defender is a woman) with other men, to displace the presumption of his or her good conduct in the married relation. This practice is intelligible when it is confined to the conduct of the spouses. But I am not disposed to extend it. I see no reason for permitting an investigation of the previous life and conduct of a co-defender. The circumstance that a man may have had illicit intercourse with an unmarried woman is not corroborative evidence of his having been guilty of adultery.

LORD KINNEAR—I am of the same opinion. As regards article 12 of the proposed addition to the condescendence I have no doubt that it must be rejected. I think it would have been irrelevant even if it had been included from the beginning. It is an attempt to prove the case against the defender by proving that on one occasion eight or nine years ago the co-defender had been guilty of misconduct with another woman. I know of no legal ground upon which the whole previous life of the co-defender could be inquired into for the purpose of establishing the particular case of misconduct which gives rise to the present action.

As regards the other two proposed additions I have more difficulty. It is not maintained, however, that it would be incompetent to allow them. It is common ground that the pursuer is not precluded by the decision of the Lord Ordinary on a closed proof, before final judgment, from bringing forward such new allegations of fact.

In general I should be extremely slow, assuming the matter to be in the discretion of the Court, to allow a pursuer to bring forward a new case in such circumstances. A pursuer must in general consider whether the case with which he is prepared is sufficient to go to trial, and when he does so the matter must in general be decided on the case as it stands. I think there is great difficulty in allowing a pursuer the privilege of amending his record by adding new statements, after the Lord Ordinary has given his decision, if the result on the case as it originally stood is unfavourable to him. At all events it is not, I think, disputed that a proof of such new facts should not be allowed unless it is clearly necessary for the ends of justice that newly discovered facts should be inquired into.

I do not differ from the view that your Lordships have expressed that in the circumstances of this case it is just and reasonable that a proof should be allowed of the new facts brought forward by the pursuer in the 10th and 11th articles. It appears from the authorities that a new inquiry should be allowed unless the pursuer knew or ought to have known at an earlier stage the facts which he proposes to make the subject of a new inquiry. In the present case I agree that it cannot be said that there was any negligence or failure of due diligence on the part of the pursuer in failing to ascertain the facts which he now seeks to prove.

I am therefore prepared on these grounds to agree in the course which your Lordships propose.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the proposed minute of amendment for the pursuer and reclaimer, No. 24 of process, and heard counsel for the parties, open up the record, allow the pursuer to amend the same by adding articles 10 and 11 of said minute to the condescendence for him, and appoint the defender and the co-defender to answer said articles by the first box-day in the ensuing vacation; disallow article 12 of the said minute," &c.

Counsel for the Pursuer and Reclaimer—Hunter—Morison. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Respondent—Dundas, K.C.—J. R. Christie. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Co-Defender and Respondent — M'Clure. Agents — Simpson & Marwick, W.S.

Tuesday, March 17.

FIRST DIVISION.

SMITH *v.* TRUSTEES OF PORT OF LERWICK.

Property — Sea — Foreshore — Udal Tenure in Shetland—Crown—Rights of Crown under Udal Law—Rights of Udaller.

A proprietor of land in Lerwick, Shetland, brought an action to have it declared that he was the proprietor of the foreshore *ex adverso* of his property to the lowest low-water mark. He and his authors had held the subjects in question upon titles—among which there was no Crown writ—going back to a disposition granted in 1819, which conveyed *per expressum* the foreshore in question, and sasine thereon published in the Register of Sasines. Defences were lodged by persons who held a disposition from the Crown, dated 1878, of "all and whole the right, title, and interest" of the Crown in, *inter alia*, the piece of foreshore in question. *Held*, in respect the land law applicable was admitted to be udal and not feudal, (1) that, the right of the Crown in the foreshore in question being a right of sovereignty and not of property, the disposition by the Crown was ineffectual to convey any right of property therein, and (2) that, in the absence of any effectual competing right, the pursuer had a valid and effectual right and title to the foreshore in dispute, he and his authors having held it for eighty years upon a title which expressly conveyed it, and which had been made public by registration.

Andrew Smith, merchant in Lerwick, brought an action against the trustees of the Port and Harbour of Lerwick, incorporated by Act of Parliament, concluding, *inter alia, (first)* for declarator "that the whole foreshore or ground below Commercial Street in Lerwick and between Commercial Street and the sea from the street downwards to the lowest low-water mark *ex adverso* of all and whole the dwelling-house and others in Commercial Street belonging to the pursuer . . . pertains heritably in property and belongs exclusively to the pursuer as proprietor of the said dwelling-house and others in Commercial Street aforesaid, and forms part and portion or part and pertinent of the said dwelling-house and others; as also that the defenders have no right or title in or to the said foreshore or ground between Commercial Street aforesaid and the lowest low-water mark within the boundaries foresaid or any part thereof, or to exercise any rights of property in the said foreshore or ground."

The pursuer was proprietor of the dwelling-house and other subjects in Commercial Street, Lerwick, referred to in the summons, under a disposition in his favour by the trustees of Charles Gilbert Duncan dated December 1879, and registered in the General Register of Sasines on December 29th 1880. The subjects in question had been transmitted to the pursuer's author by a series of dispositions. Among the pursuer's titles there was no Crown writ. The earliest of the dispositions was a conveyance by Thomas Bolt of Cruister to John Scott junior of Melby, dated November 15th 1819, and recorded in the Sheriff Court-Books of Zetland on November 28th 1820. In the dispositions of the subjects subsequent to 1820 the subjects were referred to as described in the said disposition by Thomas Bolt to John Scott junior.

