Hotel, of which the railway company have been the landlords for twenty years, is objected to somewhat late in the day; but perhaps if the retaining it was entirely *ultra vires* of the railway company the delay might not be a bar to challenge. It is suggested by the railway company that the pursuer acquired his stock in the company recently, just for the purpose of enabling him to make this challenge. This point is, however, of no consequence. The pursuer being a shareholder is entitled to institute such an action, and his motive for buying stock of the company and challenging their conduct cannot be inquired into—See *per* Kindersley, V.-C., in the case of *The Attorney-General* v. *The Great Northern Railway Company*, 29 L.J., Chan. 794. A railway company who are allowed to erect refreshment-rooms for the travellers in passing trains, and to provide sleeping compartments for them when travelling during night, may be permitted to provide accommodation for travellers when they arrive at their journey's end, by affording them the conveniences and comforts of a station hotel. Everyone who has occasion to travel much, appreciates the convenience of a hotel into which he can enter the moment he leaves the train, and without a cab journey of a mile or two in the dark. At all the great railway stations in England there is a hotel at the station; but whether the railway companies have erected these under statutory powers or not the Lord Ordinary has no information. If this case required the affirmance of the proposition that the railway company might build a hotel at their station, and let it out to a tenant, the Lord Ordinary is prepared to affirm it. But on considering the Act of Parliament passed on 22d July 1885 he is of opinion that the general proposition does not require to be here decided. The company have got statutory authority for what they have done—for they are allowed by the 35th section of that Act to 'alter, enlarge, remodel, and improve their hotel and other property fronting Princes Street, in the city of Edinburgh, and raise the back portion thereof to the same height as the front portion, so as to form an uniform block.' Now, it is impossible to put any other meaning than one upon these words. If the company can improve and enlarge their hotel, is there not here the most unmistakeable recognition of their right to hold it and to let it; and therefore on this ground the Lord Ordinary has assoilzied from the action."

Counsel for Pursuer—Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for Defenders—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, December 8.

SECOND DIVISION.

[Lord Fraser, Ordinary.

YOUNG *v.* THE NORTH BRITISH RAILWAY COMPANY AND THE LORD ADVOCATE.

Property — Foreshore — Title — Possession — Prescription.

A proprietor whose title (dating from 1804) flowed from a subject-superior, and described his lands as "bounded by the sea," sought to establish prescriptive possession of the foreshore in support of his title. He proved that his predecessor had built a retaining-wall on the foreshore, and so gained ground from the sea, and that he and his tenants had, for more than the prescriptive period, exercised the exclusive right of carting sea-ware from the shore as manure. It was proved that others had carried off small quantities of the sea-ware in creels and barrows, and that stones had been taken by the public from the shore to make a breakwater at a neighbouring harbour, and for like purposes. *Held* (*rev.* judgment of Lord Fraser) that he had made out prescriptive possession.

Observed that the acts relied on by the defenders, being not done in respect of an adverse title, but being merely acts of intrusion, or done by tolerance, could not constitute interruption of the prescriptive possession.

In course of exercising the powers conferred upon them by several Acts of Parliament entitled "The Forth Bridge Railway Acts," by the construction of a railway from the northern termination of the Forth Bridge to Burntisland, the North British Railway Company in October 1884 obtained from the Board of Trade, acting under the Crown Lands Act 1866, and as authorised by a warrant of the Commissioners of Treasury, a feu-disposition of the Crown's rights in, to, and over certain pieces of land, being part of the foreshore of the Firth of Forth below high-water mark, situate opposite, *inter alia*, the lands of Colinswell Park belonging to Robert William Young. The projected railway was to pass along the shore *ex adverso* of the estate of Colinswell.

In February 1885 Robert William Young of Colinswell raised the present action against the North British Railway Company, and also against the Lord Advocate, as acting, under 20 and 21 Vict. c. 44, on behalf of the Crown, and on behalf of the Commissioners of Woods, Forests, and Land Revenues, and also as representing the Board of Trade, for declarator that the foreshore *ex adverso* of his lands pertained heritably in property and belonged exclusively to him, subject always to the rights of navigation and other rights which the public might have therein, and to have the railway company interdicted from entering upon the foreshore, and from making or constructing thereon any railway, railway viaduct, or works of the nature contemplated by the Forth Bridge Acts, or other works of any description whatever.

The pursuer produced a feu-charter, dated in 1804, by William Wemyss of Cuttlehill in favour of William Young (the pursuer's ancestor), of, *inter alia*, the lands of Colinswell Park, described as bounded "by the sea on the south, the lands of Newbigging on the west, the said William Wemyss' land of Gedsmiln on the east, and the high-road leading betwixt Aberdour and Burntisland on the north parts;" "to be holden by the said William Young and his foresaids of and under the said William Wemyss, his heirs and successors, as immediate superiors of the same in feu-farm," &c.

