, p. 584; *Berry* v. *Holden*, 10 Dec. 1840; and *Hunter* v. *Lord Advocate*, 23 June 1869. (2) The estate of Mr Hair, the petitioner's author, being notoriously bounded by the sea or river Clyde, and having by himself and his predecessors and their tenants been in the exclusive possession of the shore-ground in question, as forming part thereof, from time immemorial, and for forty years and upwards prior to 2d March 1849, the said Andrew Hair was legally entitled to grant the lease founded on."

The Sheriff-Substitute (TENNENT) pronounced this interlocutor:—"*Greenock, 25th Feb.* 1870.—The Sheriff-Substitute having heard procurators on the closed record, finds that the pursuer and his authors have not produced or founded on any title to the sea-shore ground referred to in this action; therefore sustains the first plea in law for the respondent; dismisses the action: Finds expenses due to the respondent; allows an account to be given in; and remits the same, when lodged, to the auditor of Court to tax and report, and decerns."

He remarked in his note—"The description of the lands of Auchinleck does not contain any boundary by the sea or sea-shore, or any boundary that could be construed as giving a right to the shore-ground in question. But what the petitioner says is, that his lands of Nether Auchinleck are, in point of fact, bounded by the river Clyde; and he offers to prove (by parole) that these lands are situated upon the south bank of the river Clyde, and that *de facto* he possesses for his northern boundary the shores or waters of that river. He then refers to the cases of *Lord Saltoun* v. *Park and Others* (Nov. 24, 1857, 20 Sess. Cases, p. 89); and *Hunter* v. *The Lord Advocate and Others* (25th June 1869, Sess. Cases, 3d series, p. 899), and more particularly to the opinion of Lord Kinloch in the latter case; and what he contends is to this effect, that a conveyance of lands, whether a barony or not, which, in point of fact, are bounded by the sea, conveys the shore as effectually as if the words 'bounded by the sea' were in the charter. It may be enough in this Court and in this process to say, that as the pursuer's author has no boundary by the sea in his titles, that an attempt to show that he does possess the river Clyde as a boundary, if otherwise competent, would be a proceeding declaratory in its nature, which could only be carried through in the appropriate action in the Court of Session, and cannot be carried out in this Court. This is probably sufficient to dispose of the present application; but it may be said further, as has been observed above, that the pursuer's author has not produced or founded on any Crown grant either to lands or to the sea-shore. The proposition in law, that the same results are to follow where the sea is *de facto* the boundary of the lands, as if the sea were contained in the title as a boundary, has only as yet been applied by the Court to a barony, and any expression of opinion by an individual Judge, to the effect that the proposition will apply to lands not a barony, so far from having been adopted by the Court, has been discountenanced by it. The doctrine appears to have been disapproved of on the high authority of Lord Campbell, in *Officers of State* v. *Smith* (6 Bell,

pp. 487, 498).—'I may venture to say, that whatever may be the effect of the grant of a barony described to be on the sea-shore, there is no foundation in law for the position that a simple grant of a piece of land will pass the sea-shore by which it happens to be bounded.' Even in the case of a Crown grant and a barony, and a boundary *de facto* by the sea, the Court have hesitated to hold that the property of the sea-shore was thereby conferred. In *Lord Saltoun* v. *Park* the Court refused to insert in their judgment a finding that the shore was the pursuer's property, while they affirmed his right to the wreck and ware. The only other matter to advert to is an offer of proof made by the pursuer. He says that his authors have, from time immemorial, occupied and possessed the beach or shore down to low-water mark, *ex adverso* of the lands of Auchinleck, and that by all acts of proprietorship and possession of which the same were susceptible, and *inter alia*, by storing timber, gathering sea ware, taking gravel, and other acts of proprietorship. That, at least for the last seven years, the petitioner's authors had been in the possession and occupancy of the shore-ground in question without objection. Whatever value these allegations might be of, if established by proof, a proof of them is not competent, unless the party establishing them, and seeking the possessory judgment, be possessed of a title to the subject. Neither the petitioner nor his authors have produced such a title. Although the Sheriff-Substitute has noticed shortly the arguments on the merits that were pleaded to him, the grounds on which he has placed his decision are—That not having been able to show any title to the foreshores, the mode of obtaining one by proof that his lands are on the shores of the Clyde, and by inference from that fact that the foreshore must be included in his grant, is a proceeding so entirely of the nature of an action of declarator that it is quite incompetent in this process or Court; and that in so far as the allegations of possession are concerned, they cannot be proved, as no title is alleged."