The description of the subjects in the disposition by Thomas Bolt to John Scott junior was as follows:—"All and whole that my house in Lerwick and the garden behind the same, which house . . . is presently possessed by myself and is bounded as follows, viz.—by . . . the banks or shore of Lerwick to the north-east, together also with the property below the street belonging to my said house above described from the street downward to the lowest low-water mark, and in breadth along the street from the house called Nicol Sinclair's house and wharf or loadberry thereto belonging to the stairs going down in a right line from the kirk close on the lower side of the street to the low-water mark and the wall upon the south-east side of the said stairs, . . . together with . . . all other righteous pertinents and preveledges named or not named belonging to the said house as in the original rights and after conveyances thereof."

The disposition contained the usual clauses of a conveyance in feudal form, and was followed by an instrument of sasine in favour of John Scott junior, expede on the disposition, dated December 25th 1820, and recorded in the Particular Register of Sasines for the Lordship of Zetland at Lerwick on December 28th 1820.

The pursuer averred as follows:—"(Cond. 5) The town of Lerwick, which is of comparatively modern origin, consisted originally of detached houses fronting the sea and along a small bay, each on a plot of ground bounded on the east by the sea or sea-shore. As houses became numerous and contiguous to each other the space immediately in front became converted into a roadway or street, but the piece of ground between the roadway and the sea continued to be possessed by the respective proprietors of the lands *ex adverso*. The pursuer and his predecessors have so possessed from time immemorial, and by udal tenure, the foreshore *ex adverso* of his property in Commercial Street referred to in the summons along with the rest of said property."

The defenders denied that possession of the ground claimed by the pursuer had followed on any of the above-mentioned dispositions. They averred that the piece of foreshore claimed by the pursuer was, *inter alia*, disponed by disposition, dated July 31st 1878, and recorded in the Division of the General Register of Sasines applicable to the county of Orkney and Zetland, January 5th 1881, to the defenders by the Commissioners of Her Majesty's Woods and Forests, which conveyed "All and whole the right, title, and interest of Her Majesty in, to, and over" certain subjects, including the piece of foreshore in dispute, "being part of the foreshore and bed of the sea below high-water mark," as well as by a disposition dated February 22nd 1879, and recorded in the Division of the General Register of Sasines applicable to the county of Orkney and Zetland January 5th 1881, to the defenders by the Board of Trade. They further averred as follows:—"(Ans. 5) Said piece of foreshore has been possessed by the defenders in virtue of such recorded dispositions for the space of more than twenty years continually and together, and that peaceably without any lawful interruption made during the said space of twenty years. Neither the pursuer nor his authors ever had any right whatever to said piece of foreshore, and it has been used by the defenders and the members of the public for public uses for more than a century prior to the date of the raising of the present action. In 1838 one of the pursuer's authors allowed the Commissioners of Police of the Burgh of Lerwick to build a wall on the piece of foreshore now claimed by the pursuer; the Magistrates and Town Council of the Burgh of Lerwick granted in 1846 a right to build a Free Church on said foreshore without objection on the part of the pursuer's authors; the said Magistrates and Town Council warned the pursuer's author against depositing rubbish on the piece of foreshore now claimed by the pursuer, and he desisted therefrom, and in 1880 the said Magistrates and Town Council prohibited the pursuer himself from depositing rubbish on the said foreshore; in 1880 the pursuer applied to the said Magistrates and Town Council for liberty to build on the beach in question, which was refused, and in 1887 the pursuer complained

of the defenders occupying the foreshore by a coal store, and the defenders repudiated any title on the part of the pursuer to interfere with their operations. The piece of foreshore never has been possessed as part and pertinent of the dwelling-house and shop and premises now owned by the pursuer."

The pursuer (Cond. 5) denied that the defenders had any right or title to the land in question. He maintained that the dispositions by the Crown were inept to convey any right of property in the subjects, that the right of the Crown in and to the foreshore of Scotland depended on feudal principles, which were inapplicable to lands in Shetland held by udal tenure; that the subjects in question had not been converted into feudal holdings, and that the Crown could not grant a valid title thereto. He further averred:—"Both by the statute law of Scotland, specially 1567, cap. 48, and by international law, Orkney and Shetland were and are entitled to be subject to their own laws, at least except so far as expressly altered by the Parliament of Scotland or by the Imperial Parliament, and not to the common law of Scotland. By their own laws the foreshore of all lands in Orkney and Shetland was and is private property, and at no time belonged either in property or for administrative or fiduciary purposes, to the Commissioners of Woods and Forests."

It was admitted that the ground in question, which was formerly open to encroachment from the sea, had in or about 1877 been enclosed by an esplanade or sea-wall, and was thus capable of being built upon or otherwise utilised.

On the question of the possession of the foreshore by the pursuer and his authors and the defenders respectively proof was led. On the part of the pursuer the proof was directed to show that he and his authors had been in use to possess the ground in question by drawing up their boats on it and placing boxes, barrels, and similar articles on it. On the part of the defenders the proof was mainly directed to establish the exercise of the acts of possession by the magistrates of Lerwick set forth in detail in Ans. 5, *supra*. The purport of the proof sufficiently appears from the opinions of the Judges.

In a minute of admissions for the pursuer the pursuer admitted that the piece of foreshore in question had never been closed against members of the public, that in 1840 the Police Commissioners of Lerwick straightened and rebuilt a part of the street and set back the wall on the said piece of ground between Commercial Street and the sea, the pursuer's authors protesting against this interference; that in 1846 the Magistrates and Town Council of Lerwick, after public intimation (to which no objection was lodged) approved of the proposal to build a church on the piece of foreshore in question, though the church was not built; that in 1862 the pursuer's author deposited rubbish on the piece of foreshore, and that the pursuer's author desisted under protest, asserting his right of property and his right to make deposits on the ground; that in 1880 the pursuer, without asking liberty, took down part of the sea-wall, and the Magistrates and Town Council objected; that in 1880 the pursuer applied to the Magistrates and Town Council for their approval to his erecting a building on part of the foreshore and that they refused in respect that he intended to use part of the said sea-wall which was the property of the Commissioners; that in 1887 the pursuer complained of the defenders occupying part of the foreshore by a coal-store, and that the defenders repudiated his title to interfere.