The pursuer averred that from time im-

memorial, or at least for a period exceeding forty years, he and his predecessors had been in exclusive possession of the lands of Colinswell, and of the foreshore *ex adverso* thereof, and had continuously and without challenge dealt with it as their property, and from time immemorial, or for upwards of forty years, exercised their proprietory rights by acts of possession of every kind of which the subject was capable; that amongst these acts had been taking gravel, sand, and stones from the shore, and also wrack and ware, and also preventing others doing so; that they had also occupied part of the foreshore by the erection of a sea-wall thereon, and the formation of a carriage-road; and that their possession had been exclusive of any possession on the part of others.

The defenders denied these averments of possession. It was admitted that the railway company relied for their right on the disposition by the Board of Trade, and had given no notice to treat for the land with the pursuer.

The pursuer pleaded—"(1) In virtue of his title to the lands described in the summons, and of his exclusive possession thereof for at least a period exceeding forty years, the pursuer is entitled to decree of declarator as concluded for. (2) The said feu-disposition having been granted *a non habente potestatem*, and the defenders the North British Railway Company having no authority to enter upon the said lands, the pursuer is entitled to interdict as craved."

The railway company pleaded—"(1) The defenders being validly invested as disponees of the Crown in the foreshore in question, the pursuer has no title to sue. (2) The pursuer having no right or title to the foreshore, is not entitled to prevail in this action. (3) The statements of the pursuer as to use and possession being unfounded in fact, the defenders are entitled to absolvitor, with expenses."

Similar defences were lodged for the Lord Advocate, and the case was watched by counsel on his behalf.

A proof was allowed and taken.

The following was the substance of the pursuer's evidence—(1) Building of a sea-wall on the foreshore in 1827. Witnesses who remembered the sea-wall being built by the pursuer's father Robert Young in 1827 deponed that it was built below high-water mark, and that before it was built the sea flowed into what was now a park, and that ground was, by the building of the sea-wall, recovered from the sea and taken into the park.

Mr Cunningham, C.E., deponed that from plans and sections which he had made of the ground where the wall was built it appeared that the line of high-water mark of ordinary spring tides would but for the wall extend beyond the north side of the road within the wall about 15 or 20 yards at one point, and about 10 or 12 at another. He had caused pits to be dug inside the wall to a depth of 6 feet, and found the soil at the bottom consisted of forced sand, and that water collected in them to a depth of 1 or 2 feet, and that it rose and fell with the tide. From these facts he had no doubt that the sea before the wall was built went over the place where the pits were dug, and that it was now kept back by the wall. This was corroborated by other skilled evidence.

The defenders sought to show that the wall in question had been built on the pursuer's ground above high-water mark.

It was proved that the carriage-road inside the wall was made in 1849. It was a private road, and was made at the expense of pursuer's father.

(2) Taking sea-ware — Evidence was given by several witnesses to the effect that the pursuer's father, who during his lifetime farmed the whole land himself, constantly took the sea-ware for manure, and that no one else took any but his own people with his own carts. The only access to that part of the shore was by the private road or through the fields, and no carts other than those belonging to Colinswell were allowed to pass. The pursuer's tenants in Colinswell and in Gedsmiln, which his predecessor also acquired, proved that the sea-ware was regularly taken by them for use in their fields, and that they counted this a valuable right, and allowed about £1 an acre for it in offering to take the ground. Nobody else had ever taken or had claimed to take sea-ware from that shore in their time (13 years before the action). They had sometimes taken thirty or forty cartloads in a day.

All the witnesses agreed that the sea-ware obtained there did not grow on the shore, but was loose and brought in by the tide; that the supply depended upon the state of the weather; that there was more in winter than in summer, and most after stormy weather, and particularly after westerly gales.

Mr Young's people also took gravel from the shore, and his gardener used to take it to mend the carriage-road; it was too rough for the paths.

The defenders proved that on the occasion of the building of the breakwater at Burntisland, about twenty-seven years before the date of the action, the contractor sent men in boats along a great part of the foreshore of the Firth, inclusive of that *ex adverso* of Colinswell, to gather stones for building it, and that they did so, taking many boatloads from the Colinswell shore without being challenged. Clay was also taken on the same occasion to put into the harbour to make a soft bed for the ships. Stones were taken in the same way on a later occasion—about three years before the action—when docks and a new breakwater were made at Burntisland. It was also proved that members of the public had at various times taken away small quantities of ware in creels and barrows for their gardens, and considered it free to all to do so. Others had taken oysters (till they became extinct), partans, whelks, mussels, and other shell-fish and bait, and others had shot at seagulls and ducks along the shore without challenge.

The Lord Ordinary assoilzied the defenders.

"*Opinion.*—It is now settled that the owner of property with a boundary by the sea or by the seashore holding of the Crown has a right of property in the foreshore (subject to public rights of navigation, &c.) down to the ebb-mark of ordinary tides. It is also law that if a person is the owner of property that has a boundary by the sea, derived, however, not from the Crown but from a subject, he has a right of property in the foreshore down to the lowest ebb-mark, provided he has had exclusive possession for the prescriptive period. The inferior title is elevated by means of exclusive possession to the same force as if there had been a direct grant from the Crown of the foreshore.

