

are satisfied that they were privy to the theft which took place on the 29th of June. If it is your opinion that they knew of it being committed at the time it was committed, and participated afterwards in the proceeds, then you would be entitled to find them guilty of the theft. I must tell you this, that recent possession of stolen property and dealing with it as they did, and they giving no reasonable explanation how they came to be in possession of it—assuming that you are satisfied that it was stolen property—is evidence upon which you can form your opinion that they were guilty of the theft either by their own hand or by being privy to it—it does not matter which. Of course it is not necessary that a theft should be seen, to have been detected at the time. Most thefts are conducted in a clandestine way, and therefore it is to be gathered from surrounding circumstances whether the person charged is the thief or not. I have looked into the authorities on that matter, and I find that an interval of two months was held to be too long for recent possession to be made a ground for implying complicity in theft. In this case it is a matter of three weeks, and it is a question of large sums of money unaccounted for.

Now, gentlemen, supposing you feel yourselves not able to come to the conclusion that the prisoners at the bar were the thieves—that is to say, were privy to the theft at the time it took place, you then need to consider the further question, whether or not, they, being in possession of money, if you are satisfied that was stolen money, were guiltily in possession of that stolen money—in other words, whether they can be found guilty of receiving stolen property knowing it to be stolen. Now, I must tell you as regards that, it is not necessary according to law that the actual property which is said to have been received guiltily has ever passed into the personal possession of the receiver at all. If a man steals a bundle of notes out of another man's pocket, and after that informs another man that he has got these notes, that he has stolen them, or if a man saw him stealing them and knew that they were stolen—if he, without using any of the money with his own hand at all, connived at it remaining in the possession of the thief or being put in any place for safe custody, such as hiding it in a cupboard, he is guilty of receiving feloniously even although he never puts his fingers on the notes at all. Reset consists of being privy to the retaining of property that has been dishonestly come by.

Now, it is for you to say whether, assuming that you do not think that the theft is made out, the question comes to be whether you are not satisfied that all these three men knew that this large amount of property which was between them was stolen property, and were doing their best to dispose of it by arrangements which were made in opening accounts with banks, and so on, and whether, whichever of them had the money in his possession at the time they were apprehended, they were all privy to that money

dishonestly come by being in the possession of the individual who happened to have it in his pocket or bag—if you are satisfied of these facts you would be quite entitled to find that they were all guilty of reset. You may draw a distinction between the prisoners. If you think that there is any evidence that any individual prisoner, though proved to be in Glasgow on the occasion, is not proved to be guilty of the theft, but that there is only evidence which would go to the question of reset, you can make that distinction between them. Please consider first whether you are satisfied that these men, in recent possession of this money, were privy to the theft, joint-adventurers originally, and thieving in Glasgow—if so, you can convict them all of theft, but if not satisfied, proceed to consider whether any of them can be convicted of theft. Lastly, if you are satisfied that no one can be convicted of theft, you will consider whether any of them have been proved to be privy to the theft which had been committed, after the fact, consenting to the money not being returned to the true owner, and consenting to the money being disposed of as stolen property.

The jury by a majority found the panels guilty of reset of theft, eight voting for that verdict and seven for guilty as labelled, and the prisoners were sentenced to five years' penal servitude each.

Counsel for the Crown—Younger, A.-D.—C. H. Brown. Agent—Hart, Procurator-Fiscal.

Counsel for the Accused—G. Watt, K.C.—W. Thomson—Trotter. Agents—Angus Campbell & M'Kenzie, Writers—David Cook, Writer.

## HOUSE OF LORDS.

Friday, December 18.

(Before the Lord Chancellor (Halsbury), Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.)

WALLACE-JAMES v. MONTGOMERIE & COMPANY, LIMITED.

(*Ante*, November 17, 1899, 37 S.L.R. 83, and 2 F. 107; and March 8, 1902, 39 S.L.R. 517, and 4 F. 771.)

*Burgh—Property—Common—Immemorial Use by Inhabitants.*

*Evidence* in an action by an individual burgess for interdict against interfering with certain lands belonging to the burgh, upon which *held* (*rev.* unanimous judgment of the First Division, which had affirmed the interlocutor of the Lord Ordinary, Kincairney) that the complainer had failed to prove that the piece of ground in question had from time immemorial been appropriated to the use and enjoyment of the

inhabitants for recreation, and drying and bleaching clothes.

