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

themselves, by tenants to whom they have let the subjects, and by others having their authority, constantly taken gravel, sand, and soil from the said shores and banks for building and other purposes, and have sold such gravel, sand, and soil to others; they have erected and maintained fences on the said shores and banks below high water-mark; they have constructed drains on the said shores and banks; they have embanked and reclaimed parts of said shores; they have annually cut and removed the reeds and other vegetation growing upon said shores and banks for thatch, litter, and other farm purposes; they have constantly pastured cattle on the sea-greens and other vegetation growing on said shores and banks; they have erected and maintained a pier or landing-place on said shore below high water-mark, and have levied dues from all persons using the same; they have hunted and shot over the said shores and banks, and preserved the game thereon, and have prevented all trespass upon the said shores and banks; and they have exercised their proprietary rights in a variety of other ways. Further, the pursuer in 1853 sold and conveyed a part of said shore below high water-mark to the Caledonian and Dumbartonshire Junction Railway Company, who have since possessed and used the same as part of their line of railway in virtue of said conveyance."

The pursuer of the other action, John Edward Geils of Dumbuck, was proprietor of the adjacent lands of Dumbuck, which also formed part of the ancient barony of Colquhoun. The infeftment of the pursuer's father, dated in 1815, was in "All and Whole the following parts and portions of the lands and barony of Colquhoun—viz., the lands of Milton of Colquhoun and Curcastown, now called Dumbuck, possessed by James Brock and Mrs Margaret Cook, otherwise Colquhoun, and including therein those parts thereof feued to two vassals at Milton, and feu-duties payable for the same—Item, the lands called Easter, Upper, and Lower Mains of Colquhoun, as now divided into three farms, and possessed by James M'Murrick, William Brock, and Allan Morrison, and to be now all called the lands and estate of Dumbuck, with houses, biggings, yards, whole pendicles and pertinents of the said several lands, and with the fishings and yares in the river Clyde, and all others belonging to the said lands." The pursuer's infeftment in 1845 was in similar terms. His pleas and averments of possession were similar to those of Mr Buchanan.

Both pursuers asked for decree of declarator "that the ground forming the shores and banks of the river Clyde between high water-mark and low water-mark, *ex adverso* of the baronies or estates of Dunglass, Chapelton, and Dumbuck, belonging to the pursuers, belongs in property to the pursuers, and is part and portion, or part and pertinent, of the respective lands and estate, subject to the right of Her Majesty the Queen as trustee for public uses."

The Lord Ordinary pronounced this interlocutor in Buchanan's case:—"Finds the pursuer, in virtue of his titles to the lands libelled, and of the possession by him and his predecessors and authors under and in virtue of said titles for upwards of forty years before the commencement of this action, and from time immemorial, is proprietor of the ground forming the shores and banks of the river Clyde, between high water-mark and low water-mark, *ex adverso* of their said lands, but subject always to any rights of navigation or other rights which the public may have over the same: Therefore finds, declares, and decerns in terms of the conclusions of the summons."

His Lordship added this note:— . . . . "There being here no description by boundaries of the lands in question, it is of course necessary to resort to evidence of possession for the purpose of ascertaining the situation and extent of the subjects. One thing, however, appears on the face of the Crown title, viz., that there was a manor place in connection with Dunglass, with fishings in the river Clyde, and that the whole subjects formed part of the barony of Colquhoun, and were granted with parts and pertinents.

"Another fact which appears to me material in considering the effect of such a title, and which admits of no dispute upon the evidence, is that the situation of this manor place of Dunglass is identified with that of Dunglass Castle—an old castle the remains of which still stand upon a rock at the side of the river Clyde, and which is washed by the waters of that river at all states of the tide. The shore ground in question extends up and down the river from this rock, and consists, so far as not reclaimed, of a gently sloping bank covered with grass and reeds, over which the waters of the river flow when the tide is in, and which is left dry as the tide recedes.

"The lands of Chapelton appear to have included the three fields to the west of Dunglass, marked Nos. 329, 332, and 333, on the Ordnance map, and were also held, according to the Crown charter, with fishings and yairs in the river Clyde.

"I hold it to be settled, by the opinions in the case of *Lord Blantyre*, 6 R. (H. of L.) 72, although the point was not made matter of judgment, that where a title is silent on the subject, there is no presumption that the foreshore is a pertinent of the land. But I do not think that that opinion conflicts with the doctrine that a grant of lands, bounded either expressly or *de facto* by the sea or by a navigable river, and with the rights of a barony, is different from a grant of lands bounded by the 'sea-flood,' and does not imply any limitation by high water-mark. I have always understood that doctrine to be well established, and I think it stands upon sufficient authority. I refer to the opinions of Lords Gillies and Mackenzie in the case of *Macalister* v. *Campbell*, 15 S. 491; of Lord Moncreiff in the case of *The Officers of State* v. *Smith*, 8 D. 711, and 6 Bell's App. 487; of Lords Wood and Medwyn in the case of *Paterson* v. *The Marquis of Ailsa*, 8 D. 752; of Lord Ardmillan (concurred in by the Lord Justice-Clerk Hope) in the case of *Lord Saltoun*, 20 D. 89; of Lord Jerviswoode (whose judgment was allowed by the Crown to become final) in the case of *The Lord Advocate* v. *M'Lean*, 38 Jur. 584; and of Lord Kinloch in the case of *Hunter* v. *The Lord Advocate*, 7 Macph. 899. The opinion of Lord Moncreiff in *Smith* v. *The Officers of State* was expressly adopted in the House of Lords by Lord Brougham, and was not, in my view, questioned by Lord Campbell. In these cases the effect of such a grant without possession was not decided. It was unnecessary that the point should be decided, and it could not be decided where the Crown was not a party. But