"The pursuer in the present case is not a Crown vassal. His title is derived from Wemyss of Cuttlehill, and although his property is declared to be bounded by the sea on the south, the title so obtained from his author is ineffectual to confer upon him a right to the foreshore without proof of exclusive possession. Conscious of this state of things the pursuer has undertaken to prove such exclusive possession, and the proof having been taken, the only question is, whether it is sufficient for the purpose? The Lord Ordinary is of opinion that it is not. It is established by the proof that so far as regards the foreshore as now existing he has not had exclusive possession of it. In regard to every alleged act of possession it is shown that the public did the same things. He has gathered sea-ware on the seashore, and it is shown that the inhabitants of Burntisland exercised the same privilege. The pursuer had a tenant of his farm at Gedsmiln, and this farmer could take his carts away down to the shore, and did fill many carts with sea-ware, and use it as manure upon his farm. The people who had gardens in Burntisland had not the same facility of using a cart, but they used creels. If the owner of Colinswell once took gravel for his grounds, it is shown that the public of Burntisland digged holes in the foreshore opposite his lands and carried away clay. But the pursuer relies very strongly upon what he says was the source from which the stones for a sea-wall built upon the edge of his property were taken. He says that this sea-wall was constructed from stones gathered from the foreshore. But it is as clearly proved that the boulders lying upon the foreshore opposite Colinswell were carried away by the people of Burntisland in boats in the year 1860 in order to form the breakwater there, and the same thing was done three years ago for the purpose of repairing the breakwater. No one objected to this, and if the pursuer's predecessor did employ the stones found on the shore for the purpose of building his sea-wall as a barrier against the encroachments of the sea, he thereby did no more than what the persons who built the breakwater of Burntisland did. But the fact of building that sea-wall itself is founded upon as conclusive evidence of possession in the pursuer's favour. It was erected in 1827, and there is no witness adduced to give evidence now as to the condition of the foreshore at the time of its erection. It is said that the wall was built upon a portion of what was the foreshore, and some ingenious evidence was given by Mr Cunningham, civil engineer, to prove that this was the case. He dug two pits in the inside of the wall, and the water at high-tide percolated through the wall, and appeared in these pits—a circumstance which does not prove that the place where the pits were dug had originally constituted a part of the foreshore. If he had dug such pits in ground further back, which had never constituted a part of the foreshore, he would no doubt have found the water to have percolated there also. But let it be assumed that a portion of the foreshore had been enclosed within the sea-wall erected fifty-eight years ago by the pursuer's predecessor, that does not indicate exclusive possession of the whole foreshore now claimed, over which the pursuer never had exclusive possession, and over which the public had exercised rights of possession as fully as he ever did. If the Crown did not challenge his enclosure of a portion of the foreshore by a sea-wall, and has allowed him to appropriate the ground so enclosed, the result simply is that the Crown has lost its right to challenge the encroachment, but certainly not that it has lost its right to the portion of the foreshore not encroached upon, and in reference to which the present dispute has arisen. Therefore the result must be absolvitor to the defenders from the present action."

The pursuer reclaimed, and argued—The validity of his title as *ex facie* giving right to the foreshore being undisputed, the question was merely one of proof of prescriptive possession. This was established by the proof. The building of the sea-wall on, and of stones taken from, the foreshore, and its maintenance beyond the prescriptive period, and the exclusive taking of sea-ware for the same period—*Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309—were conclusive of continued and exclusive possession. This being so, the question was further narrowed to whether there had been adverse possession by the public on behalf of the Crown. On this the defenders' proof failed. It was not enough to show certain isolated acts by the public, which might be attributed to the tolerance of the owner, or to trespass by the public—*Buchanan and Geils* v. *Lord Advocate*, July 20, 1882, 9 R. 1218. It was necessary to show that the Crown had prevented the absolute use of the foreshore by the owner. Further, none of the acts proved to have been done by the public were sufficient to interfere with the patrimonial rights of the owner—*Buchanan and Geils*. Taking sand and shooting were not—*Buchanan and Geils*—nor was gathering whelks or other shell-fish—*Hall* v. *Whillis*, January 14, 1842, 14 D. 324. The taking of sea-ware was only an occasional act, and had been once at least challenged by the owner. The only act of adverse possession of any significance was the taking of stones for the breakwater. This was for a public object, and not having been shown to have been without the knowledge of the owner must be presumed to have been with his consent.