*Appeal to the House of Lords—Concurring Judgments on Question of Fact.*

There is no rule of practice in the House of Lords that the House will not disturb two concurring judgments in the Courts below upon a question of fact.

This case is reported *ante ut supra*.

Montgomery & Company, Limited, respondents and reclaimers, appealed to the House of Lords.

The only question argued on the appeal was whether the complainant had proved his averment that the piece of land in question had been appropriated from time immemorial to the use and enjoyment of the burgesses or inhabitants of Haddington for the purposes of recreation and of drying and bleaching clothes.

At delivering judgment—

LORD CHANCELLOR—I think this appeal should be allowed.

It is simply a question of fact, and doubtless where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses, and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an Appellate Court.

Now, in this case, though, as I have said, it is simply a question of fact, I do not think it is necessary to discredit a single witness in the sense of imputing to him wilful untruth. There are some differences between the two sets of witnesses, though I think not very many, upon any questions which depend on the personal recollection of the witnesses. There are very great differences sometimes in the opinions which the witnesses express—opinions which I think they never ought to have been allowed to express, but I give credit to the honest desire of all the witnesses to give an accurate view of the thing as they themselves saw it. But while I say that I think what they saw and truthfully depose to falls very far short of what is sought to be proved by their testimony on behalf of the complainant, namely, that the spot in dispute was dedicated to public use by the town authorities. The nature of the place, its history, and indeed I think the use made of it, are to my mind inconsistent with such an inference as is sought to be derived from what the different witnesses deposed to. The greater part of the evidence on both sides does in my mind point to something inconsistent with a dedication to public use, whether for recreation or for general user.

The argument suggests various reasons why this inconsistent user may be under

the circumstances not inconsistent with the right claimed, but a proof that something proved may be consistent with the complainers' claim is not reasonable evidence of the affirmation which the person asserting the right is bound to establish. The history, nature, and surroundings of the spot in dispute ought to be regarded in respect of this head of inquiry. I think the conclusion is adverse to the complainant's claim. The ground in dispute is a narrow strip along the side of a river, and abutting on a dam, varying in width at different times, and subject to such variations as must have made it incapable of either pleasant or profitable occupation from time to time—certainly for the necessary period of forty years never treated by the town authorities as anything but a derelict piece of land, some parts of it relinquished to dirty uses, and some parts appropriated for payment to uses inconsistent with the general user for recreation. In so far as it was made profitable to the town authorities the public of Haddington were prevented from having any power of using it for any purpose whatever—the whole matter presents an absolutely absurd hypothesis when recreation is talked of as being proved by school boys playing on it. Then the user suggested was for bleaching or washing, but payments made to the town in respect of the user were not consistent with, or at all events not evidence of, a user by the public such as the complainant was bound to make out.

The argument upon this part of the case assumed this form. There have been cases where there has been proof of interruption to the public user as great as was created here by the action of the public authorities in receiving payment for lime-stances and washing, thereby excluding the public from parts of the place in dispute, and yet the Courts have held that the public character of the ground may consist with such interruption. I think the argument overstates the effect of any decision cited to us, but even if not overstated it proves nothing, since in the cases cited it was proved or admitted that the public right was assumed to exist, and the question was whether the alleged interruptions were lawful or could have existed together with a public user. Here, however, the question is the existence of the public right at all. I do not at all disagree from what is said by Lord Adam, when he says that "it is not necessary to prove that the ground has been used for any particular purpose, such as the bleaching of clothes or for any particular form of recreation such as golf or football. All acts of the inhabitants showing that they had the free use and enjoyment of the ground are relevant to support the complainant's case." But, to use his Lordship's words, they must be such uses as do show that they had the free use and enjoyment of the ground, and that is what in this case they do not show.

The history of this case and the form in which the litigation began is not without its importance. The idea that this

spot could be treated as public ground dedicated to public user and recreation seems to have taken its rise from an observation of Lord Stormonth Darling to the effect that if the proceedings before him had alleged that there was an interference with a public park or the like, the complainer might have had a right to sue, but he alleged nothing of the kind, but simply that it belonged in property to the burgh. Thereupon the question now in debate was raised. I cannot think that if anyone had thought it was a place for recreation or public use the question would not have been raised at first.

