

order that it may carry out the powers conferred by the statutes.

Whether or not lands are to be disjoined and erected is entirely within the discretion of the Court, and in order that the Court may exercise that discretion it is necessary that it should know not only the circumstances of the parish from which the lands are to be disjoined, but what the equipment of the new parish is to be and how it is to be provided. It is accordingly the practice for those who are promoting the erection of a new parish to come to the Court prepared with a complete scheme which is detailed in the summons, and to which the Court is asked to give effect. If therefore the proposal is that the heritors should provide a manse and glebe, that ought to be, and is in practice, stated in the summons.

Now, what was the procedure in erecting the parish of Maryhill? In the summons of disjunction and erection it was asked that "a sufficient and competent additional allowance should be made in modifying the stipend of the said minister for and in place of a manse, offices, glebe, and grass ground."

If decree had been pronounced in terms of that conclusion it is plain that the heritors could never have been called upon to supply a manse and glebe. The conclusion, however, was subsequently deleted from the summons. But why? Simply because the Crown, as titular of the teinds, objected to it and threatened opposition.

The argument for the appellant is, that when the conclusion for an allowance in place of manse and glebe was withdrawn, the summons became one which did not mention manse and glebe, and that accordingly the decree which followed thereon did not in any way deal with that matter, but left it to be regulated by the general law applicable to parishes.

I cannot accept that view. The summons as originally framed clearly implied that there was to be no manse or glebe, and the withdrawal of the conclusion for an allowance simply meant that the pursuers, rather than face the opposition of the Crown, were willing that there should be neither manse and glebe nor an allowance in lieu thereof. The Court might have refused to erect a parish upon such a footing, but they had unquestionably power to do so, and in my opinion they actually did so. Further, if it was intended by withdrawing the conclusion for an allowance to lay upon the heritors a burden which could not have been laid upon them if the conclusion had remained and had been given effect to, then that should have been made clear by substituting for the conclusion which was withdrawn one for manse and glebe. If, however, that had been done the heritors might have appeared and opposed the erection, and it cannot be assumed that in that case the Court would have granted decree.

Further, it seems to be plain that at the time when the decree was pronounced it was understood by all parties interested that the heritors were not liable to provide a manse and glebe, because funds were raised by voluntary subscription and a dwelling-house for the minister erected in

which the minister of the parish has ever since resided, and which is by a trust dedicated to his use. Now, after the elapse of half-a-century, and when the cost of providing a manse and glebe would, I take it, be immensely greater than it was at the time of the decree, the present incumbent comes forward and for the first time claims that the heritors have all along been, and are now, liable to supply a manse and glebe. The question therefore arises in circumstances very unfavourable for the minister, and it may be that in any view of the case the claim is barred. That is not a question, however, upon which it is necessary for me to express any opinion, because, for the reasons which I have given, it seems to me that the footing upon which the parish was erected was that the minister should have no claim for a manse and glebe or for an allowance in lieu thereof.

I shall therefore recal the interlocutor appealed against and dismiss the whole proceedings.

Counsel for the Minister—Crabb Watt—Balfour. Agent—Wm. Geddes, Solicitor.

Counsel for the Heritors—Clyde, K.C.—Cullen. Agents—Dove, Lockhart, & Smart, S.S.C.

## COURT OF SESSION.

Saturday, March 8, 1902.

### FIRST DIVISION.

[Lord Kincairney,  
Ordinary.]

WALLACE JAMES v. MONTGOMERIE  
& COMPANY.

(*Ante*, vol. xxxvii. p. 83, and 2 F. 107.)

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

W, a burgess and inhabitant of the burgh of H, brought an action of suspension and interdict against the magistrates and M. & Co. with conclusions for restraining M. & Co. from interfering with certain lands which the complainer averred formed part of the lands included under the charter of the burgh, and had from time immemorial been appropriated for the use and enjoyment of the inhabitants for recreation, drying clothes, and other purposes.

This averment having been held relevant to entitle an individual burgess to sue such an action (*ante*, vol. xxxvii., p. 83) evidence upon which held (*following Sanderson v. Lees*, November 25, 1859, 22 D. 24; and *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066, 16 S.L.R. 676) that it had been sufficiently established.

This case is reported *ante*, vol. xxxvii. p. 83, and 2 F. 107.