Replied for the railway company—Exclusive possession had not been established. The proof was not conclusive as to the position of the sea-wall, or of its having been built of stones from the foreshore. And the proof of taking of sea-ware was irrelevant, for in previous cases where this had been held of importance the ware taken had been ware which grew on the shore, and was a natural crop of the land, and not, as here, mere drift-ware which was not an accessory of the ground. The acts of adverse possession by the public were conclusive against the pursuers' prescription of possession; for even if the pursuer did take to himself a piece of the foreshore, he did not prevent the public taking other pieces in the form of stones, which was an adverse assertion equal to his, and destroyed his prescriptive possession of the foreshore, and was to be regarded as a *unum quid*. So also with the sea-ware. Further, his acts must be attributable to nothing else but an assertion of a right of possession. So long as he merely did the same acts as the public, he was no more than one of the public, and his acts were to be attributed to the tolerance of the Crown. This differed from those of the public merely quantitatively, not

qualitatively. They both took the same things, only he took a little more than any member of the public. He must show a specific difference of use, not merely one of degree, for *majus aut minus non variant speciem.* Further, the taking of ware might be attributed to the prescription of a wrack and ware title of servitude. The taking of the stones for the breakwater was a conclusive challenge of proprietary right.

At advising—

Lord Justice-Clerk—The North British Railway Company in the course of the construction of a line of railway from Burntisland to the neighbourhood of Queensferry propose to carry the line through part of the foreshore of the Firth of Forth lying between Burntisland and Aberdour, and opposite to the lands of Colinswell, belonging to the pursuer Mr Young. Mr Young brings this action for the purpose of preventing the railway company from carrying out their works without arrangement with him; and asks for declarator against the railway company, and the Lord Advocate as representing the Crown, to the effect that he is the proprietor of the part of the foreshore in question under a title granted in 1804, on which he and his predecessors have possessed without interruption beyond the years of prescription.

The Lord Ordinary allowed a proof, on considering which he has assoilzied the defenders.

I do not agree in the result at which the Lord Ordinary has arrived. He is of opinion that the pursuer has shown a sufficient title on which to prescribe a right to the foreshore adjacent to his property of Colinswell, but he thinks he has failed to prove prescriptive possession. In coming to this conclusion he mainly proceeds upon the ground that the uses to which the property has been put by the pursuer, and which constitute the possession on which he founds, are only such as members of the public have themselves enjoyed; and this, he is of opinion, is not such possession as would under the Act of 1617 give a prescriptive title.

I am of opinion with the Lord Ordinary that the pursuer has title to prescribe; I think, further, that the Lord Ordinary has underrated the force of the possession proved. I shall very shortly explain the reasons on which I arrive at the conclusion that the pursuer has made out his case.

The pursuer's ancestor, in whose right the present contention is maintained, obtained from Mr Wemyss of Cuttlehill, in November 1804, a disposition to a strip of ground along the margin of the Firth of Forth between Burntisland and Aberdour. The whole extent of the lands thus conveyed was not considerable; and the sea-frontage now in dispute amounts in lineal measurement to no more than ¾ of a mile. The titles of Wemyss of Cuttlehill, who was the granter of the disposition, have not been recovered; but the terms in which the land itself is disponed to Young make it quite clear that in so far as the granter had power to do so, the foreshore which adjoined this strip of ground was intended to be and was conveyed to the disponee. It describes the boundary of the land in these terms—"Also All and whole that park or enclosure of land called Colinswell Park, consisting of 22 acres and 3 roods Scots measure, with the pertinents presently possessed by John Young, baker in Burntisland, bounded by the sea on the south, the lands of Newbigging on the north," and so on. There can be no doubt that if Wemyss of Cuttlehill had a right to the foreshore this was a valid conveyance of it. It is not necessary with the view of deciding the present case to enter on the controversy which has arisen in former cases as to whether the right to the foreshore is *inter regalia* or not. It has been held by distinguished authority that a disposition to the adjacent land, with a clause of parts and pertinents, followed by possession for forty years, will constitute an effectual title to the foreshore as against the Crown. But in this case, as I have indicated, there is no necessity for entering on that question. This is a disposition to the foreshore as far as the granter had power to give it. The only question is whether the granter had power to give it; and as the titles of his author are not recovered, it becomes necessary to inquire, with a view to the validity of the title as against the Crown, whether the foreshore has been possessed for the prescriptive period.

In the case of *Agnew*, in the 11th vol. of Macpherson, the question related to the effect of a barony title to lands adjoining the sea which did not contain any words specifying or indicating a grant of foreshore. Lord Neaves says—"I agree that the possession is not so much a means of acquiring the shore as a means of showing whether or not the shore is included by signification in the grant that is made. If the possession is such as to indicate that in granting these lands or this barony the shore was meant to go as much as the adjoining lands, that is an interpretation of the grant which ought to receive effect." And then he says—"I think it follows from that view that it does not necessarily require that it should be prescriptive possession. If the possession is such as in the circumstances shows that that was meant by the words used in the dispositive clause, this is sufficient to explain the grant as being a grant of shore as well as a grant of adjoining lands."

The question in this case arises rather differently. Here there is no doubt that the words of the grant did include the seashore; but it is objected by the Crown that it does not appear that the granter held these lands of the Crown by a similar title. It therefore becomes necessary for the grantee by proof of prescriptive possession to supply that defect; and the question we have to decide is whether the pursuer has succeeded in his proof.