In this view I cannot think that due weight has been given to the history of the piece of ground in question as disclosed in the minutes of the burgh and in relation to the complaints of the people on the east side of what was causing the flooding of their premises, nor to the proof of what had been the levels discovered when the works were undertaken, and to the minutes also in relation to the bowling-green and to the correspondence as to the baths and wash-houses, and I think I see why. The whole question was mixed up with the issue as to the proprietary rights of the burgh in such a manner that the issue as to public use and enjoyment seems to have dropped out of sight.

If the question now before your Lordships had been kept exclusively in view as it has been before us I think it must have been observed how slender was the evidence of any public enjoyment, and the user such as it was did not reach forty years at all.

I do not think it necessary to go through the evidence in detail. I answer the question of fact by saying that the complainer has to my mind wholly failed to make out the public user for forty years, and I move that the judgment be reversed.

**LORD SHAND**—I am also of opinion that this appeal should be sustained, and the action dismissed with costs.

It is with great reluctance that I think, as your Lordships do, that an appeal should be sustained against concurrent judgments by the Lord Ordinary and the Division of the Court on a question which is entirely a question of fact.

The Lord Advocate for the respondent, as might be expected, pressed strongly on the House that the judgment under appeal should be affirmed, because the case, which turns on fact, has been decided by the Lord Ordinary, who saw the witnesses and himself heard their evidence, and his judgment has been sustained by the unanimous opinions of the learned Judges of the Division on appeal. No one is disposed to give greater importance to such circumstances than I am, but the very special facts of the case, as proved, to which I have given the utmost attention, seem to me clearly to show (1) a complete failure on the part of the complainer to establish the alleged immemorial possession for forty years on which the case depends, and (2) that important facts in the evidence as to

the character of the alleged public uses have been overlooked or disregarded in the matters to which I shall immediately refer, and that these uses are quite insufficient to establish the rights claimed, or any of them, to which effect has been given by the judgments complained of.

I have not thought it necessary to deal with the argument whether the title to the ground in question in the magistrates is such as to support the view that they held the ground for dedication to public purposes of amusement or use by the inhabitants only, because I think there is really no evidence to support that view. And on that point I shall only say I adopt the judgment about to be delivered by my noble and learned friend Lord Robertson.

The real issue in the case has been, whether the ground in question has from time immemorial, that is, for the period of forty years from the month of July 1858, been dedicated or appropriated by the magistrates of the burgh to the use of the burgesses and inhabitants for the purposes of recreation and amusement and the bleaching and drying of clothes? If it has been proved to have been so used the result would be that the burgesses are entitled, in a question with the magistrates, to have these uses continued as a matter of right.

Unfortunately, instead of having the proof taken continuously, or nearly so, at one time, it was extended over a long and broken period, beginning on May 16th and resumed November 7th, 1900, and again resumed in March and May 1901, at different times, a circumstance which made it difficult to deal with in forming a judgment on its merits.

The first important fact to which I think due weight has not been given is the nature of the ground in question and its situation, which renders the case one of a very peculiar and special nature. The ground is extremely small in extent, consisting of a strip of a few yards in length and breadth of vacant ground on the edge of the river, and lying opposite to an enclosed bowling-green, which has been always occupied by an association or club.

The small extent and position of the ground suggests that it was more likely to be waste and neglected than to be suitable or useful as a subject for special appropriation to the public for purposes of amusement or in the bleaching or drying of clothes, and its character, at least after 1866, was what I should describe as a waste and derelict small patch of vacant land which has to some extent been recovered from the channel of the river, and was originally sand and gravel.

Again, this ground was occupied during several of the years prior to 1866 which are required to make up immemorial possession at the commencement of the alleged period, in a manner which is inconsistent with the notion of the appropriation or dedication suggested. The burgh from 1857 to 1866 let the ground in return for rent to persons engaged in making lime, for stances to be used for that purpose.