they satisfy me that there may be Crown grants which without expressly conveying the shore, and without specifying the 'sea' as a boundary, must be held to import a right of property in the shore, subject to the recognised public uses, and this independently of proof of prescriptive possession. I do not go over the authorities. They are sufficiently explained by Lord Wood in the case of *Paterson* v. *The Marquis of Ailsa*. The effect to which I think they are entitled in this case is, that if the proved facts and circumstances negative the belief that a limitation by high water-mark would be consistent with a true interpretation of the grant, the grant must be held as including the foreshore in so far as alienable property.

"Not out of place is it to note that such ground is alienable subject to the known public uses, and that in the present case it is not alleged by the Officers of the Crown that any of the recognised public uses are being threatened by the pursuer. The title of the Crown to defend the public interest in the shores is well settled by the case of *Smith* v. *The Officers of State* (6 Bell's App. 487). But this case is not defended, so far as appears, in order to secure the ordinary public uses. A decision in favour of the Crown would not protect the interests of those members of the public who are represented by the Crown witnesses. It would not secure to the public of Dumbarton and Bowling the privilege of sporting upon the shore ground in question, or of cutting reeds upon it; nor would it secure to the bargemen of Paisley the right of resorting thither in their boats for the purpose of taking sand. It is not contended that these are uses which the Crown is bound to protect. On the contrary, it is apparent, and was not disputed, that if the ground belongs to the Crown, it will be in the power of the Crown to dispose of it to the Clyde Trustees for the purpose of being made into timber-ponds, as proposed. It is hardly necessary to point out that the interposition of such works between the river and the pursuer's lands would be not less destructive of the rights claimed as public rights by the defender's witnesses than of the right of fishing granted to the pursuer with his lands.

"Keeping in view, then, the situation of the subjects, and the character of the title, I inquire, How has this shore been possessed and dealt with? And the first thing I find with regard to Dunglass is that in 1812 the lands of Dunglass were expressly disponed by Sir Charles Edmonstoune — with the 'castle and shore ground thereof' and fishings as bounded 'on the south by the Clyde.' Infeftment followed on this disposition, and the pursuer's sasine of 1834 is in the same terms.

"Of course, this subordinate title not being confirmed by the Crown, is not of itself a sufficient title to exclude the Crown from disputing the pursuer's right. But it is evidence of possession tending to show not only the extent of the right which has always been claimed under the Crown grant, but also the kind of right to which the pursuer and his predecessors have ascribed any possession they have had. I hold such infeftments to be not only sufficient as a basis of prescription against the Crown under the Act of 1617, but to be themselves acts of possession proper to be considered along with other evidence in identifying the subjects described in the Crown charter, and thus in explaining that charter. The competency of referring to possession for the purpose of interpreting title, as well as for the purpose of fortifying title, admits of no dispute. (See opinion of Lord Curriehill in *Lord Advocate* v. *Sinclair*, 3 Macph. 994, and of Lord Deas in the case of *Baird* v. *Fortune*, 23 D. 1081.)

[*His Lordship then referred to the evidence of facts of possession.*]

"In short, the ground has been used and possessed by the proprietor of Auchintorlie at his pleasure without objection on the part of the Crown, and without any complaint by anybody that the rights of the Crown were being encroached upon. If it was not as strictly enclosed and watched as it might have been, I am satisfied that it was as well attended to as was thought necessary, and that none of the proprietor's acts in assertion of his rights were resisted or questioned.

"It is said, however, that members of the public also made certain uses of the shore. In so far as these may have been among the proper public uses to which the shore is always subject, the fact of such use would not be inconsistent with the claim of Mr Buchanan to have the shore recognised as included in his title; and the decree sought in the present action would not interfere with them. And in so far as these uses were of a different character, or were uses by persons like Strathearn, who considered that the ground belonged to the public, I do not see how the proof of such use can give much aid in deciding between the Crown and the pursuer the true construction of the Crown grant. It appears to me that much of the evidence adduced on behalf of the Crown is explained by the fact that, apart altogether from the question of property, there was in the case of open sea-shores recognised public rights which will always account for a considerable amount of public use without affecting the measure of the proprietor's infeftment. The right of passage from port to port is said to be one of these public rights. (See the opinions of the Lord Justice-Clerk and Lord Moncreiff in *Smith* v. *The Officers of State*.) In so far as the banks of a tidal and navigable river like the Clyde fall within the same rule, a similar explanation of public resort must be admissible. Such public resort will not, in my opinion, settle the question between the Crown and the proprietors of the land, what is the extent of the proprietor's infeftment according to the true intent and meaning of the original Crown grant? Unless it can be shown that the assertions of right by the proprietors of Auchintorlie were insufficient in themselves to put the representatives of the Crown upon their inquiry, or were not sufficiently maintained to show that the ground in question was being held and dealt with as part of their property, occasional uses by members of the public, not interfering with the enjoyment of the proprietor's rights, will not enable the Crown now to dispute a right which has hitherto been openly asserted without question.