This barren strip of ground along the shores of the Firth of Forth, covered at high-water, admitted of few and slender modes of patrimonial or profitable occupation or enjoyment. There were few uses to which the adjoining proprietor could put it, but I am of opinion that in so far as it was capable of being patrimonially used it was so used by the grantee under this disposition, and has been so used by his successor. There are various matters alluded to in the proof which I think immaterial. I thought that two of them alone had importance, and in the view I take of the proof one of them is by itself conclusive. It is said, in the first place, that in the year 1827 Mr Young enclosed with a retaining-wall a portion of the seashore, and in that way vindicated or asserted his right under the terms of his disposition. I am of opinion that in so far as such

an operation can be held to be the assertion of a right to possess the sea-shore it was of that character. I think the proof shows that the line of this retaining-wall was within the high-water mark, and considerably within it. On the other hand, I am not disposed to attach undue importance to the building of this retaining-wall, or the situation or line in which it is erected. It is built partly on the foreshore, within high-water mark, and it is true that this could only be legally done—if it could be done at all—by reason of a right to the foreshore. The act therefore became in a measure a permanent assertion of such a right. But the measurements are so inconsiderable, and the act itself would attract so little attention at the time, that had this stood alone I should not have been disposed to have thought it by itself sufficient for judgment. The important matter is the collection by Young and his tenants of the sea-ware brought in by the surf *ex adverso* of these lands. Now, it is proved beyond all question that the grantee of these lands, Mr Young and his successors, from the time at which he acquired the lands, or at least from a period beyond forty years ago, year by year collected the drift sea-ware washed in by the tide, and applied it to the profitable improvement of his lands. It is proved by the evidence of the tenants of Gedsmiln, an adjoining farm belonging to Mr Young, that the amount of benefit so derived to the land was equivalent to an addition of £1 an acre, and that it made a serious consideration in the settlement of the rent. The whole evidence of the pursuer on this subject is consistent, and I do not think there is any material doubt or dispute in regard to it. The fact remains, therefore, that a right which could only belong to him as the possessor of the seashore was used by him, year by year, for the purpose of increasing the value of his land, and did in point of fact add a very material increment to the worth of his property. In the opinion which I have formed I mainly proceed upon this fact, and the only remaining question is, whether that possession has been, in the words of the Act 1617, "continuous and without interruption" for the prescriptive period. I am of opinion that it has, and that in point of fact, on the evidence we have before us, and holding the unquestionable principle that such as the possession was forty years ago it must be held to have been from time immemorial, I conclude that this possession has been unbroken.

The Lord Ordinary has given, I think, undue weight to various acts of promiscuous or precarious possession by the public during the course of the running of the prescriptive period. It is said that various people in the neighbourhood took sea-ware as well as Mr Young. It is said that some of them dug for sand; that, in particular, on the occasion of the building of the breakwater at Burntisland, twenty-seven years ago, a very considerable quantity of stone was taken from the foreshore for the purpose of aiding in the building of the pier, and it is said that these acts are quite as strong and important as those upon which the pursuer founds. I think there is a fallacy underneath the whole of this view. Acts of possession by a man having a title to prescribe are in one category, but acts of intrusion or trespass by persons who have no title at all are totally different, both in legal nature and legal effect. These last can lead to no result, for they must either be trespass or intrusion, or they must be acts which are tolerated by the person entitled to prevent them. It is quite plain that the members of the public who are said to have taken seaware, or were allowed to take it, or the contractors for the building of the pier at Burntisland, who were allowed to take stones from the frontage, had no title whatever on which they were entitled to possess, and the question really is, whether their doing so, and being allowed to do so, constituted an interruption to the current possession. I think it is unreasonable to give it any such effect, and I entirely concur in the view which Lord Mure announced in the case of *Geils*, that these things done without title by the public cannot possibly militate against a direct assertion of a patrimonial right founded on a title *ex facie* sufficient, and the enjoyment of it for the period of prescription. They do not constitute an interruption of the prescriptive possession because they are done without title, and I think it right to say in regard to some views which were thrown out from the bar in the course of the debate, that it is an entire mistake to imagine that a person who has a title on which he may prescribe a right to parts and pertinents, and is in progress of doing so, is at the mercy of every trespasser or intruder, and is powerless to protect his possession until forty years are expired. The law is notoriously otherwise, even against a competing title. Lord Stair says —"Parts and pertinents in possessions are sustained by the present peaceable possession for some time—for seven years' peaceable possession will retain the right of the whole until reduction." This even where the disturber alleges an adverse title. But even without the benefit of a possessory judgment, a title *prima facie* effectual, and only subject to challenge by the Crown as flowing *a non domino*, would in my opinion be sustained as sufficient to protect the possessor against all illegal encroachments on the part of those who could show no colour of right. In the present case this is all the stronger from the fact that the alleged acts were such as the owner had no interest to prevent. The petty pilfering of sea-ware was too insignificant to deserve notice, and the one occasion of removing the stones from the seashore to aid in building the breakwater at Burntisland was no injury to Mr Young, was conducive to an important public object, and if done with his knowledge was not improbably done also with his sanction.