The return from four or five different tenants amounted annually to £4 or £5 for these stances, let from £2 to 10s. each stance, and thus for eight years of the period necessary to establish time immemorial the ground was occupied by this inconsistent use. It is true that there were some very small patches left open on the river side, but these could scarcely afford grounds for either amusement or use of bleaching in so far as employed in this way. The use of these patches, so trifling in character, was really a casual use of neglected or waste ground, which neither the magistrates nor anyone else could notice or would have taken any interest to put a stop to.

Again, in regard to the use of the ground for the purpose of games and amusements the lime stances were inconsistent with this, and such a use as occurred was not of a nature sufficient to create a right. It was merely such use by boys in the neighbourhood of their schools, as boys will take on any vacant place to which they can have convenient access, and was entirely restricted so long as the stances existed.

With the removal of these in 1866 there was some further use of the same kind for playing and for walking exercise, but nothing occurred of such a use as systematic golf and cricket, or games of that class, and no such constant and persistent uses as to indicate appropriation where that has been held to have taken place in previous cases.

In regard to the drying and bleaching of clothes, even at the time after the stances were removed, the use of the ground seems to have been made to much the greater extent after the erection of the wash-houses by the persons who paid and used for that accommodation. Any use beyond that was trifling in kind, and was not, I think, taken or thought of as a matter of right, or as given or allowed by the burgh as an appropriation to the public.

In these circumstances I am of opinion that the complainant has failed to prove (1) possession from time immemorial, and (2) having regard to the position and nature of the piece of ground in question, that the uses which took place are to be regarded as having taken place on ground waste and neglected, and in that sense derelict in character, and not as uses of a right to ground dedicated or appropriated to the public for any of the purposes alleged by the complainant.

LORD DAVEY—The issue in this case is whether a piece of ground, not exceeding an acre in extent, situate on the west bank of the river Tyne, and extending from a point a few yards above Nungate Bridge in the burgh of Haddington to a point some yards below the bridge, has from time immemorial been reserved and appropriated to the use and enjoyment of the burgesses and inhabitants of the burgh. This is a question of fact, and the burden of proof was, in the first instance, on the complainant, the present respondent. It is agreed that, according to the practice of

the Scottish Courts, at least forty years user by the public must be proved in order to establish a claim of right by immemorial user. It is not a question of prescription, for there is no dominant tenement, but by analogy (I presume) to the law of prescription, the period of forty years has been adopted as the minimum of proof in such a case. I think the evidence required to establish a case of immemorial user must be of the same character and as strong as would be required in a case of prescription. It must show that the right claimed has been enjoyed *nec vi nec clam nec precario*.

Before I address myself to a consideration of the evidence in the case before your Lordships, I desire to make one observation of a general character. It was pressed upon your Lordships by the learned counsel for the respondent that this House would not disturb the concurrent findings on a question of fact by two Courts below. And reference was made to what was said by noble and learned Lords in the case of *Gray v. Turnbull* (L.R., 2 Sc. Ap. 53), the case of the "*P. Caland*" (1893, A.C. 207), and *MacIntyre Bros. v. Gavin* in the same volume, p. 275. But when these observations are carefully read, it will be found that they do not lay down any rule of practice (such as is followed by the Judicial Committee in Indian appeals at any rate), that this House will not entertain an appeal on a question of fact where there have been concurrent findings in the Courts below. In the case of the "*P. Caland*," for example, Lord Herschell is reported as saying:—"Now, I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding in fact in which both the Courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the Courts below. I can lay hold of nothing as turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the Courts below that this House would be justified in reversing the judgment appealed from."

I do not disagree with what was thus stated, if it be regarded merely as a guide to the judgment of the tribunal and not as a rule of law or practice. In all cases your Lordships should and would pay the greatest respect to the concurrent findings on a question of fact of two courts. When the question depends on the credibility of witnesses the opinion of the Judge who heard the evidence would in most cases be conclusive. In every case the appellant assumes the burden of showing that the judgment

appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decision of the Courts below. Some noble and learned Lords have lamented that an appeal lies to this House on questions of fact, but so long as that is the law I think that this House cannot decline the duty of forming and expressing its own judgment after taking into account all the considerations to which I have referred.