Dr John George Wallace James brought an action of suspension and interdict against Messrs Montgomery & Company, and the Provost, Magistrates, and Town Council of Haddington. The conclusions of the action were "to interdict, prohibit, and discharge the respondents, the said Messrs Montgomery & Company, Limited, and all others authorised by or acting for them, from taking possession of or encroaching on the piece of ground on the west side of the river Tyne, lying between the Bowling Green and Public Washing-House, both belonging to the royal burgh of Haddington, on the west, and the river Tyne on the east, and extending from the Vennel leading from the East Port of Haddington to the Water of Tyne on the north, and the ford across the said river to the south of the Nungate Bridge on the south—and, in particular, from ploughing up the surface of the said piece of ground, excavating therein, or removing soil, sand, or materials therefrom, and from in any way interfering with the said piece of ground, and further, to ordain the respondents, the said Messrs Montgomery & Company, Limited, to restore the surface of the said piece of ground to the same condition in which it was prior to the operations complained of, and to grant interim interdict."

The complainer averred that he was a burgess of Haddington and resided there; that the piece of land in question formed part of the common good of the burgh; that it had been from time immemorial appropriated to the use and enjoyment of the burgesses or inhabitants of Haddington for the purposes of recreation and of drying and bleaching clothes; that Montgomery & Company were removing the river bank at the place in question, and that the Town Council of Haddington refused to move in the matter.

Montgomery & Company lodged defences in which they averred that the ground in question was their own property, that it was included in their titles, and that ashpit refuse, filth, and rubbish had, without their consent, been deposited at the place in question by certain inhabitants in the bed of the river with the result that their mill-dam had been partially filled up and that they had been deprived of water and storage.

The Town Council lodged a minute whereby, in respect that the operations complained of were not disadvantageous to the public interest, they stated that they proposed to take no further steps in the proceedings, under reservation of their rights of title.

The complainer pleaded—“(1) The said piece of ground being part of the common good of the royal burgh of Haddington, appropriated from time immemorial to the use and enjoyment of the burgesses and inhabitants of the said burgh, as set forth in the pleadings for the complainer, and the respondents having illegally and unwarrantably taken possession of the said piece

of ground on the pretence that it is their property, and interfered therewith so as to destroy and prevent the said use and enjoyment thereof formerly had by the burgesses and inhabitants, the complainer, as a burgess of the said burgh, is entitled to obtain interdict as craved. (2) The said piece of ground, being the property and in the possession of the burgesses and inhabitants of the royal burgh of Haddington, and the respondents the said Messrs Montgomery & Company, Limited, having illegally and without any right or title entered upon possession thereof on the pretence that it belonged to them, and encroached on and interfered therewith, interdict should be granted as craved, with expenses.”

The respondents pleaded—“(1) No title to sue. (2) The complainer's statements are irrelevant, and insufficient to support the prayer of the petition. (3) The actings of these respondents complained against being confined to operations within their own property, interdict should be refused, with expenses. (4) The complainer's statements, so far as material, being unfounded in fact, the prayer of the petition should be refused, with expenses. (5) The present note of suspension and interdict being an incompetent, or at least an inappropriate, form of action for trying the questions raised by the complainer's record as amended, the note should be refused, with expenses.”

The Lord Ordinary (KINCAIRNEY) replied the first and fifth of the defenders' pleas, and allowed a proof.

The respondents appealed to the First Division, who on November 17, 1899, adhered to the interlocutor reclaimed against. This stage of the case is reported *ante ut supra*.

A proof was taken, the import of which, and of the titles upon which the parties founded, sufficiently appears from the opinion of the Lord Ordinary.

On 7th June 1901 the Lord Ordinary pronounced the following interlocutor—“Finds (1) that the piece of ground referred to in the prayer of the note has from time immemorial been in the use and possession of the Provost, Magistrates, and Town Councillors of the burgh of Haddington, and in this process falls to be dealt with as part of the common good of the burgh; (2) that it has been appropriated from time immemorial for the use and enjoyment of the burgesses and inhabitants: Repels the second, third, and fourth pleas-in-law for the respondents; reserves expenses; appoints the cause to be enrolled for further procedure; grants leave to reclaim.”

*Opinion.*—“The complainer sues this action as a burgess of the burgh of Haddington, and his object is to challenge the removal by the respondents of a portion of the west bank of the river Tyne, with the effect that the river now covers that which before the respondents' operations was river bank. The complainer avers that a portion of the river bank, until the operations complained of, had been in the uninterrupted use and possession of the Magistrates, burgesses, and inhabitants, and he makes this averment—‘It has been from time imme-

morial appropriated to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking, and exercise, for the bleaching and drying of clothes, and for the general use and enjoyment of the burgesses and inhabitants.