I am of opinion that the pursuer should have decree in terms of his summons.

Lord Young—I am of the same opinion, and I do not know that I have anything at all material to add.

The question refers to the property of the seashore at the place specified in the record; and the controversy about the proprietorship is between the pursuer, who is undoubtedly proprietor of the land adjoining the sea, and the Crown as the granter, and the North British Railway Company as the recipient, of what is *ex facie* the property title of that sea-shore, dated in April 1884.

It appears that the North British Railway Company having, I suppose, statutory authority, with that end in view, and desiring to construct a railway along this bit of the sea-shore, applied to

the Crown for a grant of that part of the sea-shore as the proprietor of it, and obtained a grant of the foreshore on the footing that there was no competing interest in or title to it. Now, the pursuer avers that he is truly the proprietor of what the Crown has so conveyed to the North British Railway Company. He produces to us a title which as a title-deed is abundantly sufficient to make him proprietor of the foreshore in question. It appears that he and his predecessors have possessed for eighty years — I do not say the sea-shore, because that is the point in controversy — but possessed everything else included in the title, the title including the sea-shore undoubtedly. The earliest title, as his Lordship has observed, is that of 1804, and it describes the pursuer's land as "bounded by the sea" on the south. Now, that is a title which requires no explanation by possession or otherwise. Had it proceeded from the Crown, or from anyone having a Crown title in the same terms, there could be no question as to the meaning of it. It gives the property of the sea-shore so far as property may exist in the sea-shore. It is not a matter for explanation. It may proceed *a non habente potestatem*, and the real proprietor may object to it as conferring no right. But then that introduces the law of prescription, and I think the pursuer here appeals successfully to that law. It is not, as your Lordship has observed, a Crown title, and the Crown title of the author of it is not produced, and therefore if there had been no possession or no sufficient possession that is sufficient either in quality or in quantity—I mean length of endurance—the Crown might interpose, or anyone in the Crown's right might interpose, and say, "That is an excellent title no doubt, but it proceeds *a non habente potestatem*." But that answer is, by possession sufficient in quality and length of endurance, excluded. That is the very meaning and virtue of our law of prescription — that anyone with an *ex facie* sufficient title upon record, and possession following upon it for the requisite period, which used to be forty years and now is twenty years, may not be ejected or his proprietary right questioned by anyone on the ground that his title proceeds *a non habente potestatem*. Now, that reduces the interest in this case to the question whether there has been possession of the sea-shore for the last twenty years. If there has been no possession of it, then the production of his title will not be good against the Crown or the North British Railway, as in the Crown's right under the conveyance of last year. But if there has been possession, then the Crown comes forward too late to assert that this *ex facie* good title proceeds *a non habente potestatem*, and therefore confers no right. I am of opinion with your Lordship, that from the first—that is, for a period double the old period of prescription, there has been all the possession that this sea-shore admitted of—all the possession which you would look to a proprietor of the land using in order to signify to the world that he had asserted himself to be the proprietor. But it is sufficient if for the period of twenty years previous to that he has asserted his right in the property under the title which *ex facie* unquestionably gives it to him.

Now, I attach great importance to the fact that he enclosed and made dry land as much of it as he needed. That was an assertion of property, because it was doing a very significant act—an act which the true proprietor, if this man was not the true proprietor, could have come forward and could have stopped.

It would be beyond the exigencies of the present case to consider the law generally as to sea-shore, and what the proprietor thereof may or may not do. The pursuer here qualifies his declarator of property with these words—"Subject always to the rights of navigation and other rights which the public may have therein." Now, the rights which the public may have therein, and of which the Crown have always been the guardians, will depend upon the position of the sea-shore and the nature of it in the particular locality, but wherever without prejudice to the public rights the sea-shore may be enclosed and made dry land of, and the sea thus be shut out, the proprietor may do so—always provided that there is no interference with any public rights or uses. It would be the duty of the Crown, or of the guardians of the foreshore, to interfere or prevent him, in so far as such a proprietor was interfering in any such way as to prejudice the public. But the proprietor alone can convert the sea-shore into arable land; and it is needless to say that that is frequently done. But it may be said that this conversion, this shutting out of the sea and converting the shore into dry land, is as emphatic an assertion of a proprietor's right as anything can be; and the challenge of anybody else who considers himself the proprietor—be it the Crown or be it a subject who comes forward to interfere—would be a proper challenge in order to determine whose the property was. If there was no challenge it would be a difficult thing to say there had been no possession upon the title. The title here was good; and the only thing I am considering is whether the party in possession of that title held the property upon a barren title or upon possession in conformity with it. I repeat that I think the shutting out of the sea and the making of dry land what was previously sea-shore is an emphatic act of possession and assertion of a proprietary right. The pursuer and his predecessors upon the same title are shown to have taken, I think, about the only other valuable use which the proprietor could take of this ground. In the assertion of right he gathered the sea-ware from the foreshore, and he prevented others from doing it, except to such a small extent that one is not surprised either at the inability to prevent it or at the good nature which did not prevent it, and in considering whether such things could be prevented various considerations have to be looked at. You cannot prevent trespass or an encroachment upon a right to take sea-ware or sea-sand or anything else absolutely. You would require a staff of watchers altogether beyond the value of the subject absolutely to prevent any trespassing. As to the taking by the cottagers in the neighbourhood of a creel of sea-ware for their gardens, I regard that as of no importance whatever. If this had been an absolute title proceeding from the Crown direct, and no dispute about the right of property, I should have been surprised to find that there was an absence of taking a creel of sea-ware occasionally, in the absence of any stronger or more general prohibition than that which occurs here.