In the present case I have the misfortune to differ from the opinion of both the Lord Ordinary and the Inner House, and I believe that all your Lordships have come to the same conclusion. I think that the learned Judges did not give sufficient weight to some circumstances which in my opinion are of material import, and attached too much weight to evidence of user which seems to me of a very precarious description. I assume that all the witnesses intended to speak the truth, and believed themselves to be doing so, but some allowance must be made for a natural exaggeration and lapse of memory as to events which happened more than forty years ago.

I think that the fair result of the evidence is that the piece of land in dispute has, to some extent at any rate, been formed by accretion to the river bank during the last century, and that water formerly flowed through the western arch of Nungate Bridge more continuously and in greater volume than it did before the alteration which is complained of in this action. That this is so is demonstrable as regards the piece of land adjoining on the north to and lower down the river than the piece of ground in dispute, because it was found in the course of the appellants' recent operations that the western end of the weir for a considerable distance was covered up in soil which had formed over it. And the configuration of the ground shown on the map and model leads to the inference that a large portion of what was until the recent alterations dry land to the south of the weir must have been formed in the same manner and at the same time. This conclusion is to some extent confirmed by the two old maps of 1819 and 1820, though they cannot be depended on for exact accuracy of scale, and by the petition or representation made by the inhabitants of Nungate in 1831 complaining of their houses being flooded by what they described as the "encroachments" or "embankments" on the opposite side of the river, which they said were increasing. The evidence of Kellacher and other witnesses as to the building of the sewage tank to the south of Nungate Bridge about thirty or forty years ago supports the same conclusion as regards that portion of the land in dispute. The inference which I draw from the evidence is that the piece of land in dispute was formerly at

most a narrow strip on the bank of the river, and of very little (if any) practical importance.

I now turn to the history of this piece or slip of land. It appears that in the year 1749 a lease of the bowling-green was made by the Town Council for a term of 114 years. The subject demised is "All and hail that piece of waste ground belonging to the said community, and now made into a bowling-green by Robert Thomson," and it is described as bounded by the bridge on the south, by the water of Tyne on the east, and by the Clarty Burn on the north. It follows that either the land in dispute north of the bridge was not in existence at that date, in which case it is a subsequent accretion to the demised subjects, or if and so far as it was in existence as dry land it was comprised in the tack of 1749. It does not appear at what date the land in dispute first became or was treated as a separate subject outside the lease of the bowling-green, probably about 1822, when the east wall of the bowling-green is said to have been built. The lease of the bowling-green has been renewed, and it has been and is now in the occupation of private persons. The piece of ground to the east of the present bowling-green was let to and occupied by persons for the purpose of lime stances from at least 1857 until the year 1866, and the Town Council received rent for it. It was then ordered by the Town Council to be turfed and put into proper order. It is quite true that when there is independent evidence of immemorial user by the public, an encroachment by the Town Council on the public right will not be a defence to an assertion of such right. But when the question is as to the sufficiency of the proof to sustain the right, it appears to me to be a fact of capital importance that the Town Council has without objection for a long period commencing more than forty years ago, and extending to a time within forty years before the commencement of the action, dealt with the land in a manner inconsistent with the right claimed.

The proof of public user which is relied on in substance consists of evidence of school boys playing on the ground and of bleaching clothes. I have read the evidence very carefully, and I do not propose to discuss it at any length. There is only very slight evidence of the boys playing any definite games on the ground, and the evidence appears to me to show nothing more than that boys used to run over and amuse themselves—lark over the ground as boys will in any vacant space. And this, it must be observed, went on while the land was let for lime stances. It appears to me quite a misnomer to call this strip of ground the town playground as the Lord Advocate suggested. The only witness who speaks to bleaching clothes on the ground more than forty years ago is, I think, Peter Taylor, who speaks of it only in general terms. The town bleaching-ground was in fields higher up the river called the East and West Haughs, and the piece of ground in dispute had only rare tufts of grass on it, and was not suited for

bleaching. After the washhouse was built and the piece of ground had been turfed in 1866 poles were put up and it was then used by women using the washhouse for bleaching. Altogether the user proved earlier than 1858 appears to me of a too casual and precarious character to prove a dedication to public uses.