"The respondents Messrs Montgomery & Company, Limited, who removed the bank, have pleaded that the bank which they removed belonged to themselves, being included in their titles. They aver that 'ash-pit refuse, filth, and rubbish' have without their consent been deposited by certain inhabitants of the burgh in the bed of the river, with the result that their mill-dam has been partially filled up, and that they have been deprived of water and storage.

"The respondents also objected to the complainer's title to sue, and they pleaded that the conclusions for interdict came too late, because before the action was raised the operations complained of had been complete, and the ground had been removed.

"The respondents have no plea to the effect that the operations complained of were illegal because they interfered with the flow of the river or with the storage of their mill-dam.

"The Magistrates, who are called as defenders, have lodged a minute in which they state that at a meeting of the Town Council it had been resolved that, under reservation of the right of the Town Council to the ownership of the ground, the operations complained of were not disadvantageous to the public interest, and that in the meantime the Council proposed to take no further steps in the proceedings.

"The case has been already before the Inner House, and the title has been sustained, and the plea that the prayer for interdict was too late has been repelled. In the judgment of the Court, delivered by Lord Kinnear, the law applicable to the case averred is stated thus—"The law is, that when a piece of land forming part of the common good of a burgh has been appropriated from time immemorial to such purposes as are alleged in the passage I have read' (the passage above quoted), this possession by the inhabitants is a quality of the right in which the Magistrates are vested for the benefit of the community, and any member of the community is entitled to protect it against encroachment, even by the magistrates themselves."

"According to this important judgment, the case now depends on these two questions—*Firstly*, Whether the ground removed was part of the common good of the burgh or is in this action to be treated as part of the common good, and *secondly*, whether it has been appropriated to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking, and exercise, for the bleaching and drying of clothes, and for the general use and enjoyment of the burgesses and inhabitants, as averred by the complainer. These are the questions to which the very bulky and cumbrous, and in many points obscure, proof has been directed.

"The parole evidence is extremely long, and a very great number of titles have been produced, the descriptions in which are difficult to follow, and various plans and minutes and other documents have been put in evidence which have made the study of the case laborious and difficult. But I think it may be sufficient that I should indicate my views with reasonable brevity, since it would be out of the question to endeavour to discuss the proof or titles or plans in detail, and I shall not attempt to do so.

"It is, however, desirable or necessary, in the first place to obtain a clear idea of the position and character of the ground in question. These are shown distinctly on the various plans produced (chiefly sheets of the Ordnance Survey), and are exhibited exceedingly happily on a model of the town prepared by Mr John M'Laren, architect, Edinburgh, the ingenuity and, as I think, the accuracy of which it is difficult to praise too highly.

"From these plans and the model, and from the evidence, it appears that at the place in question the river Tyne flows mainly from south to north, and separates the burgh of Haddington on its west side from the suburb called Nungate on the east; and there is by the side of the river a river bank or margin of varying width. This case relates to the west bank. At a point at the southern extremity of the burgh the Tyne is crossed by the Waterloo Bridge, and on the right or east side of the river there are two portions of river bank divided by the high road to Haddington, which are known as the West and East Haughs, extending to about 5 acres, bounded between the Tyne on the east and a mill-lade passing through what is called the East Mill, and joining the river about 1000 feet or thereby below the Waterloo Bridge, where there is a bridge across the lade. About 300 feet further down is a river bank called the Little Green. Still further down, and about 1700 feet or thereby below the Waterloo Bridge, the river is crossed by an old bridge called the Nungate Bridge, very frequently mentioned in the proof.

"About 500 feet below Nungate Bridge, measuring on the west or Haddington side of the Tyne, a weir has been constructed transversely across the river to a point on the east side nearly 900 feet below the Nungate Bridge, which has the effect of diverting a part of the stream into a lade which passes into and through Gimmers Mill on the east side of the river, and is returned to the Tyne by a lade at a considerable distance down, where the river makes a sharp bend to the east, enclosing between lade and river a space of arable land. Both the weir and Gimmers Mills are structures of very old date, going back far beyond memory.

"The weir dams the river back up to a short distance above the Nungate Bridge, and this portion of the river forms the mill-dam, and the only mill-dam which stores the water for the Gimmers Mill.

"The respondents, Montgomery & Company, Limited, proprietors of Gimmers Mill,

conceived that if the river bank at the west side of the river were removed above the weir the effect would be, as it has been, to increase the storage of their mill dam and the force and quantity of the water thereby thrown into the mill.