The pursuer pleaded, *inter alia*, "(1) The subjects in question being, in virtue of his titles, the property of the pursuer, he is entitled to decree as craved, with expenses."

The defenders pleaded, *inter alia*:—"(2) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the action. (3) The pursuer's averments, so far as material, being unfounded in fact, the defenders are entitled to decree of absolvitor, with expenses. (5) The subjects in question being the property of the defenders, and having been possessed by them on an *ex facie* valid irredeemable title for the space of more than twenty years continually and together without any lawful interruption made during the said space of twenty years, the defenders are entitled to decree of absolviter, with expenses."

On 16th July 1902 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds, declares, and decerns in terms of the first conclusion of the summons, but excepting always from the subjects therein described the esplanade and the ground on which the same is built: Finds it unnecessary to deal with the alternative conclusion of the summons; dismisses the same, and decerns."

Opinion.—"The pursuer is the owner of a house in Commercial Street, which is the principal street in Lerwick, and runs nearly parallel to the shore. The pursuer's house is on the side of the street furthest from the shore. There is no house in the street immediately opposite but a vacant space some sixty feet wide or thereby which extends from Commercial Street to the sea. It is bounded on either side by buildings extending from Commercial Street to or beyond the line of low-water mark, and is thus separated from all other portions of the foreshore. This space is the subject of this action. It is claimed by the pursuer under a written title, and by the defenders, the Trustees of the Port and Harbour of Lerwick, under a Crown grant dated in 1878.

"The titles which the pursuer has produced go back to 1819. But there is no Crown writ among them. The disposition of 1819 bears that the property is bounded 'by the bank or shore of Lerwick,' and the conveyance bears to be 'together also with the property betwixt the street belonging to my said house above described, from the street down to the lowest low-water mark.' There is no doubt that this is a disposition

of the sea-shore *ex adverso* of the pursuer's house. The boundaries on either side are distinctly expressed and can yet be identified. Indeed they are practically the same now as they were in 1819. This description is embodied by reference in the subsequent titles.

"This piece of ground was formerly known as Sinclair's Beach, and a large part of it was covered by the tides. I think, however, the ordinary spring tide did not reach so high as Commercial Street. There seems no doubt that there was a strip between Commercial Street and the line of the spring tide, which was therefore above the foreshore. But in or about 1877 an esplanade was formed under the authority of an Act for improving the harbour and constructing the esplanade. It was constructed at or slightly below low-water mark, and crossed Sinclair's Beach and formed its boundary from the sea. No error of consequence will be made if the quadrangular space enclosed by Commercial Street and the esplanade and the two lateral boundaries be regarded as the subject in dispute. But it must be observed that since the esplanade was constructed that space has not been sea-shore, because now the tide never reaches it, being stopped by the esplanade.

"Although the pursuer possesses and pleads a written title consisting of dispositions and infeftments, yet it does not follow that his title is feudal. On the contrary, I understood the parties to be agreed that the pursuer holds by udal tenure, it being apparently settled in law that udal lands cannot be feudalised without a charter from the Crown—*Beatton* v. *Gaudie*, February 2, 1832, 10 S. 286; *Rendall* v. *Robertson's Representatives*, December 15, 1836, 15 S. 265. I therefore assume or hold the title in this case to be udal.

"In my opinion the construction of the esplanade and the consequent exclusion of the sea from the ground in question, so that it cannot now be held to be foreshore, is a specialty of very great importance, yet I think it may be proper to consider the case, in the first place, apart from that specialty, and as matters stood before the esplanade was constructed.

"I understand the pursuer to maintain that whatever might be said about his title he was entitled to succeed in this action, because the title of the defenders was absolutely and fundamentally null by reason that the theory of the udal tenure excluded all right on the part of the Crown. I do not think it necessary to go at length into this point, which, in the view I take of the case, need not be decided, but I am not prepared to adopt the pursuer's argument. I agree, indeed, that the feudal idea of the Crown right seems excluded, but I think that the *jus coronæ* extends over the whole lands in the kingdom, udal as well as feudal, and would support a right to lands in Orkney and Shetland to which no other right could be produced. I am therefore of opinion that the defenders, in virtue of their Crown right, are entitled to call on the pursuer to prove his right.

"The parties have each alleged possession of the foreshore. In my opinion, however, the proof of possession in this case goes for very little. The pursuer and his authors from time to time asserted by protests their rights to Sinclair's Beach when these rights were invaded by the magistrates. But I do not find that they made any use of the beach themselves. There was, in truth, hardly any use which they could have made of it had their title been never so clear, having in view that it was sea-shore open to the public. The only use really made of the beach was for beaching boats on it, and that was a public use.

"There is very little proof of use of the beach by the defenders either. The various acts of attempted possession spoken to were chiefly by the magistrates, and I understand that the defenders have adduced this kind of evidence rather to refute the pursuer's right than as proving their own. As the defender's case is rested on a Crown grant, it does not require to be supplemented by proof of possession. While, if the Crown title were bad, proof of possession could not assist it. On the whole, I am of opinion that nothing has been made out of the attempted proof of possession, and the pursuer's case depends on his title.

"It was maintained for the defenders that this failure to prove possession was absolutely fatal to the pursuer's case, because the title to property held under udal tenure depended wholly on possession —Stair, ii. 3, 11. But I think that cannot be so. It may be that the right of a udaller may be established by parole proof of possession, and that proof of possession and of verbal bargain may be sufficient without any formal disposition or sasine or other investiture. But that does not imply that a udaller's right may not be equally well proved by better evidence, and best of all by a disposition and sasine, although the sasine may not have the ordinary feudal effect. I see nothing inconsistent with udal tenure in holding that a title to land would be perfectly well proved by disposition and sasine. So far as the pursuer's title relates to the mainland I see no reason to doubt its sufficiency. The question is, is a disposition of a portion of the foreshore of Shetland inept. It is a difficult and a novel question.