But then it was said that this piece of land was part of a larger tract described in a deed of 1765 as "the commony of the said burgh called the Sands." What is now called the Sands is a triangular piece of vacant ground to the west of the bowling-green and separated from it by the road. The bowling-green itself is not described as part of the Sands in the tack of 1749. And there is no evidence that the piece of ground in dispute was ever called the Sands. What is relied on is a description of what is now called Elm House in the deed of 1765 as bounded by "the Mylds Burn and the commony of the said burgh called the Sands and the Skinners Knowe, and the tenement of the heirs of Mr James Lauder on the south and north." If the map is looked at it will be found that the southern boundary of the Elm House property is of an irregular line, and part of it abuts on the road and the present Sands, and at the south-western corner the true southern boundary of the other part is the burn.

The description does not prove that either the bowling-green or the ground between the bowling-green and the river was ever called the Sands. The "Sands" probably in former times included a larger area than the piece of ground which is now called by that name, but in my opinion the suggestion made by Lord Adam and adopted by the Lord Advocate that the ground in dispute was part of the Sands is based on nothing more than conjecture.

I am of opinion that the respondent has failed to sustain the issue tendered by him, and I agree that the appeal should be allowed.

**LORD ROBERTSON**—I am clearly of opinion that the appeal should be allowed.

The question which alone is before the House was a good deal confused in the Court of Session by a collateral issue, viz., the now abandoned claim of property, and also by a large amount of incompetent evidence, taken down without challenge or check, in response to leading questions and invitations to witnesses to express their opinions on points in the case. Accordingly I am the less surprised that amid such distractions the attention of the Court has not been applied with concentration to some questions in the case which are crucial.

What I regard as the initial error in the judgment of the First Division lies in its accepting without hesitation, and certainly without discussion, the respondent's theory that the ground in dispute was part of an ancient common ground called the commony of Sands. As their Lordships have said that this is clearly proved, and as I know the habitual accuracy of the learned Judge who delivered the judgment, I have

carefully searched for the evidence of this statement, and I can only say that I have discovered none. The ground in dispute is in no title or record ever called or spoken of as part of the Sands, nor does any document yield or suggest the inference that it was so in fact. Even the parcel of ground next to that in dispute, viz., the bowling green, is not called in any title or proved to have been part of the Sands. An existing piece of open ground is still called the Sands, and is so marked on the Ordnance Survey plan, and it is sometimes referred to in the evidence for the respondent as the Sands in contradistinction to the ground in dispute. It is true that a portion of another piece of ground, Lady Kitty's Garden, seems from the title to have been part of the Sands, and doubtless it is true that in Haddington, as in other burghs, alienations have been made of such common ground. But it would be quite illegitimate to accept without evidence the independent proposition that this particular ground, not contiguous either to the existing Sands or to Lady Kitty's Garden, was also a part of the Sands.

The importance of this question of title and its influence on the Court's consideration of the rest of the case are apparent. If you start with the assumption that this is part of an ancient recreation ground, you will rightly be less exacting about evidence that this original state of things has continued. You will also account for commercial use and exclusive private rights by calling them encroachments. But if there be no such basis, then it is incumbent on the pursuer of the issue to prove immemorial use and enjoyment by the inhabitants. Applying this to the present case, it was necessary for the respondent to prove that for forty years before he raised his action in 1898 this ground had been, as he averred, reserved and appropriated to the use and enjoyment of the inhabitants for the purposes specified on record. Forty years is the necessary period—not that this is a question of prescription, but because a state of facts must exist continuously for at least forty years before the inference can be drawn of immemorial use. Now, even on a very general survey of the facts, the year 1866, which is only thirty-two years before 1898, stands out as distinguishing sharply the period before it from the period after it, for it was in that year that for the first time the town council laid out the ground in grass. Prior to 1866 there was no semblance of any act of dedication to popular uses on the part of the authorities, and on the contrary a considerable part of the ground was let for exclusive use for lime stances. Yet this crucial date is not adverted to in the judgment of the First Division. In short, the case was not treated as one where there was any difficulty about the period of possession or any need for distinguishing between the period before and the period after 1866, in order to make out the requisite period of forty years. In short, the learned Judges, starting with the theory of an ancient title, have not subjected the case to the test of working

backwards from the date of the action.