The petitioner appealed to the Sheriff (FRASER), who dismissed the appeal, remarking in his note:—"At the debate in this cause it was suggested that a declarator should be brought, so as to clear up the rights of parties, and the Sheriff understood that such an action would be brought. But as this has not been done, the Sheriff must now dispose of the case as one for a possessory judgment. Now, to obtain a possessory judgment it is necessary that the party applying for it shall have a title (*Nelson* v. *Vallance*, 10th Dec. 1828, 7 Shaw and Dun, 182). This is as necessary as in an action of declarator; and the question comes to be, whether or not the petitioner has such a title? His author got a conveyance to certain lands, which are *de facto* said to be bounded by the river Clyde. These lands are not erected into a barony —they are not described as bounded by the river —but it is said that for the prescriptive period the petitioner's author has occupied the fore-shore, and that in this he has got a title to the shore. The petitioner's right, founding upon that of his author, is not rested simply upon his title, but upon his title combined with possession. Such a right can only be established by a declarator. The Sheriff has no power to enquire into this matter. The right must be established by a declarator, if it exists; and in all probability the Court will order the Clyde Trustees and the Crown to be called as parties to such an action. The case of *Hunter* v. *Maule*, 26th January 1827, 5 S. 238, is an authority to the effect that in order to obtain a possessory judgment there must be an *ex facie* title to the property claimed, and the Sheriff cannot find in the titles of the petitioner's author any right to the foreshore. Possession, no doubt, may give the petitioner that right, but that must be established in the proper action in the Supreme Court."

The petitioner appealed to the Court of Session.

TAYLOR INNES, for him, argued he had title to the foreshore as part and pertinent of his lands, so as to give a basis for a possessory judgment, Bell's Prin. 641; *Fullerton*, M. 12,524; *Innes* v. *Downie*, Hume 553, 1807; *Campbell* v. *Brown*, F.C., 18th Nov. 1813; *Officers of State* v. *Smith*, 8 D. 711; *Hunter* v. *Lord Advocate*, 7 Macph. 899.

MACDONALD in answer.

At advising—

LORD JUSTICE-CLERK—It is better that we should not say anything on the larger points. On the merits of the Sheriff's judgment I have no doubt. The party says he has the foreshore under his titles, or under his titles and possession. I do not think he has it under his titles alone. (1) As to possession, what is proposed to be done is to obstruct the public in the natural and primary use of the shore. How far a grant from the Crown would entitle a proprietor to do so is not *hujus loci*. But (2) looking to the respondent's peculiar interest in the matter, there is enough upon record to enable us to refuse the interdict.

LORD COWAN—There can be no doubt that the operations contemplated were works of such a kind as necessarily excluded all access to walkers and to the public generally. That being so, respondent *brevi manu* removed these palisades. Then this interdict is asked for the very purpose of making this erection.

Had there been a clear grant of shore to this party, this might have entitled him to an interdict against interruption; or had there been exclusive possession for more than seven years, the possessory argument might have been good.

LORD BENHOLME concurred, but doubted whether they should disturb the Sheriff's interlocutor. He thought there was no title to the sea-shore sufficient to exclude the public. A title to lands adjoining sea-shore had been never held to be a title to the *dominium* of the sea-shore.

LORD NEAVES concurred, but was not prepared to say that, even if there had been an express grant of sea-shore, the party, so long as it was a shore, could exclude the public.

Appeal dismissed.

Agent for Appellant—Thos. Landale, S.S.C.

Agent for Respondent—Adam Shiel, S.S.C.

Tuesday, November 15.

WILLIAM WALLS & CO. *v.* ANDERSON AND CROMPTON.

Sale — Fungible — Specific Appropriation — Risk — Deposit—Mutuum—*Damages.* 750 gallons of oil having been sold by W. & Co. to A. & C. at so much per gallon, to be delivered when re-