"The argument by counsel was learned and exhaustive, but I do not think they produced any authority bearing on that precise point. I see no sufficient reason for holding such a disposition inept. The foreshore of Shetland is a part of the island, and when the sovereignty of the island was taken over with its existing laws and customs, I think that these laws and customs must be held to apply to the foreshore as well as to the mainland, unless there were something in the old Norwegian law to the contrary, having special reference to the foreshore. No *dictum* of any kind was referred to, to the effect that the law of udal tenure did not extend to the foreshore, and I think it must be held to be applicable. If it were incompatible with

the law of Scotland that the foreshore thould be the property of private individuals the case might be different. But that is not so. The cases are numerous in which sea-bound proprietors in Scotland have been held entitled to the foreshore, and that even without any title from the Crown, direct or indirect (*Young* v. *North British Railway Company*, August 1, 1887, 14 R. (H.L.) 53), and Crown grants of the foreshore have been numerous, and in this case I confess I am not able to see why a disposition habile to carry land should not also be habile to carry the sea-shore. On udal principles the consent of the Crown would seem no more necessary in the one case than in the other.

"It is legitimate to observe that it seems to be by no means the custom in Shetland to preserve the sea-shore inviolate. What are called loadberries, which are kinds of stores, are very frequent in Shetland, and they have always been built on the foreshore, and cannot be used otherwise; and I think one of the witnesses familiar with the island deponed that three-fourths of the foreshore of Lerwick was enclosed or covered by buildings. If it were the udal law that the foreshore could not be appropriated by a subject, that law was not in accordance with usage.

"Even had the esplanade not been built I lean to the opinion that the pursuer's title would have been sufficient to confer a right to the shore *ex adverso* of his house.

"But the construction of the esplanade made a considerable difference. The pursuer's title to the property from the street to the lowest low-water mark now meets with no opposition until it reaches the esplanade; it does not interfere with any public use, and unless it could be made out that the Crown had a right of property in the foreshore of which it could not be deprived, which is not in accordance with udal customs, I do not see how the pursuer's claim could be resisted. Apart from udal law, I am not aware of any case where the right of the Crown to foreshore was sustained to any land where the tides did not ebb and flow. I apprehend that, according to our own law, land gained from the sea becomes the property of the adjacent proprietor—*Campbell* v. *Brown*, November 18, 1813, F.C.; *Boucher* v. *Crawford*, November 30, 1814, F.C.—and that that would be so where acquisition of land from the sea was the result of some construction executed under the authority of Parliament, such as the esplanade—*Hunter* v. *Lord Advocate*, June 25, 1869, 7 Macph. 899, *per* Lord Ardmillan, at p. 910. I see no sufficient authority for holding that land which was, as foreshore, the property of the Crown, continues to be so after it ceases to be foreshore.

"For these reasons I am of opinion that the pursuer is entitled to prevail in this case, and that consequently the title of the defenders is inept. The language of the conclusions seems hardly to fit the state of the facts since the esplanade was constructed, and might deserve consideration."

The defenders reclaimed, and argued—The defenders had under the disposition in their favour by the Commissioners of H.M. Woods and Forests, dated July 31, 1878, a title from the Crown to, *inter alia*, the ground in dispute. This had been followed by the assertion and exercise of rights of possession over the ground in question. If the Crown had any right to the foreshore of Shetland, such right was conveyed validly to the defenders. The supereminent right of the Crown—what the Lord Ordinary called the *jus coronæ*—existed in respect of the foreshore in Shetland as much as in respect of the foreshore of the mainland, and was similar in degree and quality, and therefore the *onus* lay on the pursuer to prove his right. The pursuer put forward as the ground of his right—(1) the written titles from 1819 downwards, and (2) possession on these titles. With regard to the written titles the pursuer had no grant from the Crown direct or indirect. The fact that the disposition of 1819 and succeeding dispositions included this piece of foreshore did not prove the pursuer's right. The question was whether the foreshore in question was the property of the disponer in the disposition of 1819, so that he was *in titulo* to convey it. This conveyance, in so far as it related to the foreshore, was inept, in respect that it proceeded *a non habente potestatem*. In form the disposition of 1819 was feudal, but it was admitted that the tenure of the land had remained udal—*Beatton* v. *Gaudie*, February 2, 1832, 10 S. 286; *Rendall* v. *Robertson's Representatives*, December 15, 1836, 15 S. 265; *Dundas* v. *Heritors of Orkney*, January 24, 1777, 5 B's Suppl. 610; *Spence* v *Earl of Zetland*, January 25, 1839, 1 D. 415. Under the udal tenure right depended wholly on possession—Stair ii. 3, 11; Bankton, ii. 3, 3; Ersk. ii. 3, 18. The pursuer could only succeed by showing by parole evidence that he had been in actual possession of this piece of foreshore. As the title to land by udal law was perfect without writing, so the transmission of the land consisted in the delivery of possession to the party acquiring it—Menzies' Conveyancing (3rd ed.), p. 565; *Irvine* v. *Robertson*, January 18, 1873, 11 Macph. 298, 10 S.L.R. 188. Under udal law, accordingly, the pursuer's right of property comprised only what he had effectually possessed. (2) On the evidence as to possession, it was clear that the pursuer did not have possession of this foreshore. The acts relied on by the pursuer, such as placing barrels and boxes on the ground, drawing up boats thereon, &c., might be attributed to his right as a member of the public, and did not involve use of the foreshore as proprietor though he happened to be a frontager. The Magistrates of Lerwick had exercised rights of possession as proprietors of this ground, and had consistently repudiated any right in it by the pursuer other than as a member of the public. The pursuer's possession then being under udal law, the measure of his right, it followed that he had no right in the foreshore as he had not in fact possessed the foreshore. The defen-

ders, on the other hand, had a Crown grant, *inter alia*, to this piece of foreshore, and this had been followed by possession. The Crown had therein conveyed such right in the foreshore as it had, and the right of the Crown to the foreshore of Shetland was similar to its right to the foreshore of the mainland. Although under udal tenure there were no burdens and services as in feudal tenure, yet the Crown's rights as *ultimus hæres*, and as trustee for public uses, &c., were similar, and no local customs, as had been held in *Bruce* v. *Smith*, June 20, 1890, 17 R. 1000, 27 S.L.R. 785, could prevail against the rights of the Crown.