In the same way I look to the taking of the stones for the building of the pier. The question that is put with regard to that is really whether that was done by the assumed permission of the Crown or of the proprietor. Now, the good nature and goodwill of the one or the other in allowing that to be taken which was doing no prejudice to anybody is out of the question. I do not think there was any allowance or good nature exercised in the matter. I think it was simply not known. I think further that barrowfuls of stones can easily be taken from the seashore without anybody being a bit the wiser for it. I hold that to be quite certain. Let a man be proprietor of the seashore never so much, if stones which were quite useless to him, and which he thought were perhaps better away altogether, were taken to build a pier or a jetty, or to make the foundation for any building or pier, he would be a very ill-conditioned proprietor if he interfered to prevent such a thing. Therefore I do not think that is any interference with his assertion of a proprietary right which he had made in the manner already alluded to.

I therefore think that there is here a good title requiring no explanations from possession, but which was clothed with possession during the prescriptive period; so that neither the Crown nor anyone deriving right from the Crown can now be permitted to come and say that the pursuer's title proceeded *a non habente potestatem.* That, in my view, is the whole case, and I think upon it, with your Lordship, that we ought to pronounce declarator of property in favour of the pursuer. I am disposed to agree with your Lordship that *in hoc statu* we should pronounce no further decree—no decree of interdict at all events. The proprietary right will be asserted by the party in whose favour we are declaring it. Our judgment will stand, and will no doubt be treated respectfully and according to law by the railway company, who are thereby informed that they have another proprietor than the Crown to deal with—in short, that the Crown is not the proprietor, but that Mr Young is the proprietor, and that they will therefore have to deal with him in acquiring this ground in the construction of their railway.

Lord Craighill—At the close of the discussion on the reclaiming-note I had doubts about this case, and its decision was in consequence delayed. Since then I have re-read the whole proof and re-considered all that was said upon it in connection with such questions of law as the title and the value of what is referred to as adverse possession. The result is my concurrence with the other members of the Court in the judgment which has been proposed.

The pursuer, I am now satisfied, has had peaceable and uninterrupted possession of the foreshore for the full period of prescription, whether that is to be taken to be time immemorial or forty years or twenty years, on a title admittedly habile for prescription. In 1827 a predecessor of the pursuer appropriated part of the foreshore, which was a strong assertion of right, and such stones as could be used were taken from the foreshore for the construction of the wall by which this bit of shore ground was enclosed. Further, year by year, for a period as long as memory can go back, the sea-ware upon the shore has been gathered and carted away by the servants of the pursuer and his predecessors as manure for their land. These, which practically were, so far as the pursuer and his predecessors were concerned, all the uses to which the shore could properly be converted, were sufficient assertion of a right of property in the shore, assuming the pursuer's possession not to be impaired by adverse possession. Nor has the contrary of this proposition been suggested by the defenders or by the Lord Ordinary.

The next question is, Has this possession been exclusive? If it has been, the pursuer's case is established. What are relied on as proofs of possession by others. These are—first, the taking of stones and clay; secondly, the gathering of sea-ware; and third, the lifting of sand and gravel and the picking up of whelks and other shell-fish. As to the first of these groups, the taking of the materials mentioned was only for a comparatively short time, occurring at intervals in a period of not more, at the most, than a couple of years, upon the occasion on which the first Burntisland breakwater was in the course of construction, for a period, rather shorter than longer, when the works connected with the new docks at this port were in progress, and for a still shorter period when these works were resumed. The first occurred twenty-seven, the second ten, and the third occasion about three years ago. By themselves, either singly or taken together, these are obviously insufficient in point of duration, and their value as elements of possession is, moreover, uncertain, because the quantity taken from the shore at any time, or during these three periods, opposite Colinswell is unascertained, and at the best can only be loosely conjectured. (2) As to the taking of sea-ware, which is another of the things referred to in the proof of counter or joint possession, it was only occasional. The quantity taken was also small, having been at the most no more than was carried home in creels by persons living in the neighbourhood when in spring their plots of garden ground were in preparation for a crop. But it does not appear that the Youngs, though living at Colinswell, knew that sea-ware was thus removed, and even if they had been aware, it is unlikely that in the circumstances any objection would have been offered, what was taken being of little value in itself and being too insignificant to be a ground on which adverse possession could be rested. A challenge would in the circumstances have been an unneighbourly proceeding. (3)As to the lifting of sand and gravel and the picking up of whelks and other shell-fish from the shore, these were only trivial incidents which but seldom occurred; and the latter in particular, as those who took these shell-fish were only casual stragglers, and their acts were no more acts of possession than bathing in the sea opposite Colinswell would have been. Little, accordingly, was said as to any of these so-called incidents of possession in the course of the argument. The case of the defenders upon the proof therefore has, as I think, failed.