“They accordingly removed a part of the river bank above the weir, extending their operations to a point about 100 feet or thereby above the Nungate Bridge to a point where there is a ford across the river. They hold that in doing so they restored the bank and river to their prior condition, which had been, as they say, affected by the deposit of refuse, filth, and rubbish by the inhabitants ‘within the last few years.’

“This is the operation to which, or rather to part of which, the complainer objects, and against which he seeks interdict. He does not ask interdict against the operations so far down as the weir, but only to a point 200 feet or thereby below the Nungate Bridge; below that the bank became narrower, and I suppose the complainer does not claim it as part of the common good. The ground so removed by the respondents extended to about 300 feet along the river, and was of an average breadth of about 20 feet, the space being equal to about an acre and a-half. It is partly above the Nungate Bridge and partly below it, and the portion below the bridge is bounded on the west by a public bowling-green, and intervenes between the bowling-green and the river. It formed a part of the river bank which I think should be regarded as continuous from Waterloo Bridge to below Nungate Bridge. The respondents’ operations were carried on openly and were not interfered with by the magistrates, because, as has been seen, the magistrates did not consider them detrimental to the public interest.

“The questions are, were the respondents entitled to remove this part of the river bank without authority, and if they were not, is the complainer (failing objection by the magistrates) entitled to interfere?

“Reverting to the law of the case, as stated by Lord Kinnear, the first question is whether the piece of ground in question was part of the common good of the burgh, or is to be so considered in deciding this case, which it must be kept in view is an interdict, not a declarator.

“The proprietary titles on which the complainer founds and is entitled to found are of course the titles of the burgh, and he has maintained that the ground in question is embraced by the town charter. The respondents, on the other hand, have maintained that it is covered by their title. I do not think that the titles of either party are conclusive by themselves. The charter of incorporation of the burgh granted in 1624 is set forth in statement 2, and the description in it is of a very general kind. It is described as ‘All and whole the burgh of Haddington, with all and sundry the lands, houses, buildings, gardens, acres, waste ground, tofts, crofts, and others lying in the burgh roods and territory of the said burgh, with all and sundry the

other lands, muirs, lochs, meadows, acres, yearly revenues, and others, as well of property as community, pertaining to the same.’ These words are very general, and there is, of course, nothing in them which, unexplained by possession, can be applied with any confidence to the ground in question. On the other hand there is, I think, nothing plainly exclusive of the ground. I have not heard anything which convinces me that it cannot be embraced in ‘burgh roods and territory of the burgh.’

“The title on which the respondents found is of a different character, and is fully detailed. The title is stated at length in the respondents’ statement, but it was not maintained that the ground could be covered by any part of the description except that of the piece of land first mentioned. It is said to be included in the description ‘specially the town called Gimmers Mill Haugh lying on the west part of the dam of the said mills, extending to the common wall of the said burgh of Haddington on the west and the common way that leads to the abbey of Haddington, above the Cherry Tree Haugh on the north, the yard of the lesser friars now belonging to the burgesses of the said burgh of Haddington on the south, and the water gate on the east parts.’ The respondents contend that the dam here mentioned is the part of the river Tyne dammed back by the weir, and that the description applies to lands lying wholly on the west side of the Tyne, and they found especially on the mention of the ‘yard of the lesser friars’ as the south boundary. They endeavoured to locate the yard of the lesser friars at a place south of the ground in dispute, and maintained that if the yard of the lesser friars bounded their property on the south, it followed that the ground in question must be embraced within the boundary.

“The complainer, on the other hand, interprets the question quite differently. He says that the word ‘dam’ interpreted according to local usage means the mill lade, not the water dammed back by the weir, and that the description embraces the piece of land on the west side of this mill lade and between it and the river, as shown on the plan.