Argued for the pursuer and respondent—The piece of foreshore *ex adverso* of the pursuer's house was expressly included in the titles of the pursuer and his authors since 1819, and he and they had exercised all the possession of which the ground was capable by drawing up boats and laying boxes and barrels on it. If the drawing up of the boats could be attributed to the right of the pursuer as a member of the public, the practice of storing boxes and barrels on the ground was susceptible of being attributed only to his exercise of a proprietory right in the ground. Further, the pursuer had successfully resisted all attempts at possession by the Magistrates of Lerwick. It had been admitted by the defenders that, though the dispositions from 1819 were feudal in form, the subjects were held in udal tenure. It was a mistake to say that udallers held only by possession and not by written titles. Written titles had been known in udal law from a very early date—*cp.* Collection of Deeds relating to Orkney and Zetland, 1433-1581. The ancient form of conveyance was judicial, the decree of the Foude or court being the title—Bell's Prin., sec. 932. The written decree or evidence of title constituted the "shyndbill"—Hibbert's Description of the Shetland Islands, p. 309. In Norway and other countries in which the udal system had sway there existed a system of registration more ancient than feudal registration. When the system of using the forms of Scots conveyancing was adopted the title might be extrajudicial, and was published by being recorded. The udal law was not merely a body of local customs, but a distinct system of law which the Crown by treaty bound itself to recognise. The real question in the case was the effect of a udal title. Under the udal system the holding is allodial—*Dundas* v. *Heritors of Orkney, supra; Spence* v. *Earl of Zetland*, January 25, 1839, 1 D. 415, at p. 425. An allodial holding was free from the superiority of the Crown—Craig's Jus Feudale, i. 9, 25; Calvinus' Lexicon, s.v. *allodium*; Ducange, s.v. The argument of the defenders rested on an entire misapprehension as to the position of udal tenure and its relation to the Crown. Under the udal system the proprietor had *plenum dominium* like the *dominus* in Roman law. He had no superior. The right of the Crown was one merely of sovereignty and not of property. The Crown as sovereign was *ultimus hæres*, and it might be that the Crown, in virtue of its right of sovereignty, held as regards the foreshore certain rights as trustee for the public to protect the public use of the shore—Libri Feudorum—De Allodiis ii. 54, Maine's Ancient Law, p. 107; Ersk. Inst. ii. 3, 18; ii. 6, 17; ii. 1, 6; *Gammell* v. *The Commissioners of Woods and Forests*, 3 Macq., pp. 419, 434, 463. Accordingly the title of a udal proprietor to the foreshore, and his right to dispone it, was perfectly good, and the Crown had no right in it to grant. In Scandinavian law the proprietors of land had full property in the foreshore *ex adverso* of their land. A similar rule held in Iceland—Grágás, ii. 352, 358, 360, 390, and in the modern law of Norway—Brandt, Foreläsninger over den Norske Retshistorie (ed. 1880), i. p. 213. On this principle, the town of Lerwick was in fact chiefly built on the foreshore—Gifford's Historical Description of Zetland, pp. 41, 63, 78—and nearly all the other proprietors in the position of the pursuer had appropriated the shore and occupied it with buildings. The words of disposition in the titles in the present case were in conformity with this practice, and were indeed words of style common in the old deeds—*vide* Collection of Deeds referring to Orkney and Zetland, 1433-1581. The pursuer held the same position as if he held a Crown charter or a feudal title on which prescription had followed—Bell's Prin., secs. 642, 643; *Magistrates of Culross* v. *Dundonald*, 1769, Mor. 12,810; *Magistrates of Culross* v. *Geddes*, 1809, Hume 554; *Magistrates of Montrose* v. *Commercial Bank*, January 11, 1886, 13 R. 947, 23 S.L.R. 682; *Young* v. *North British Railway Company*, August 1, 1887, 14 R. (H.L.) 54, 24 S.L.R. 763. If this view of udal tenure was correct the disposition by the Crown, on which the defenders founded, conveyed nothing, for the Crown had no right of property in the foreshore to convey. Reference was also made to the judgment of Lord Kincairney (Ordinary) in *Smith* v. *Trustees of Port of Lerwick*, November 16, 1897, 5 S.L.T. 229—a case in which the question at issue was similar to that raised in the present case.

At advising—

LORD PRESIDENT—The question in this case is whether the pursuer is entitled to have it found and declared that he is proprietor of the foreshore or ground below Commercial Street in Lerwick, and between that street and the sea, from the street downwards to the lowest low-water mark, *ex adverso* of a dwelling-house and other property in Commercial Street belonging to him.

The foundation of the title relied upon by the pursuer is a disposition by Thomas Bolt of Cruister in favour of John Scott and others, dated 15th November 1819, and recorded in the Sheriff Court Books of Zetland, on 28th November 1820. By that disposition Mr Bolt conveyed several pieces of property, including his house in Lerwick and garden behind it, bounded as therein described, "together also with the property

below the street belonging to my said house above described, from the street downward to the lowest low-water mark, and in breadth along the street from the house called Nicol Sinclair's house, and wharf or loadberry thereto belonging, to the stairs going down in a right line from the kirk close on the lower side of the street to the low-water mark, and the wall upon the south-east side of the said stairs."