"But what are the uses alleged to have been enjoyed by the public? Are they indicative of a general denial of proprietary rights to the owner of the estate of Dunglass, or merely of the assertion of public rights? The evidence is that persons from Dumbarton and Milton resort

thither on holidays for the purpose of shooting sea birds; that a man named Clark had gone there and cut some of the reeds; that sea-weed and wrack had been gathered upon it; and that certain bargemen from Paisley, who appear to have taken sand from any part of the shores where they could get it (including the Erskine shore), resorted to the sand bed below Dunglass Castle for the purpose of filling their barges. The witnesses who were called to speak to these uses were not of the class which I should have expected to see if there was any public dispute of Mr Buchanan's title. They do not represent the immediate neighbourhood of this property. Not a few of them appear to me to be unreliable witnesses in a question of the kind raised. . . . Of course the nature of the ground made it impossible to enclose it effectually, or even to watch it in such a manner as to assert upon all occasions a proprietor's rights.

"The taking of sand appears to have been by no means generally claimed or understood to be free. The evidence of such a witness as Thomas Edgar (a builder and merchant at Bowling, and who required sand for his business) is, in my opinion, of more weight than that of the witnesses from the other side of the river who deal in sand, which they take wherever they can get it, and who obtain access to the shore by a way which it is difficult to check.

"It was urged that the evidence of public resort to the shore was at least sufficient to negative exclusive possession by the proprietors of Auchintorlie. If the question in this case were purely a question of prescription, I should have thought the tolerance of so much coming and going as appears to have existed very important. In the question, however, as to what has been the construction of this title acted on by the parties to it, I cannot think that anything in the evidence is at all inconsistent with the construction contended for by the pursuer, or is sufficient to deprive of its natural effect the proof that all kinds of possession of which the subject was capable have been openly claimed and enjoyed by the pursuer and his predecessors without dispute or complaint.

"On the whole, I think that the evidence of possession by the proprietors of Auchintorlie is sufficient to establish the pursuer's right, even in a question of prescription under the statute of 1617. But it is still more conclusive as explaining the title; and I think that the evidence of disturbance adduced on behalf of the Crown is not sufficient, either in kind or degree, to enable the Crown to dispute the meaning of the grant.

"I therefore find, declare, and decern in terms of the conclusions of the summons, and with expenses."

In Geils' case his Lordship pronounced an interlocutor in the same terms, adding this note—. . . . . "I think it clearly proved by the documentary evidence produced, as well as by the parole testimony, that for upwards of forty years the shore ground in question has been publicly advertised and let to tenants by the pursuer and his predecessors as a part of the estate of Dumbuck; that interdicts have been taken out by them against trespassers upon it; that the exclusive right to take sand from it has been claimed by them, and recognised by the neighbours on that side of the river; that cuttings and embankments have been formed upon it by them with materials taken from the foreshore; and that when a rifle range was formed upon it in 1871, and subsequently extended, the necessary mounds, firing-places, and accesses were constructed upon it by the leave of the proprietor of Dumbuck as proprietor of the ground. The soldiers at Dumbarton Castle, as well as members of the public, were on various occasions excluded from it. The occupancy of it by the proprietor of Dumbuck was openly and invariably ascribed to his right by property. His ownership, or reputed ownership, was recognised in the book of reference and plans connected with the Clyde Navigation Bill in 1839; and so generally was his right recognised that even among those members of the public who claimed public rights over it it was known as 'the Colonel's shore.'

"His fishing rights were exercised upon it. He did his best to preserve the game upon it. The natural islands upon it were his, and were possessed by him or his tenants; and unless he had banked it all round, I do not see what he could have done that he did not do to assert his right of property over it.

"A good deal of evidence was no doubt adduced to show that this shore (which extends eastwards from Dumbarton to the Milton Burn) was resorted to by members of the public for sport and recreation. I should have been much surprised if such evidence had not been obtainable.

"In the immediate neighbourhood of a town like Dumbarton it would be impossible to exclude the public altogether without some complete alteration of the shore, such as has been proposed by the Clyde Navigation Trustees to be carried through with the sanction of the Board of Trade. For the reasons explained in the case of Buchanan, I think that the use of the shore by members of the public for purposes of passage and occasional recreation is not a sufficient challenge of the right of property. But apart from that, I must observe that in this case a large part of the evidence upon such use goes too far. It shows that the persons who so resorted to the shore did not confine themselves to the ground below high water-mark, but thought themselves entitled to use the shore up to the top of the embankment. Even in the case of Mooney, whose acquittal of the charge of trespass was much founded on, it appeared that he was above high water-mark. It was not disputed on behalf of the Crown that the pursuer's property extended beyond the embankment, at least to high-water of ordinary spring tides. On the contrary, in order to explain away some of the acts of possession proved by the pursuer, it was maintained that the best part of the grass outside the embankment was above high water-mark, and that this accounted for the shore ground being occupied by the proprietor and his tenants for the pasture of cattle.