But apart from this it must be borne in mind that those who are said to have possessed along with the pursuer and his predecessors were without title. They never could acquire a right to this foreshore whatever were the things they carried away, or however long the practice was

followed. The pursuer and his predecessors, on the other hand, had a title, and to that the use which they took must be ascribed; what others did must be ascribed to mere toleration. On this point the case of *Pirie* v. *Rose*, February 1, 1884, 11 R. 490, may be consulted, the result to which we are brought being, that if the possession which the pursuer and his predecessors enjoyed was, in a reasonable sense, possession of the shore, as I think it was, its efficacy could not be impaired by reason of the alleged adverse possession on the part of others who are said to have used or to have lifted materials from the shore.

It appears to me therefore that the proof of adverse possession has entirely failed. I should have said the same thing if there had been circumstances in which it might have been said that those who exercised the rights of adverse possession had a title or represented anyone who had a title to that which was taken, but those who came to the shore and did the things which are said to be done had no title to which an alleged possession could be ascribed. What they did, they did merely because there was tolerance on the part of those who had the right to challenge, and however long and extensive might have been the possession that was taken the result could never have been to them the assertion of a right in the foreshore. The question would not be whether they had a right, but who was the party who in the controversy could shew that he had a title which with possession would be sufficient to establish that right. I think there has been an oversight on the part of the Lord Ordinary here, and considerable oversight also on the part of the defenders' counsel, as to the quality and character of the acts which are said to have constituted the adverse possession. Those who came had no right to remain. They had no right to what was there, and I think that even if the possession by others was of the character which has been given to it by the Lord Ordinary, it would never have been possession in a question with one who like the pursuer had a title, and who had rendered that title still more efficacious by reasonable and substantial possession taken by himself and his predecessors. On the whole matter I agree with your Lordships, and with the grounds of judgment set forth by your Lordship and Lord Young.

Lord Rutherfurd Clark—I am of the same opinion. I agree with Lord Young in thinking that pursuer's title does not require explanation. It seems to me to be a title which *per expressum* includes the foreshore *ex adverso* of the rest of the pursuer's 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 as his property for a period of twenty years prior to the date of the challenge then the objection is removed. I am of opinion that he has given sufficient evidence that he has possessed the foreshore as part of his property, and I am therefore of opinion that he is entitled to the judgment of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusion.

Counsel for Pursuer—W. Mackintosh—H. Johnston. Agents—Cowan & Dalmahoy, W.S.

Counsel for North British Railway Company — D.-F. Balfour, Q.C. — Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Lord Advocate (Respondent)—Jameson. Agent—Donald Beith, W.S.

Tuesday, December 8.

FIRST DIVISION.

[Lord Lee, Ordinary.

MILLER *v.* RENTON AND BEATTIE & SONS.

Landlord and Tenant—Structural Alteration on Adjoining Tenement—Reparation—Contractor—Liability of Contractor—Separation of Defenders.

In an action by a tenant to recover damages for injury which he alleged he had sustained by the mode in which certain structural alterations were carried out by the landlord on an adjoining portion of his property, the contractor as well as the landlord was called as a defender. *Held* (*rev.* the Lord Ordinary) that the pursuer's averments were relevant to have the case sent to proof against both defenders.

This was an action by John Miller, lessee of the Crown Temperance Hotel, No. 2 West Register Street, Edinburgh, against James Hall Renton, stockbroker, and proprietor of the Crown Hotel, and of adjoining premises in Princes Street, and against William Beattie & Sons, builders, Edinburgh, concluding for payment of £1200.

It was admitted that the defender Renton resolved in the beginning of 1885 to execute alterations on the premises adjoining the hotel of which pursuer was tenant, and contracted with defenders Beattie & Sons to execute them.

The pursuer averred that it was stipulated by this contract that the work should be done by 1st March, and that Beattie & Sons proposed to Renton that the work should go on night and day, which he agreed to, notwithstanding both defenders knew that such work would be ruinous to his hotel business. "(Cond 3) Nevertheless, the defenders improperly and illegally, and with gross recklessness and want of due care, or any care or attention to the rights and interests of the pursuer, proceeded with and, in defiance of the pursuer's remonstrances and threats, carried out the said works, working, as after mentioned, night and day. Had the defenders carried out and executed the work contracted for with due care and attention to the pursuer's rights and interests, and not working at untimely and unusual hours, the loss arising to the pursuer would have been comparatively little. The said works, carried out as they were, were also in the knowledge of all the defenders a gross violation of the contract of lease under which the pursuer held his hotel. The work contracted for included taking down