“It appears that this description is a translation of an earlier description in Latin, in which the Latin word, which has been rendered ‘dam,’ and also ‘watergate,’ is ‘aqueductus,’ and it is said that that word would have been more aptly rendered as ‘lade’ than ‘dam.’ There are difficulties attending this argument which it does not seem necessary to examine closely, because while I am not convinced that it is sound, nor yet prepared to negative it absolutely, still I cannot with any confidence adopt the reading of the respondents; for, in the first place, I think the word ‘dam,’ when regarded as the translation of ‘aqueductus,’ ought not to be understood as meaning or including the part of the river in which the water is dammed back, although it may, in accordance with what I take to be proved to be local usage, include the weir as well as the lade lower

down; further, I think that neither the site of the yard of the lesser friars nor the exact line of the old burgh wall has been ascertained with any certainty, nor is it clear that even if the respondents' contention on these points were accepted, it necessarily follows that the boundary must include the ground in question. If the respondents had been able to found on possession by themselves or by their predecessors in accordance with their interpretation of the title, that interpretation might have been very readily adopted, but without possession the description appears to involve too much mere surmise and too much doubt and uncertainty to be sufficient for the identification of the space described.

"Now, I think there is no satisfactory evidence of any possession by the respondents or their predecessors of the ground or any part of it. The only act of possession or ownership suggested was the granting of leases of sand and gravel by Mr Hogarth, the respondents' author, but it does not appear that the sand and gravel so let extended as far up the river as the ground in question, and it seems to me quite insufficient to explain or support the respondents' title. On the other hand, the complainer has led a considerable amount of proof of possession and of acts of ownership. Some of these acts of possession may be referable to the title of the burgh as owner, and may not support the contention of the complainer that the land is held for behoof of the public; others of the acts of possession may be referable to a public right; but all these acts, of whichever nature they may be, seem equally to support the conclusion that the ground in question formed part of the common good of the burgh.

"But a considerable part of the evidence and argument for the respondents seems directed to meet the complainer's evidence of possession at the outset; for it seemed directed to this that the ground had not existed at all for forty years, and so could not have been immemorially possessed, but formed at one time part of the bed of the Tyne. The averment of the respondents in their fourth statement seems to be that it was brought into existence 'within the last few years' by deposits of rubbish illegally placed in the river or 'mill-dam,' as he calls that portion of the river. I think that of that averment there is no proof at all. There may have been operations above the bridge and deposits below the bridge which may have increased to some extent the width of the bank, and to a corresponding extent diminished the width of the river, but none of these were 'within the last few years' or of recent date.

"I am inclined to think that at a somewhat remote date this was so. There are two facts which point to that conclusion—the one, that there is an arch of the Nungate Bridge, the west arch, through which at present no water flows, but which appears to have been constructed with a view to permit the flow of the river through it; and the other fact is that the

weir has been so built that a considerable part of it, at its west end, was found to be embedded in the land. It was argued that it must have been so built in order to meet and direct the current of the river, indicating that at that time the river probably flowed over a space which now is land. It is a probable conjecture that that was so. But the Nungate Bridge and the weir are ancient structures, hundreds of years old, and in this question it cannot be in the least material to consider what the use of the ground was then. In a tack of the bowling-green dated in 1749, which has been produced by the complainer and put in evidence by both parties, the bowling-green is described as bounded on the east by the Tyne. At the date of the respondents' operations the ground in question came between the bowling-green and the Tyne. Whether that document warrants the suggestion that in 1749 the ground in question was covered by the river or no, that also appears to be a date too remote to be usefully referred to. The history of this lease does not very clearly appear, but it is said to be now vested in the burgh. But the respondents have led a considerable amount of evidence to the effect that in more recent times the river has been encroached on and the bank has been widened. There is a considerable discrepancy in the proof on that point, which no doubt requires consideration. The onus seems to be on the party seeking to prove the illegal actings and the changes alleged, and while I think there may have been some change, some modification, and some increment of the bank, I think it has not been proved that there has been within recent years such a change as to affect the substantial identity of the bank as it was at the date of the respondents' operations with the bank as it existed forty or fifty years ago. I do not think that such proof of gradual accretion as the respondents have adduced can give them a right to remove the land at their own hand (although it may possibly be that part of what they removed may at one time have been thrown into the river) nor in this case affect the proof of the complainer's possession.

"On this point of the case I am of opinion that the various titles and plans produced or recovered by the complainer warrant the conclusion that this particular ground (at least below the Nungate Bridge) was a piece of waste land which formed a part of a commonalty called the Sands, which formed part of the burgh patrimony; that about 150 years ago a bowling-green was constructed by the Magistrates, or with their sanction, on the Sands immediately to the west of the ground removed, and was leased by the lease already mentioned, and I consider that the complainer is entitled to found on this lease as proof of the possession by the Magistrates. Further, during the period from 1850 to 1860 or thereby a part of this ground between the bowling-green and the river was let out by the Magistrates for lime stances, and after these stances were removed it was sown

down with grass, and was used for bleaching clothes, and clothes posts were put up on it. Further, it was used by the inhabitants for the grazing of cattle, either under lease from the Magistrates or in virtue of their rights as burgesses. The Magistrates let the sand and gravel *ex adverso* of the ground in question, and there is a large body of evidence to the effect that it was used for the playing of games and for recreation, all of which proof of public use is, I think, available as evidence of possession by the burgh. There is also evidence that the piece of ground was always regarded as the property of the burgh, and that no one else ever advanced any claim to it, and, in particular, not the respondents. I have little doubt on the proof that the portion of the ground in question below the Nungate Bridge was used as burgh property or common good much more than forty years before the date of the action.