"Evidence was also led, as in the case of Buchanan, to show the cutting of reeds by one or two persons on this shore ground, and also the taking of sand from it by persons from the other side of the river. But as that evidence was not different in any material respect from that which was there adduced, and is open to the same observations, I think it unnecessary to refer to it further than to say that I think it insufficient in weight and character to throw doubt upon the

pursuer's rights. I do not question the title of the Crown to defend the public interest in the shores. But that public interest, in so far as represented by the defender's witnesses, would not, in my opinion, be defended by a judgment that would give to the Crown rather than to the proprietor the right of sanctioning the alterations proposed in the Clyde Trustees' plan. The receipt, with the other evidence of the pursuer's possession, appears to me to be much more weighty and unequivocal than proof that persons from Paisley were able to get access to the shore in boats and to carry away sand from it.

"The result of the evidence, in my opinion, is very clearly in favour of the pursuer's claim, as I think that the title of the pursuer, explained and supported as I hold it to be by the necessary possession, is sufficient to include, and includes, the shore ground in question.

"In this case also, therefore, my judgment is for the pursuer, with expenses."

The Lord Advocate reclaimed. In the course of his argument he was referred to the terms of the 34th section of the Conveyancing Act of 1874, by which the period of prescription is reduced from forty years to twenty for all the purposes of the Act 1617, cap. 12. He argued that that limitation did not apply to such a case as this, for here the possession for the prescriptive period was founded on as explicative of the terms of an ambiguous title, and must therefore be continued for the period of forty years; the limitation in the statute was applicable solely to cases of possession upon a clear title.

The Lords made avizandum.

At advising—

Lord Mure—This estate of Auchintorlie, with reference to which the present question as to the right of foreshore arises, was originally part of the barony of Colquhoun. It is situated on the north bank of the Clyde, and adjoins the estate the right to the foreshore of which was adjudged to belong to Lord Blantyre in a case with the Clyde Trustees by the House of Lords in 1879, to which reference was made in the course of the discussion. On the estate of Dumbuck, on the west, the right to the foreshore has also now to be disposed of. The estate of Dumbuck was also part of the barony of Colquhoun, but the titles of that barony do not contain any express grant of foreshore, or any such definite or distinct boundary as is of itself sufficient to instruct that foreshore was intended to be conveyed. In these circumstances the question now to be disposed of is, Whether the pursuer had granted to him as proprietor of the barony of Colquhoun a right to the foreshore, or whether he has had such possession of it as was sufficient to entitle him to decree in terms of the conclusions of this summons. The title of pursuer on which his case is rested is one granted by Sir Charles Edmonstone of Duntreath in 1812, and is in the terms quoted in the appendix to the reclaiming-note. And there is a title in somewhat similar terms to the property of Chapelton, dated 1835, also part of the barony of Colquhoun, with the fishings in the Clyde and everything else pertaining to it. Now, this title is, I think, plainly a title to property adjoining the river, bounded by that river on the south and the shore ground thereof, and if that title had been conferred by the Crown it would have been of itself sufficient to operate an express grant of foreshore. That title, however, has never been expressly recognised by the Crown, and so cannot of itself be held to constitute a grant of foreshore in a question with the Crown. But I agree with the Lord Ordinary in thinking that this title, having regard to its terms, is a very important element of the proof of possession, and is the foundation of pursuer's right of property in the foreshore, for it shows what the understanding of the owners of the barony of Colquhoun was as to their right to deal with the foreshore as being part of the barony. And I think it is not to be presumed that they would have conveyed away parts of the barony adjoining the river with an express grant of ground which would be covered by their warrandice unless they had been in use to exercise rights of ownership of the foreshore in respect of their title to the barony. This view of the matter is, I think, to some extent confirmed by the renunciation in favour of pursuer, executed in June 1828, of the lease granted by Sir Archibald Edmonstone in 1784 in favour of Mr Dunlop. Now, as I read the terms of pursuer's title, and the way in which the proprietors of the barony of Colquhoun appear to have dealt with it, the main question for consideration is, Whether the use upon the part of pursuer of the foreshore so conveyed to him is sufficient to instruct that continuous possession of part of the foreshore of the Clyde where his property is bounded by the river which is necessary to establish a right of property in the foreshore as against the Crown. I am of opinion with the Lord Ordinary that the possession of the foreshore by the pursuer in this case is sufficient to instruct that right, and that on the following grounds, which I shall state shortly, and with reference to the evidence, the Lord Ordinary having given a full explanation of the evidence. There has been in the past a continuous and exclusive possession on the part of pursuer of the whole foreshore of the property. That is proved by the tenants who possessed it from about 1826 down to the present day. [*His Lordship then referred to passages in the evidence on this head.*] So that the exclusive use of the foreshore is established, in my opinion, beyond question by the tenants and parties residing in the district, as well as by Mr Logan and Mr Paton, the factors and overseers for pursuer from 1851 down to the present time. Such being the nature of the possession which has been had of the foreshore for pasture purposes, it is next important to observe that the ground has been publicly recognised and dealt with as shore ground belonging to pursuer. This was done in 1839 in the book of reference prepared by the Clyde Trustees with a view to their operations for the improvement of the navigation of the river. In that book the foreshore in question is scheduled as part of the river bank always covered with water at spring tide, and belonging not to the Crown, to whom the engineer of the Clyde Trustees now seems to consider it to belong, but to pursuer. In that book of reference, moreover, it is not unimportant to observe that the Crown is not mentioned as owner of any of the foreshore or river banks at that part of the river. Some years after that, in 1851, when the railway from Glasgow to Dumbarton was made, it was carried through part of the ground in question, and cut off a portion of the foreshore to the west of Dun-