I did not understand it to be disputed that if that disposition is effectual in law, it, along with the subsequent titles, conveys to the pursuer the piece of foreshore or ground now in dispute, but it is maintained by the defenders that it is ineffectual, and that they have acquired right to the ground in question under a disposition by the Commissioners of H.M. Woods and Forests in their favour, dated 31st July 1878, and recorded in the Division of the General Register of Sasines applicable to the county of Orkney and Zetland, on 5th January 1881, and also under a feu-disposition by the Board of Trade in their favour, dated 27th January 1879, and recorded in the Register of Sasines already mentioned on 5th January 1881.

The first important question is whether the tenure of the piece of ground in question was udal or feudal at the time when the disposition by Thomas Bolt already mentioned was granted. If the tenure was then feudal, the presumption would be that the property in the foreshore down to low-water mark was vested in the Crown, subject to public uses, and that no proprietary right to it could be acquired except by a conveyance flowing immediately or mediately from the Crown. This would result from the view that, according to the feudal system, the whole territory of the country was originally vested in property in the Sovereign, and that it is consequently incumbent upon a subject claiming a proprietary right in the shore to produce a title to it flowing directly or indirectly from the Sovereign. It appears to me that if the property in the foreshore at the place in question was to be regarded as feudal, there would not be sufficient grounds for affirming that the pursuer has established a right of property in it. In order to establish such a claim, the person making it would, in the absence of an express title flowing directly or indirectly from the Crown, in my judgment, require to prove exclusive possession of the foreshore for the prescriptive period upon a barony or other general title, so as to divest the Crown of the right which it had previously possessed; and the pursuer has not, in my view, adduced evidence of such possession as to bring about this result.

I understand, however, that the parties are agreed that there is no evidence that the foreshore in question had ever come to be held under feudal tenure, and that it remained, so far as proprietory right is concerned, subject to the laws and usages of udal tenure. I think this view is in accordance with the authorities which were referred to, and that the question comes to be what are the rules and incidents of udal tenure applicable to the circumstances of the case. Now I understand the first of these to be that the right to the territory of the country is not originally vested in the Crown, but belongs to subjects who can prove that they have had adequate possession of it to establish a right to it apart from written title, or who can show a written title to it after it has come to be the subject of conveyance by written title. Now, as the piece of foreshore in question has been held subject to written and recorded titles at least from the year 1819, I think that a progress of titles thus extending to a much longer period than that of prescription is sufficient to establish a valid right of property in the holder of the titles. It may be that this right is subject to certain public uses, such as navigation, passage, and the like, in so far as the ground is below high-water mark, but in so far as the right of property in it is concerned it seems to me that the titles are, *prima facie*, sufficient to establish a valid right.

The pursuer also relies upon the possession which he alleges that he and his predecessors in title have had of the foreshore at the place in question, but I do not think that the possession proved has been, except perhaps as regards the upper strip, of such a character as would have been requisite to support a conveyance of the foreshore by a subject superior under feudal titles. Nearly everything which the pursuer and his authors have done in the way of occupying and using the foreshore might, in my judgment, be attributed to the exercise of public rights; and the element of excluding or preventing other persons from making similar uses of the foreshore at the place in question does not appear to have been present.

I need only add that I do not think that either of the dispositions relied upon by the defenders can confer upon them a title to prevail in a question of proprietory right with the pursuer founding, as he does, upon a progress of written and published titles to udal property extending over a period of upwards of eighty years.

The piece of foreshore in dispute appears to have been long known as Sinclair's Beach, and a considerable part of it seems to have been covered by ordinary tides, although such tides did not reach Commercial Street. There is, I understand, a strip of ground between the high-water mark of spring tide and Commercial Street, and I do not see any reason upon which it could be successfully disputed that the pursuer has the right of property in this strip. It appears, however, that in or shortly after 1887 an esplanade was formed *ex adverso* of, *inter alia*, the property admittedly belonging to the pursuer, which now prevents the sea from reaching any part of the property now in dispute. That property is therefore no longer subject to any such public uses as can be made of the seashore—for navigation, fishing, transit, or the like; and the pursuer consequently holds that part at all events of his foreshore property free of any

public rights of that class. If I be right in thinking that he has a good udal title to it, it would follow that since it has been disburdened of any public rights incident to an open seashore between high-water and low-water mark, he now holds it under conditions which entitle him to have the decree which he seeks in this action.

I may add that if the pursuer is found to have the right which he claims, he will get nothing more than his neighbours have already acquired, apparently without objection on the part of the defenders or of any one else. On referring to the maps, plans, and photographs produced it will be seen that the ground which the pursuer claims forms a sort of recess in the general line of buildings along the sea front, his neighbours on both sides having long ago built upon the corresponding pieces of foreshore opposite to their properties.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—I agree with your Lordship.

LORD KINNEAR—I have come to the same conclusion and have very little to add. I agree with what I understand to be your Lordships' opinion, that if the question concerned a portion of the foreshore of the mainland of Scotland, where rights of property are governed by feudal law, the pursuer would have no good title against the Crown or against anybody claiming in right of the Crown, because the pursuer's title does not flow from the Crown and cannot be connected with the Crown, and because he and his predecessors have had no such prescriptive possession as would furnish him with a good answer to a challenge of his title on the ground that it proceeds *a non domino*. I am afraid, therefore, that we cannot avoid deciding the question, as to which the Lord Ordinary expresses so much hesitation, whether the property of the foreshore of the Shetland Islands is originally vested in the Crown. If that question cannot be answered in the negative, the judgment, in my opinion, cannot be supported.