“The case is not quite so clear about the part of the ground south of the bridge. It seems proved that the Magistrates at a somewhat early date disposed that piece of ground to one John Robertson; that a washing-house was afterwards built on part of it, and that a tank to receive sewerage was placed on it. It does not appear to fall within the title of the respondents or of anyone else, and on the whole I think the same conclusion may be reached about it as about the portion of ground below the bridge.

“On this first point of the case it therefore appears to me that the Magistrates have been in possession, and also that they must in this process be treated as owners of the ground, although it may be that their title may not be conclusively established in this process. Still I cannot doubt that they would have been found entitled to prevent the removal of the banks of the river by the respondents had they thought it their duty to intervene by a petition for interdict.

“But although that may be so, it does not follow that the complainer has the same right. The Magistrates and not an individual burgess are the guardians of the burgh property, and I understand the judgment of the Court in this case to decide that the complainer must establish not only that the ground removed was a part of the common good of the burgh, but also, that being so, it must be shown that it was appropriated from time immemorial to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking, and exercise, for the bleaching and drying of clothes, and for the general use and enjoyment of the burgesses and inhabitants.

“I have found this second branch of the case the more difficult of the two, because the proof, although I think it sufficient, is by no means very strong or unanimous or conclusive. It is, however, a question as to the balance of evidence, and it is to be remembered that this branch of the case is to be considered on the assumption that the ground belonged to the burgh and not to the respondents. The question is whether the proprietary right of the Magistrates

was qualified by appropriation to the use of the public.

“Now, the proof is of the usual kind in such cases, and it is proof of such uses as are averred on record, which are the ordinary uses to which such land is usually put. I think that it is entirely parole evidence, and that no writing has been produced which supports it.

“It is said, indeed, that in leases of the grazing the rights of the public were always expressly reserved; but I do not know that any written lease has been produced instructing that statement.

“The parole evidence led for the complainer is to the effect that the public had free access to this part of the river bank, and used it at their pleasure for walking, recreation, and for bleaching, without any interference whatever by the Magistrates. That is denied by the respondents chiefly on the ground that the land was too small for such uses, and was kept in such a state of disorder and filth as to be unfitted for them. I am disposed to think that the latter point has been exaggerated by the respondents, and that since 1870 or thereby, when the Clarty Burn was enclosed in a pipe and covered, there has not been a great deal to complain of on that ground. The respondents have also met this part of the case by the evidence of witnesses who deny that the ground was used for recreation or other similar purposes. I think that on this point the positive evidence for the complainer ought to prevail over the merely negative evidence for the respondents.

“The respondents maintain that the leasing of the ground for lime stances is inconsistent with the dedication of the ground to the public. But in the cases of *Sanderson v. Lees*, 25th November 1859, 22 D. 24; *Grahame v. Magistrates of Kirkcaldy*, 19th June 1879, 6 R. 1066; and *Murray v. Magistrates of Forfar*, 29th June 1893, 20 R. 908, acts by the Magistrates equally or more inconsistent with dedication to the public use were held not to defeat a claim of this kind by a burgess. Further, the custom of letting out lime stances, which occupied only a part of the ground, was abandoned about forty years ago.

“The evidence as to the lease of the bowling-green is somewhat unsatisfactory. It appears that the lease must have been in substance renounced, because the Magistrates themselves came to be in right of it; and there is no evidence that in the hands of the Magistrates it was put to any use inconsistent with the public enjoyment.

“The case resembles very closely in all its points the case of *Grahame v. Magistrates of Kirkcaldy*, *supra*, and there is an important passage near the close of the opinion of the Lord Ordinary (Lord Adam) to which I would specially refer, which would very nearly apply to this case even in details. In that case interdict was granted against the Magistrates of Kirkcaldy to prevent them encroaching on a public links. I think the judgment in that case is a strong authority for a judgment in favour of the complainer in this case.