glass Castle lying to the north of the railway. This ground when taken by the railway is proved by pursuer's factor to have been paid for by the railway as belonging to pursuer—compensation was paid to him by the railway company for the land taken. It is also proved that an arrangement was then made with the railway company by which they claimed the portion of the foreshore cut off to the north of the line, but instead of doing this the company appear to have made an annual payment of a small amount—about £4—to the pursuer for some years, and afterwards to have paid a sum of money towards the expense of reclaiming this land; and the ground to the north of the foreshore was afterwards completely reclaimed by pursuer about 1877, and it is now arable land. The shore ground to the west of Dunglass Castle was reclaimed mainly by means of stuff put there by the Clyde Trustees, consisting chiefly of dredgings. This was done in 1864, and it is proved to have been let annually before that date by roup along with the adjoining parks, and is now tenanted by a man Keir. The ground marked "reclaimed" on the plan to the east of Dunglass Castle was let in 1826 to the witness Bell, but it was reclaimed by pursuer in 1878, and is now let under lease by pursuer. Therefore there are three portions of foreshore which have in this way been taken complete possession of in the matter of reclaimed and arable land on that portion of the foreshore to which the present action relates. Another point showing occupation of foreshore by the proprietors of this property is that pier and wharf to the east of Dunglass Castle belonging to pursuer for the use of which fees were paid to him. That is proved by pursuer himself and his overseer, and by two independent witnesses, a man named Sloan and Mr M'Gill, partner of a firm who had a shipbuilding-yard to the east of the property. Now, this building-yard of M'Gill's is another proof of the foreshore having been made use of by pursuer, by granting a portion of it to Mr M'Gill for his shipbuilding purposes. That was done in 1850 and 1851, and the ground is situated to the extreme east of pursuer's property. That is very distinctly proved by pursuer's factor, and also by Mr M'Gill himself, who speaks to finding it necessary to have that corner of his woodyard run down into the Clyde at that place. Although perhaps his own right of property to the east was sufficient to cover a claim on his part to get the woodyard extended down to that point, seeing there was a dispute about it, he acquired from the pursuer in this case what was sufficient to secure the shipbuilding-yard down to that. Then there were fences run down to the water at Dumbuck, which there was some dispute about, and a good deal of argument was raised whether these fences were put up by the proprietor of Dumbuck or the proprietor of Auchintorlie. In the view I take of the case I do not think it signifies much who put them up. By a great preponderance of evidence it is clear that it was a joint operation. Sometimes the fence was carried on one side of the burn and sometimes on the other, but they were put up for the joint protection of the two proprietors. I think it is plain that these fences have gone into disuse, and have not been repaired for a good many years—that is, from the period when the man Keir became tenant of the whole foreshore, both that belonging to Dumbuck and that belonging to Auchintorlie estate. Then it is also proved that parties applied to the pursuer and his factor and overseers, and to his tenants who had a lease of the foreshore, for leave to cut reeds and take sand from the foreshore. The factors are quite distinct about that, and the sand was at a place to which access could only be got through the property of pursuer, or by lighters from the Clyde. Mr Multer, who is proprietor of Milltown works, is quite distinct to being in the habit of getting permission to get sand there; and a builder of the name of Edgar is distinct also. I think it is pretty clear that all the people resident in the district, and people of position there, recognised the right to the foreshore on the part of Mr Buchanan in this matter, and applied to him for leave to take reeds and sand to other places. There is a good deal of evidence about using the foreshore for shooting, and about gamekeepers doing their best to warn people off, although they do not appear always to have been perfectly successful, as probably no gamekeeper is. There was no actual interdicting of people coming for sand, or people who were in the habit of going to the foreshore for the purpose of shooting; but the explanation the pursuer made about that is that the people came and went chiefly by boats on the sly; and that if he had got hold of any tangible person he would have applied for interdict. But it was impossible to do that so as to work an interdict satisfactorily. Now, that is the general nature of the evidence. The foreshore appears to have been in the occupation of the pursuer in every way that a foreshore admits of being used. And on that evidence it cannot admit of doubt, I think, that there has been possession of the foreshore on the part of pursuer sufficient to maintain his title from the superior of the barony of Colquhoun to instruct a right of property in the ground.