The same assumption as to the history of this ground as part of the Sands has led to their Lordships giving but a very scanty description of what seems really a very important feature in the case, the physical nature of the ground. On a broad view of the situation, and also when the evidence has been examined, this ground is simply part of the flood channel of the Tyne. It lies *vis-à-vis* to the westmost arch of Nun-gate Bridge. Through that arch the river flowed in times of flood, although the arch and the ground in question were in the usual state of things dry. What the place was like before 1866 may be gathered from what is said by the respondent's witness Peffers—"there was a tuft of grass here and there,"—but as to the substance of the ground we are left in no doubt, for this same witness carried out the operations in 1866, and "the stuff that came out was sand and gravel." And what was found by the persons who carried out the operations now complained of substantially confirms these statements.

Again, as regards the conformation of the ground, we are told (also by a witness for the respondent) that it was subject to change from the action of the river. "Sometimes it was highest at the wall, sloping gradually down towards the river, and sometimes it was not. The water sometimes made a difference on it. I have seen it sometimes exactly level, and I have seen it sloped a little way." When those physical facts are borne in mind it is the more easy to understand the title of the bowling-green (which unquestionably has on its immediate east the ground in question) when the title bluntly asserts that its eastern boundary is "the water of Tyne." Those facts are also entirely in harmony with the representations made in the earlier half of last century, and considered by the town council, that the main part of the Tyne used, even in the beginning of last century, to flow more to the west of the river, and that the western part of the channel had since then been allowed to get filled up.

Related to this last is the question of the size of the area available for popular uses before 1866. On this it is not easy, nor is it necessary, to be precise. But, in any possible view, the space available was of the most exiguous. A substantial part of the ground was occupied by lime stances, and the space intervening between these and the river was, as already seen, subject to fluctuation. The witness who seems to have been most constantly there of all examined was Charles Cumming, who worked from 1851 to 1854 at the lime stances, and he says that people could hardly get their carts driven past the lime stances unless they went into the bed of the river.

There is clear evidence that the ground in addition to its natural disabilities was uncared for and dirty, not so dirty as the ground below the Clarty Burn, but dirty.

Out of these unpromising materials the respondent has dressed up a case, in studied

imitation of *Grahame v. The Magistrates of Kirkcaldy* (June 19, 1879, 6 R. 1066, 16 S.L.R. 676), and the rest of that well-known chapter of law. I do not intend to examine its shortcomings in much detail, because I have already pointed out the vital difference I have with the Court in the initial stages of the case. Once the case is unmasked, once the ground is seen to be historically not part of an old common recreation ground but part of the flood channel of the river, the burden of proof is duly ascertained. Has the respondent proved possession from 1858 downwards? The fatal answer is, that whatever may be said of the period beginning in 1866 with the laying out of the ground in grass, he has, in substance, no case at all for the eight years from 1858 to 1866, which may be called the period of the lime stances.

I have the less hesitation in saying this, because we have nothing to show that the Court of Session would think otherwise if they had specifically examined the evidence about those eight years.

What the respondent has is a good deal of evidence of boys playing—the games being running games—a very little quoit playing, and a certain amount of bleaching. Of more general forms of recreation, of pleasure walking, there is virtually none, and the conditions do not make this surprising.

Now, of schoolboys, one of the respondent's own witnesses (Stevenson) has compendiously observed, "boys go anywhere;" they seem to have frequented the lime stances as well as the place clear of lime stances, and the wynds near the school, and the ground on the other side of the river—the "recognised" playground—(Stevenson) being all the while not any of these places but the Sands, *i.e.*, the triangular piece of ground beside the school.

As to bleaching, the respondent's witness Davie definitely confines the bleaching to the period after 1866—"They could not do it when the lime stances were there." "I have seen bleaching on the ground between the washing-house and the river at different periods off and on during the last 30 years but not prior to that." The just inference to be drawn from this testimony is not that those witnesses speak untruly who say that they did bleach or did see bleaching before 1866, but that this ground was not habitually used for that purpose. In the same relation I may observe that the value of what the Lord Ordinary calls negative evidence must not be underrated. There is a substantial body of evidence from Haddington townsmen of credit, knowing this ground perfectly well, and its size, nature, and uses, during the period in question, and they scout the idea of it being in fact a place of recreation and bleaching.