"Parties referred also to *Sinclair v. Dysart*, 1779, M. 14,159, 2 Pat. 544; *Home v. Young (Eyemouth)*, 1846, 9 D. 286; *Dyce v. Hay*, July 10, 1849, 11 D. 1266, *aff.* May 28, 1852, 1 Macq. 305; and *Edinburgh v. Leith*, July 10, 1877, 4 R. 997.

"On the grounds which I have endeavoured to explain I think that I am bound to decide this case in favour of the complainer, regarding the case of *Grahame v. Kirkcaldy* as almost a direct authority. I do so with considerable reluctance, for although I do not doubt that the respondents acted in their own interest, still I think there is a great deal to be said for the opinion expressed by several of the witnesses, that what they have done has been attended with no disadvantage but with benefit to the burgh, and that the Magistrates acted reasonably in refraining from interfering.

"The complainer's counsel stated that he wished no more than findings in his favour, and that he did not ask in the meantime for a decree on the respondents to restore the ground which had been removed; and I have limited my present judgment with a view to that statement."

The respondents reclaimed, and argued—  
 (1) The title of the burgh was general, and might prevail against a person with no title, just like that of a superior against one who had none, but the underlying hypothesis of that was that the ground in question was part of the lands of the burgh. Here there was nothing to show that. The burgh property was treated in their titles as a known subject with nothing to identify it. The ground may or may not have been included therein. The reclaimers, on the other hand, produced a title which they maintained did include the ground, and the respondents did not discharge the onus of showing a competing title. (2) The evidence showed that this ground had not in fact existed at all for forty years, but formed at one time part of the Tyne, and had to a large extent only been brought into existence by the deposit of rubbish within forty years, and accordingly it could not be prescribed. The Lord Ordinary had fallen into the error of holding that the case was one where he ought to decide *in dubio* on the positive evidence of the complainer rather than on the negative evidence of the respondents, but there were in fact two sets of positive evidence, one showing that the land had been used for certain purposes, the other that it had not been so used. The onus lay on the complainer to prove prescriptive possession making the ground part of the common good, and he had failed to prove it. As regards the ground north of the bridge, use by the burgesses could not go back before 1866, because prior to that it was covered by lime stances, and could not be used for pleasure or recreation. All that could be proved was that school boys had occasionally played there, and that was no evidence of possession—*Magistrates of Edinburgh v. Leith Magistrates*, July 10, 1877, 4 R. 997. The case of *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066, 16 S.L.R. 676, was not appli-

cable except by way of contrast to the present case. There the question was one of fact whether the burgesses had *non utendo* lost rights which they once had. Here the complainer was trying to set them up *faciendo*. The ground south of the bridge had been covered with filth, and in a state of disorder unfitting it for any use till 1870, when it was sown with grass.

Argued for the respondent—The general description in the burgh titles was amply sufficient to include the ground if explained by possession, even though it was not expressly included. The reclaimers' titles, on the other hand, would be satisfied by holding their property to be bounded by the ground in dispute. (2) The evidence of possession on the part of the burgh was overwhelming. There had been for over sixty years dedication of the ground to the public by use for public bleaching and recreation, while there was no satisfactory evidence of possession by the reclaimers or their predecessors. The custom of leasing part of the ground for lime stances had been discontinued forty years ago. Moreover, it had been held that acts equally inconsistent with ordinary public uses did not defeat a claim of this kind—*Grahame v. Magistrates of Kirkcaldy, supra*; *Sanderson v. Lees*, November 25, 1859, 22 D. 24.

At advising—

LORD ADAM—The ground in question is very accurately described by the Lord Ordinary in his opinion.

I agree with the Lord Ordinary in the result at which he has arrived, and on the grounds on which he has arrived at it, and have little to add.

I think it is clear that the respondents have not proved that the land in question is within the description in their titles, and that there is no proof that they or their predecessors have ever had any possession of it. On the other hand I think it is clear that the burgh has been in possession of it from time immemorial, and has used and enjoyed it in all the ways in which it was capable of use and enjoyment. As the Lord Ordinary points out, the charter of incorporation of the burgh of 1624 by which there are granted to the burgh "All and whole the burgh of Haddington, with all and sundry the lands, houses, buildings, gardens, acres, waste ground, tofts and crofts, lying in the burgh roods and territory of the burgh, with all and sundry the other lands, lochs, meadows, acres, yearly revenues, and others, as well of property as community, pertaining to the same," constitutes an ample title to sustain such possession.