As against this claim it does not appear to me that any substantial defence is raised in evidence on the part of the Crown. There has, plainly, been no adverse possession of any kind by the Crown of any part of this foreshore, nor any attempt at giving away the foreshore by the Crown to anybody applying to them for a grant of it; and during the long period of years over which the proof extends no single step appears to have been taken by the Crown to prevent the pursuer occupying and using, and even disposing of, the foreshore as he thought fit. They have, however, given in defences to this action which contain no separate statement of facts, and amount simply to a denial of pursuer's allegation; and they have adduced a good deal of evidence, some of it rather of a questionable description, to show that people have shot, and in some cases apparently poached, on the foreshore; that they have landed and cut reeds, and occasionally carried away sand from the bank of sand on pursuer's ground. And in respect of that evidence they seem to think that they have shown such a counter or joint possession on the part of the public as entitles them to ask the interlocutor of the Lord Ordinary to be recalled. I am quite unable to take this view of things, because it appears to me that a great part of their evidence is not of a kind which is calculated to prove anything which can operate as a defence to this action. It is altogether insufficient, I think, therefore, to cut down the evidence adduced on the part of the pursuer. It consists

of three different classes of witnesses, namely, of people who walked along the foreshore, or saw others doing it for the purpose of recreation; second, of people who have shot upon the shore; and third, of people who have cut reeds and actually taken sand without permission of pursuer, and without applying to him for leave. I think it is pretty distinctly proved that these things were done. Now, these latter parties who were in the habit of taking and cutting reeds, and coming with lighters and taking away sand, seem to be those who were mainly relied on on the part of defenders; and a good many of them are not parties resident in Dumbartonshire or in the neighbourhood, but seem to have come from considerable distances—from Paisley and other places. But I do not think, assuming all the facts stated in the proof, that can be sufficient to establish a defence as against the occupation and possession the pursuer has had of that shore for far more important purposes—actual possession of the ground for agricultural use and other purposes. One of defender's witnesses certainly says he considered that he was entitled to go upon the land. He says he considered it like his own property, and that he was entitled to use it in any way he liked, and that he would have done what he says he was in the habit of doing, according to his view, whether it belonged to the Crown or to the proprietor of the shore. But what he does is not an act of use—of exercising a right which must necessarily tend to cut down the claim made by the pursuer in this case—because what he did in taking a walk along the shore and taking a shot occasionally is perfectly consistent with the foreshore belonging to pursuer. What I say is, that a body of evidence of people going along the shore and shooting, or landing and shooting, in a navigable river in the way this man did is not clear evidence to me to exclude the claim of pursuer to be held to be proprietor of that foreshore. There may be a right of servitude or there may not, or a right in the public to walk along there; but that will not be disposed of in this case; that is a matter that would be tried by the Crown if they were still owners of the foreshore, or by the puruser if he chooses to bring such an action. One of the witnesses, John Clark, seems to live in Dumbarton, and he says he does not know how many times he has been convicted of theft—about five or six times. Once he stole corn; on another occasion he stole a coat; and he does not remember what else he stole. Now, that is the leading witness about taking sand from the property. The witness Park is in the same position. He says he has been once or twice in prison. He has been convicted twice of being drunk and disorderly; twice for breach of the peace; of disturbing the police in the execution of their duty; again of breach of the peace; and of exposing children on two occasions. Now, these are two leading witnesses for the Crown, and it seems to me that these people's reputation is not first-class, and it is not sufficient to set up a defence in a case of this description. The assistant harbour-master at Bowling, I think it is plain, does not know much or recollect accurately the character of the place, because he says there has never been any fence between Auchintorlie and Dumbuck. Now, that is the character of the evidence produced to show that people came and took sand. There were a good many men came from Paisley and roamed about in the Clyde by directions from their employer to get sand wherever they could find it, and went in any direction, landing and taking it away on the property of Lord Blantyre and on the opposite side as well as this. And there is the evidence about shooting which I have already referred to. Now, that is the nature of the case set up in defence, and I do not feel myself able to hold anything adverse to the right maintained for pursuer.

The period of time that this occupation has continued is, in the view I take of it, beyond forty years; there is evidence that it has been going on since 1826. Therefore it is not necessary to decide in the case, or to give any opinion upon, the question raised about twenty or forty years' prescription. I can only say that having looked into the Act of Parliament and the later Act of 1874, my view is that substantially the Legislature wished to substitute twenty years for forty years; and so the law stands as laid down in that Act. But in this case it was not in the least necessary for pursuer's rights, because the evidence from 1826 to 1851 is perhaps as strong as any; and my view is that the Lord Ordinary's interlocutor should be adhered to. Whether the terms of the interlocutor, having regard to the conclusions of the summons, are precisely suited to the circumstances of the case, I think is a matter for consideration. I rather think in the case of *Lord Blantyre* v. *The Clyde Trustees* there was a somewhat more qualified interlocutor, and I would suggest that the form of the interlocutor should be similar to that in *Lord Blantyre's* case.

With regard to the Dumbuck case, the title to that property, upon which the whole thing rests, is very much in the same words. They had not got a gift of the shore itself. The title is dated 1815, and an extract from it is quoted in the appendix, as follows:—[*reads ut supra*]. A later title dated 1845 is quoted on the same page and the following page. An island which is referred to in that second title, as I understand it, is Milton Island, which is on the foreshore of the Clyde at this place. That is the nature of the title, and upon that there has been possession by Mr Geils' family of the foreshore extending from Milton Burn down to Gruggie's Burn, not far from Dumbarton Loch. Now, there has been in this case, as regards that foreshore, a similar and exclusive possession of that foreshore by the Geils' family. [*His Lordship then referred to the evidence.*] These are very distinct acts of possession, and covering as they do a period of upwards of forty years, they are quite sufficient to entitle Mr Geils, in my opinion, to maintain that he is now the proprietor of that ground.