I am unable to assent to certain views suggested by the Lord Ordinary as tending to exclude this question, or to relieve it of its difficulty. His Lordship says, in the first place, that the cases are numerous in which sea-bound proprietors in Scotland have been held entitled to the foreshore without any title from the Crown, direct or indirect. I think this is true of the foreshore in exactly the same sense as of other land in Scotland, but in no other sense. Possession sufficient in quality and endurance upon a title granted by a subject which is *ex facie* sufficient to carry the right is as good as a title from the Crown, because the law of prescription comes in to exclude the objection that the granter had no right or no power to convey. But I know of no authority for holding that without prescriptive possession a grant of foreshore which cannot be traced to the Crown is of any validity against the Crown or its donees. I think the case of *Young* v. *The North British Railway Company*, to which the Lord Ordinary refers, is a direct authority for the doctrine I have stated. The ground of judgment both in this Court and in the House of Lords, is stated with his usual conciseness and precision by Lord Rutherfurd Clark, who says:—"The pursuer's title seems to me to be a title which *per expressum* includes the foreshore *ex adverso* of the rest of his property. But as the pursuer's title is not a Crown title, and is not connected with the Crown in any way, it may be objected that it flows *a non habente potestatem*, and that objection can only be removed by proving that he possessed the foreshore as his property." But if he proves that he possessed the foreshore for a period of twenty years prior to the date of the challenge the objection is removed. I conceive, therefore, that as between the Crown or persons in right of the Crown and the subject proprietor of land on the sea coast of Scotland, the question of property in the foreshore depends upon precisely the same principles of feudal law and the same rules of conveyancing as if it concerned any other piece of land. The only difference consists, not in any rule of law which may be applicable to the one case and not to the other, but in the character of the acts of possession which will import the assertion of a proprietary right, and that will, if necessary, depend upon the nature of the ground and the different uses to which different kinds of land may be put.

For the same reason, I cannot assent to the view that the construction of the esplanade is of itself conclusive against the right of the Crown and its donees. The property of the esplanade is not in dispute, and I presume it may be held that the defenders have a Parliamentary title to it. But the argument from which I venture to dissent is, that assuming the property of the foreshore to be in the Crown, a piece of ground which was formerly foreshore ceases to be Crown property as soon as the building of the esplanade prevents the tide flowing over it. I do not think rights of property can be lost in that way. If the proprietor of the adjoining land encloses a part of the foreshore and converts it into dry ground, that will no doubt be a very distinct assertion of a right, and it will go to establish a claim of property if he has possessed for a sufficient time upon an *ex facie* sufficient title. But apart from a valid title or prescriptive possession I cannot see that it is a fact of much importance. If it be assumed that the Crown has an antecedent right of property in the foreshore, I do not follow the reasoning by which it is supposed that such right of property is lost as soon as the tide ceases to flow over the ground. There are Crown rights, no doubt, affecting the foreshore which may not affect land from which the sea has been effectually shut out, but they are not rights of property; and I cannot admit that a right of property in one part of the *solum* of the country may be lost or acquired by other methods than those which regulate the acquisition or loss of

property in any other part. There is, to my mind, nothing to suggest such a difference in the cases which have been decided as to the right of a proprietor to follow the sea when it recedes, or to gain land from it by embankment. All of these cases have depended upon the true construction and effect of titles, as expressed in terms, or as explained by prescriptive possession. The question must always be whether a grant, good against the Crown, will pass the seashore or ground covered by the sea.

The whole difficulty in this part of the discussion seems to me to arise from a confusion which, according to Sir Henry Maine, is incidental to the feudal system, between two different things, sovereignty and property in the Crown. But in our law it is now established these two ideas are perfectly separate and distinct. It is familiar and elementary doctrine that the Crown, if it has not granted it out, has a right of property in the foreshore which may be alienated, and also a right of sovereignty as guardian of the public interests for navigation, fishing, and other public uses which cannot be alienated. But it is only with the first of these rights that we have any concern in this action. The only question is whether the piece of ground described in the summons is or is not the property of the pursuer, and a decision in his favour will not in any way interfere with the public uses, the protection of which is an unalienable right of the Crown. I take it to be well settled that in Scotland, where land rights are feudal, when a subject has acquired by Crown grant the absolute property of the seashore, the Crown will "still retain," as Lord Moncreiff puts it in the *Officers of State* v. *Smith* (March 11, 1846, 8 D. 711, at p. 721), "a supreme title over it for protecting all the rights and purposes of navigation, great or small," and possibly also for protecting such other public uses as may be established by long possession. We are concerned in this case, therefore, with a question of private right, and with no question of public uses whatever. Nobody has suggested that as regards these the Crown right is not the same in Shetland as on any other part of the sea-coast of Scotland. But whatever it be, it will not be prejudiced by anything we decide in this action.

The whole question, then, seems to me to depend upon whether the rights of property in land in the Shetland Isles are governed by the feudal system, and I cannot see any ground in reason or authority for distinguishing in this respect between the foreshore and the rest of the soil. If the *solum* as a whole is vested in property in the Crown, every part of it, whether it be called foreshore or not, still belongs to the Crown if it has not been expressly granted to a subject or acquired by prescriptive possession on a title which the Crown can no longer challenge. On the other hand, if the *solum* as a whole is not originally the property of the Crown, I know of no authority and can see no reason for holding that part of it which is called the foreshore is Crown property.