I think, therefore, that it is clear that the ground in question was part of the common good of the burgh, and consequently that if the present question had been between the burgh and the respondents it would have been attended with little difficulty. But the operations complained of have been carried on with the leave and licence of the Magistrates of the burgh, who are the administrators of the common good, and who decline to interfere

with the operations on the ground that they consider—and perhaps justly—that they are for the benefit of the burgh. That accordingly raises the further question whether the operations were such as the Magistrates were entitled to authorise or to carry out for themselves—and that depends upon this question, whether the title of the Magistrates to the ground in question is qualified by its having been appropriated from time immemorial to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking and exercise, bleaching of clothes, and such like uses—so as to render any alienation or other appropriation of it inconsistent therewith illegal.

I agree with the Lord Ordinary in thinking that this is the difficult question in the case.

My opinion on the question may be shortly stated. It appears to me that this case resembles in its chief characteristics the cases of *Musselburgh* (*Sanderson v. Lees*, 22 D. 24) and *Kirkcaldy* (*Grahame v. The Magistrates of Kirkcaldy*, 6 R. 1066), and must be disposed of on the same principles as were applied in these cases.

I think that the burgh of Haddington, like these and other ancient burghs of Scotland, had attached to it links or common ground which was open to the common use and enjoyment of all the burgesses and inhabitants of the burgh, and whose right to such use and enjoyment was coeval with the right and title of the Magistrates. I think it is clearly proved that the burgh had such common ground attached to it, and that it was called the *commonty* of Sands, and that the ground in question was part of it. It is clear from the charter of 1624 that the burgh had at that date some common lands, because there is conveyed to it lands “as well proper as common.”

It is also clear that the burgh had such common lands prior to that date, because there is produced a *sasine* in favour of Alexander Symsoun dated 20th March 1578 of certain property in the burgh, which is described as bounded by the lands of Friar's Croft “*ex australi, ac communiam dicti burgi appellatam ‘the Sandis’ ex orientali partibus.*”

There is also produced an excerpt from a minute of meeting of the Town Council of the burgh, held on 26th July 1622, in which the deputy treasurer is instructed to repair and build up a dyke or wall pertaining to the town on the west side of “*ye commoun callit the Sandis.*”

I need not particularise them, but there will be found in the appendix excerpts from titles of the adjoining lands in which frequent reference is made to the *commonty* of the burgh called the Sands. There is also produced a minute of meeting of the Council of date 14th December 1774, in which they deal with an application by the Hon. Mr Charteris, who desired to build an assembly hall on the “*commonty called the Little Sands.*”

Turning now to the parole proof, it appears to me that the complainer has proved that the inhabitants of the burgh have had,

from time immemorial, such use and enjoyment of the ground in question as its size and nature admitted.

It is necessary to keep in view, in considering cases of this kind, 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 cricket or football. All acts of the inhabitants showing that they had the free use and enjoyment of the ground are relevant to support the complainer's case. I think it is proved that it has been used for walking over and exercise by the inhabitants from time immemorial; that it was, so far as suitable, used for the bleaching of clothes; and as regards recreation, it was certainly used by the younger part of the community for their games and amusements to the fullest extent.

Such uses appear to me to be sufficient to show that the burgesses and inhabitants have had the use and enjoyment of this ground as common ground from the earliest date, and I think that neither the Magistrates, nor anyone deriving right from them, had a right to interfere with them in such use or enjoyment.

That this *commonty* of Sands has suffered encroachment at the hands of its administrators—as we know similar commons have done—is sufficiently clear, but it is well settled that such encroachments give them no right to encroach further on what of the *commonty* remains intact.

I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Complainer and Respondent—J. Wilson, K.C.—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Respondents and Reclaimers—The Lord Advocate, K.C.—Dundas, K.C.—W. Trotter. Agent—T. S. Paterson, W.S.

Counsel for the Town Council of Haddington—Blair. Agents—Strathern & Blair, W.S.

Thursday, March 20.

## SECOND DIVISION.

DE LA CHAUMETTE'S TRUSTEES v.  
DE LA CHAUMETTE.

*Trust—Husband and Wife—Antenuptial Marriage-Contract—Presumption against Child-Bearing—Fee Destined to Issue—Trustees Authorised to Invest Trust Estate in Annuities for Spouses when Both were Seventy Years of Age without Issue.*

A wife by antenuptial marriage-contract conveyed certain funds to