The defence here is pretty much the same as that in Mr Buchanan's action, which rested upon the evidence of people who came and took sand and reeds, and people who shot and walked over the ground. Various people from Dumbarton were examined, and said they went occasionally to this foreshore, but that is perfectly consistent with Mr Geils being proprietor of that property. And a decision in his favour that he is proprietor would not have the effect of preventing the public from the right, if they have it, of walking along the foreshore. In these circumstances, my opinion is that the Lord Ordinary is right in the view he has taken, and I advise that the same judgment be pronounced, namely, to adhere, qualifying the

interlocutor as I have suggested in the Auchintorlie case.

Lord Deas—With reference to these two cases as to the right to foreshore, we have had them pleaded very fully in the course of the session. The one case is at the instance of Mr Buchanan, who claims the foreshore *ex adverso* of his property; and the other is at the instance of Mr Geils, who claims a portion of the foreshore *ex adverso* of his property. After what has been already said I do not think it necessary for my own part to add more than that I have formed upon the debate and a perusal of the proof a clear opinion in both these cases that the respective pursuers have proved sufficient prescriptive possession to entitle them to the property of that portion of the foreshore which they each claim. I formed that opinion on the footing on which the cases were pleaded, that forty years' possession was necessary in terms of the Act of 1617. We have now felt ourselves called upon to look at the Conveyancing Act of 1874, sec. 34, and to consider whether that Act, and that section of it, does not make twenty years' possession in a question of this kind altogether equivalent to forty years' possession under the former Act. I was satisfied upon the argument and upon the proof that forty years' possession had been proved upon the part of Mr Buchanan of the foreshore he claimed; and still more clearly, if it could be clearer, that forty years' possession had been proved upon the part of Mr Geils. But with reference to that section of the Act of 1874, it provides that twenty years' possession in all cases of this kind is substituted for what required forty years' possession before. And in that view I do not think any of the parties can very well contend that the law of the case is clearer than for each of these cases it was or would have been under the statute of 1617. Section 34 of the Act of 1874 says:—[*reads.*] Now, the title mentioned in the outset of that section I apprehend in a case of this kind applies beyond all doubt to the title to the estate of which the foreshore is claimed as a pertinent. I do not see any doubt at all of that. And here there is unquestionably a valid and irredeemable title in each of these cases to the principal estate, and that I think is quite sufficient to make this clause directly applicable. Therefore, if it be the case here, as it can hardly be disputed, that there has been possession for that number of years, I think that strengthens the case of possession.

Any rights which the public may have is a different matter, and I do not understand that our judgment will interfere with that. The public may have a right to walk along that shore. I do not say that where fences were put up they have a right to jump over them, but they may have a right to find their way along that shore; and they may have a right to fish there with the rod or in some other way as in the sea; or they may possibly have a right to sport there and shoot wild fowl and so on. But subject to whatever uses the public can vindicate over that portion of the shore the property belongs to these respective parties. I am for adhering to the decision of the Lord Ordinary.

Lord Shand—I am of the same opinion. It is not disputed that the titles of the pursuers in these cases, Mr Buchanan and Mr Geils, are sufficient as titles to prescribe the property of these foreshores provided that sufficient evidence of possession has followed upon these titles. It was maintained on their behalf that they had instructed possession for twenty years, and that that was quite sufficient under the law as it now stands; and alternatively that if twenty years be not sufficient, then that forty years' possession has been made out. From the way in which the argument was put it appears to me that it is necessary for the Court to deal with the question as to whether twenty years' possession was enough; and I agree with the opinions that have been expressed to that effect. The effect of the statute of 1617, chapter 12, and of the decisions that followed upon that statute has been very shortly and clearly stated by Mr Rankine in his excellent work on the rights and burdens incident to the ownership of land. Under the statute, as it has been interpreted by decisions, forty years' possession on the requisite titles recorded in the appropriate register is sufficient in the first place—is sufficient to secure an owner against anyone alleging a better title, and where any dispute occurs regarding the nature or extent of the estate; and secondly, to determine the extent of the estate where a question arises as to what is comprehended under a general or particular description as distinct from a description by boundaries and measurements; or whether a specific piece of property has been carried under a clause of parts and pertinents. And it appears to me that the effect of the statute—the plain result of the language of the statute—of 1874 is, in regard to these questions, to substitute twenty years for forty years. I do not mean to enlarge upon that, because I think the language has plainly that effect, and I cannot say more about it. In the present cases, therefore, as we are here considering the question whether the titles of these two pursuers include the foreshore, the twenty years' possession, coming in place of forty under the statute of 1617, is enough.