On the main question I do not think it possible to doubt that the land law of Shetland is allodial and not feudal. This is in accordance with all the authorities cited to us both before and after the case of *Sir Lawrence Dundas*. But if the land right is allodial it is certain that in that system the fundamental doctrine of the feudal system as to the Crown right of property has no place. In the feudal system the king is the original lord of the land, and every right of property in land issues mediately or immediately from him. That is the theoretical basis of our whole system of land rights in Scotland. But the king or overlord has no such radical right of property in allodial land. The right of the private owner is not to hold of and under a superior. His right of property is *dominium* in the sense of the Roman law. The king is sovereign, but he is not the universal landlord. This is certain as regards allodial land in general, and as regards land in Shetland it is stated very distinctly by Lord Jeffrey in the case of *Spence* v. *Earl of Zetland*—"There is not the slightest appearance of its ever having been held that the overlord in these islands of Shetland had been the original proprietor of all the lands they contain. There is no feudal supremacy, and there is not a shadow or trace of an original property in the lord or sovereign." Lord Glenlee says in the same case—"As to the udal holding I never heard the most distant idea that it would be considered as having anything in it of feudal right." It follows that it is no objection to the pursuer's title that it does not flow from the Crown, and the defenders' Crown title, such as it is, cannot compete with the pursuer's title of 1819. The question then is, whether the pursuer's title, taken on its own merits, is conclusive evidence of his right, and that is a question which in certain circumstances might not be free from difficulty. The validity of a grant must depend upon the right of the granter, and in the case of allodial land the granter's title cannot prove itself and cannot be connected with prior indisputable title. The process by which udal land comes to be transferable and to be held in severalty is very obscure. But the difficulties are perhaps historical rather than of practical importance in the present case, and it is certainly the result of all the decisions that the udal tenure is held still to survive, except in particular instances where land has been feudalised by the acceptance of a charter; and where the land is still udal a direct conveyance followed by possession must be good evidence of right, unless better evidence of an adverse right can be brought forward. Now, the only ground of challenge is the supposed radical right of the Crown, and if that fails the defenders do not maintain that they have a private right derived from any other source, or that there is a better right in any other person. The defenders, indeed, do not dispute the validity of the title as regards any part of the land contained in it except the foreshore; and they have alleged no tenable ground of distinction between the foreshore and the rest, except

that there has been no specific possession of the shore as such which would exclude the Crown right of property if it existed. If there be no right of property there is nothing abnormal in a conveyance which expressly includes the shore; and no reason has been suggested for holding that it must be ineffectual. On the contrary, the pursuer's counsel have shown by many examples that in these islands it is a common and familiar form to describe the subjects of a conveyance as extending from the full to the lowest ebb; and as matter of fact, the pursuer's property, if his claim is sustained, will extend no farther to the sea than that of his neighbours. It is suggested that the conveyance is in some respects feudal in form. But that arises only from a misapplication of forms which were probably familiar to the conveyancer who drew the deed to a subject to which they are not properly applicable. This appears to me to be a point of no significance, because it has been decided in *Beatton* v. *Gaudie* that sasines neither granted by the Crown nor by a subject superior deriving right from the Crown do not indicate that the lands have been feudalised.

The result is that the pursuer and his predecessors have held the subjects in dispute for eighty years upon a title which has been made public by registration in the Register of Sasines; and that no competing right can be alleged except upon the assumption, which I hold to be unsound, that the land in question is held feudally of the Crown. I therefore agree with your Lordship and the Lord Ordinary.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent —Salvesen, K.C.—Galbraith Miller. Agent —William Balfour, S.S.C.

Counsel for the Defenders and Reclaimers — Johnston, K.C. — Craigie. Agents — Mackenzie & Kermack, W.S.

Friday, March 20.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

NISBET *v.* FORSYTH.

Burgh—Street — Building Regulations — Rights of Proprietors—Right of Proprietor of Ground to Build under Surface of Street — Glasgow Building Regulations Act 1900 (63 *and* 64 *Vict. c. cl.*), *sec.* 20.

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. c. cl.), sec. 20, enacts as follows: — "The Dean of Guild shall not without the consent of the Corporation grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one-half of the width of such street, measuring such half from the centre of such street, towards such ground shall be cleared of all structures, if any existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every decree granted by him."

Held that section 20 of the Glasgow Building Regulations Act 1900 did not prevent the owner of a piece of ground, which extended to the middle of a street, from putting his property under the level of the street to all ordinary and lawful uses, and, in particular, that the dedication of the street to the public for street purposes did not preclude such owner from excavating and building under the street to its centre.

Burgh—Building Regulations—Rights of Proprietors — Buildings of Warehouse Class—Right to Increase Cubic Content of Existing Warehouse already above 350,000 *cubic feet — Glasgow Building Regulations Act* 1900 (63 *and* 64 *Vict. c. cl.*), *sec.* 65.

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. c. cl.), sec. 65, enacts as follows:—"(1) Except as in this section provided, no building of the warehouse class shall be erected without the consent of the Corporation if such building extend to more than three hundred and fifty thousand cubic feet, unless such building is divided by party walls in such manner that no division of such building shall extend to more than three hundred and fifty thousand cubic feet. No addition shall without such consent be made to any building of the warehouse class or to any division thereof so that the cubical extent of any such building or of any such division shall exceed three hundred and fifty thousand cubic feet."

Held that under section 65 of the Glasgow Building Regulations Act 1900 the owner of an existing building of the warehouse class, the cubic content of which was already above 350,000 cubic feet, was not entitled to make additions increasing the cubic content of the building unless and until the consent of the Corporation had been obtained.

Robert Wallace Forsyth, warehouseman, 1 Renfield Street, Glasgow, presented a petition to the Dean of Guild Court at Glasgow for a lining of his property and for authority and warrant for proposed additions conform to plans produced.

The petitioner was proprietor of a piece of ground bounded on the south by Gordon Street, on the east by Renfield Street, on the north by the property of Mr Stuart Cranston along the centre of Renfield Lane, and on the west by the property of Messrs J. & W. Mackillop. On this piece of ground there was a warehouse occupied by the petitioner, and the plans showed that the petitioner proposed to make altera-