The evidence has to be considered as applied to vacant ground, part of the town's property but with no historical or overt dedication to popular uses, and the evidence of use during the forty years from 1858 being all that there is to prove the rights now asserted. In my view the evidence for the respondent of itself fails

to make out such a claim, and when the whole evidence is considered the contention of the appellants is satisfactorily established. For a case of this sort it will not do to show merely that a piece of town land was unused for commercial purposes and was resorted to by the classes who frequent vacant spaces. In a genuine case of the class into which this case is sought to be intruded there is sure to be, or to have been, some congruity between the nature of the ground and those purposes of which recreation is the leading one, and something to show that it was not merely the worthlessness of the subject that accounts for the abstention of the authorities from disposing of it for the pecuniary advantage of the town. Otherwise the ideas of reservation and appropriation, expressed in the respondent's averment on which this question turns, never arise. In my view of the facts those ideas are entirely excluded from the present case.

LORD LINDLEY (read by LORD DAVEY)—I also have carefully examined the evidence in order to see if it justified the inference that there had been forty years' user as of right of the piece of land in question by the public as alleged by the respondent. I have come to the conclusion that the evidence falls far short of what is necessary to establish any such user. I entirely concur in thinking that there is no law or settled practice of this House to prevent it from differing even from two concurrent findings of fact if on a careful consideration of the evidence this House comes to the conclusion that those findings are wrong. In this particular case the evidence relating to the structure of the bridge, the ice-worn appearance of the third arch, and the natural soil near it and beneath it, all convince me that in early times that arch was over the bed of the river, although it may have been more or less dry in the summer when the water was low. I infer from the evidence that by the deposit of sand and gravel and some softer soil brought down by the river, its bed near and under the arch gradually rose and became more and more dry and firm enough to bear brick rubbish and other material carted upon it. The use made of the piece of land in question, when it became of any use at all, appears to me to be quite inconsistent with any dedication of it to the public for recreative purposes as contended by the respondent. It was worth nobody's while to object to such use as was made of it by boys and persons who dried clothes on it when they could, but any use of small portions of it for such purposes for forty years as of right is not only not proved but is in my opinion clearly disproved by the clear and frequent acts of ownership of the rest of it which are placed beyond dispute.

The appeal ought in my opinion to be allowed with costs in the usual way.

Interlocutots appealed from reversed, and appeal allowed with costs in the House of Lords and in the Courts below.

Counsel for the Complainer and Respondent—Lord Advocate (Dickson, K.C.)—Wilson, K.C.—Lawrie. Agents—A. & W. Beveridge, Westminster—Patrick & James, S.S.C., Edinburgh.

Counsel for the Respondents, Reclaimers, and Appellants—Clyde, K.C.—Constable. Agents—John Kennedy, W.S., Westminster—T. S. Paterson, W.S., Edinburgh.

## COURT OF SESSION.

Friday, December 11.

### SECOND DIVISION.

[Sheriff Court at Glasgow.]

OWNERS OF "LADY PALMER" v.  
OTTMANN.

*Ship—Charter-Party—Demurrage—Lay-Days—Length of "Working Day."*

A charter-party provided that the ship was to be loaded in nine "working days" and to be discharged as customary per like working day. It further provided that at the port of discharge the steamer should work day and night if required to do so.

Held that in calculating the time at which demurrage should begin to run, the working day at the port of loading must be taken as consisting not of 24 hours but of 12 hours.

*Ship—Charter-Party—Demurrage—Exceptions—Detention by Railways—Scarcity of Waggons—Discharge of Cargo.*

A charter-party provided that the charterer was "not to be responsible for detention by railways, scarcity of waggons . . . or other causes beyond his control."

Upon the arrival of the ship at the port of discharge the charterers instructed the Caledonian Railway Company, who promised to forward the cargo with all possible despatch to the consignees, but notwithstanding this promise they did not provide any waggons until thirteen days after the ship was berthed. The cause of this delay was (1) the congestion of the harbour, and (2) the fact that the Caledonian Railway Company thought that the consignees were unduly detaining waggons at their works. The charterers continued to press the Caledonian Company, and received several repeated promises from them. Two days after the ship was berthed the charterer applied for waggons for part of the cargo to the North British Railway Company and these were supplied, but on his applying five days later for more waggons they were unable to undertake the further order. The discharge was ultimately completed by the Caledonian Company but not until 16 days after the ship was berthed.