In reference to the possession, I agree in the views that have been fully stated by Lord Mure and the Lord Ordinary in his notes in the respective cases. If the last twenty years alone are to be looked at, I can scarcely see that the argument can be maintained for the Crown that there has not been sufficient possession. But even if the pursuers had to make out forty years' possession, I should hold that there has been here proved an appropriation and exclusive use of this foreshore such as the subject admitted of. Such appropriation is always subject to public uses, at least where the shore is accessible to the public; and, of course, although parties talk now and then of the "Colonel's shore," that can only be understood in this limited sense, that he has such rights as might have been in the Crown, but subject to the rights of the public. There has been a good deal of evidence led that persons walked upon the shore, and were found shooting upon the shore, and using it as the public use an open shore; and it was said that the evidence was important as negativing the idea that these pursuers were acquiring a private right of property. I do not attach much importance to the evidence upon that question, because if this shore had been in the possession of the Crown that use would have gone on all the same. It is rather a use against

the Crown, and against the proprietor, if the Crown be not proprietor, only in this sense, that it is the exercise of rights with which the property, whether in the Crown or proprietor, is necessarily burdened in favour of the public. There is no doubt some evidence going further, showing that persons were in the habit of taking reeds and sand from the shore, but I think that was generally done surreptitiously. It was generally stopped, and the extent to which it was carried was so trifling that it cannot be regarded as of any real weight in a question with a proprietor who was defending his right, both in the case of Mr Buchanan and his predecessors, and Mr Geils and his predecessors. That being so, it appears to me that the interlocutor of the Lord Ordinary should be plainly affirmed. In the case of Lord Blantyre the rights of the Clyde Trustees as well as of the public were reserved; but if I am not mistaken the Clyde Trustees were parties to that litigation, and requested that their rights should be so reserved. They are not parties here, and I think the Lord Ordinary has adopted the proper form of interlocutor, the interlocutor being precisely as in Lord Blantyre's case, omitting all reference to the Clyde Trustees.

Lord President—I entirely agree with the view Lord Mure has taken both of the titles and the evidence of possession in these cases, and I should not have thought it necessary to add even a single word had it not been that this is the first occasion upon which we have been called upon to consider and apply the 34th section of the Conveyancing Act of 1874. That section provides among other things that "possession following on a recorded title, "for the space of twenty years continually and together, and that peaceably without any lawful interruption made during the said space of twenty years, shall for all the purposes of the Act of the Parliament of Scotland, 1617, cap. 12, anent prescription of heritable rights, be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act." Now, the only doubt that could be suggested about the application of that section, I think, to the present cases arises from the use of these words, "shall for the purposes of the Act of Parliament 1617, cap. 12," because that statute does not in precise words apply to this case. The strict letter of the Act of 1617 would make it only applicable to cases where the property in dispute was expressly mentioned in the charter of sasine or in the other titles. But while that is undoubtedly the literal and most strict interpretation of the Act of 1617, it is quite apparent that that was not the intention of the Act of Parliament in passing that statute—I mean the intention was not to confine it strictly to such cases; and accordingly from a very early period that statute received a somewhat extensive interpretation, as a great many of our ancient Scottish statutes have done. The extensive interpretation of which I speak, is stated perhaps better by Mr Erskine than by any other author in a passage of his 3d book, 7th title and 4th section, where he says—"A right or subject may be carried by prescription, though it be not expressed in the prescriber's charter, if he shall have possessed it for forty years as part and pertinent of another subject specially mentioned in it. This obtains though his competitor shall have been specially infeft in the subject in dispute, unless he has also taken care to preserve his right either by acts of possession or of interruption within the years of prescription;" and he cites two cases, one in 1677 and the other in the year 1711; and he then adds —"But if the subject cannot by its nature be counted a pertinent of the lands in which he who claims prescription is infeft, prescription cannot be admitted, an instance of which has been already given in the case of a bounding charter." And I have no doubt your Lordships all recollect the application of that construction of the Act of 1617 to the very remarkable case which occurred regarding the Sleepless Island in the Tay between *The Magistrates of Perth* and *Lord Wemyss*, November 19, 1829, 8 S. 82.

I have no doubt, therefore, that this 34th section in using the words "shall for all purposes of the Act of 1617 be equivalent to possession of forty years," intended that it should be for all the purposes of that Act as interpreted in the decisions of the Court. Therefore I entirely agree in holding that in a case like this, which is a case of prescribing a part and pertinent, twenty years' prescription and not forty years' is now applicable. We shall simply adhere to the interlocutors in the two cases.

The Lords adhered.

Counsel for Pursuers—J. P. B. Robertson—Darling—Forbes. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Lord Advocate—Guthrie. Agent—Donald Beith, W.S.

Thursday, July 20.

FIRST DIVISION.

(Before the Whole Court.)

[Lord Curriehill, Ordinary.

MACFARLANE'S TRUSTEES *v.* MACFARLANE AND OTHERS.

Succession—Parent and Child—Legitim—Election—Equitable Compensation—Forfeiture—Approbate and Reprobate.

A testator directed the whole residue of his estate to be divided equally between his two children, a son and a daughter, and provided that the half of the residue falling to each should be given to him and her in liferent allenarly, and to his and her children in fee. Both the son and daughter were married and had issue. The daughter claimed and received legitim, and the liferent of her half of the residue was applied in compensating the other liferenter and the fiars, in proportion to the injury done to their respective interests by the withdrawal of the daughter's legitim, until such time as these interests were entirely compensated. The daughter then claimed that from the date of full compensation being