what sum that *jus relictæ* would amount to. Now, there is nothing to prevent her claiming the *jus relictæ* except the signing of that minute of 28th March 1882, but that does not in any way prevent her having an accounting of her deceased husband's estate. It is admitted that the husband left other means besides those comprising the amount to his credit with the firm of Lusk & Co., but we know nothing of what has been done with those other means, and an undertaking by her to stand by the will so far as regards the money in Lusk & Co's account would not preclude her from having an accounting of these other means, as the will does not provide for the disposal of all her husband had left.

But further, I think that the signing of the minute of 28th March expressing her resolution to stand by the provisions conveyed to her by the will is no answer to the present claim for *jus relictæ*. I look with great suspicion at this meeting of trustees called at such an early date, and with the desire to get her to put her name to a paper containing a resolution so foolish. But the purpose of this meeting seems to have been a desire to get the widow to put her name to this paper so as to preclude her from afterwards claiming what she was legally entitled to claim. I say there was no reason to call a meeting of the trustees at such an early date, because the whole income that the property yielded was a sum of 15s a-week. She must have got it all for the support of herself and her family, if only to keep them from applying for parochial relief, and yet the minister of the Evangelical Union and her brother-in-law, presumably an office-bearer in the same denomination, meet to get her to put her name to a document which will have the effect of sending all this money to their Church. I do not look upon it as at all a creditable proceeding, and I do not think that her signing such a document will prevent her claiming her legal rights. But any way that minute is no answer to the pursuer's claim for an accounting.

I think that the validity of the action must be sustained and the case sent to the Lord Ordinary to proceed with the accounting if that should be necessary, and the result will be that she will get her *jus relictæ*. I do not see how she can have anything to pay back; she was entitled to get it all for the support of herself and her family, and if she did get any advances out of capital for the payment of rent, &c., which she could not be expected to pay out of that small sum of 15s. a-week, she has nothing to pay back there either.

Lord Craighill—I concur. I think that the case is quite clear, if read in the light of justice between the parties as well as in the light of the decisions. Looking at what she knew of the matter, or rather did not know, it is plain that the matter was not presented to the pursuer in such a manner that she can be said to have got proper advice in regard to her conduct as to election between her conventional provisions and her legal rights. And although the trustees knew that she had not got that advice, still they did not insist that a proper time and consideration and consultation as to that line of conduct which she ought to pursue must be given. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

Lord Rutherfurd Clark—In the case of *M'Fadyen* which was quoted to us I had some difficulty on the question between the widow and the representatives of the husband, although I did not differ from your Lordship's judgment, and I confess I have difficulty here also. The settlement was laid before her at the meeting and was explained to her, and that she did not at once object to the provision made for her is shown by her having kept to it for four years. I confess that in these circumstances I have some difficulty in holding that her claim for her legal rights is not excluded. I should be very sorry if the result of our judgment should be that her claim was defeated, and I am glad therefore to be able to surrender my difficulty, and do not differ.

The Court pronounced the following interlocutor:—

"Find that the pursuer is not barred from claiming an accounting from the defenders in virtue of and in accordance with her legal rights: Therefore recal the interlocutor reclaimed against: Repel the defences: Remit to the Lord Ordinary to proceed in the accounting: Find the pursuer entitled to the expenses hitherto incurred by her in the cause," &c.

Counsel for Pursuer—Rhind—Napier. Agent—A. R. Patrick, Solicitor.

Counsel for Defender—Guthrie. Agents—J. & J. H. Balfour, W.S.

Friday, June 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MAGISTRATES OF MONTROSE *v.* COMMERCIAL BANK OF SCOTLAND, LIMITED.

Property—Superior and Vassal—Burgh—Bounding Title—Foreshore.

A royal burgh which was the proprietor of lands situated on the shore of a tidal river-basin feued out a certain portion thereof, which in the feu-disposition was described as bounded on one side by the flood-mark. *Held* that the burgh was divested of their whole right seaward, and had no title to ground subsequently formed *alluvione* between the feu and the sea.

Hunter, &c. v. *Lord Advocate, &c.*, 7 Macph. 899, *followed.*

This was an action of suspension and interdict at the instance of the Magistrates of the royal burgh of Montrose against the Commercial Bank of Scotland, Limited, in which it was sought to interdict the respondents from "enclosing, or in any way interfering, by themselves or others acting under their authority or on their behalf, with that area or piece of open ground lying immediately to the west of the west boundary wall enclosing the respondents' property, situated on the west side of the High Street of Montrose, and extending said area or open piece of ground from said wall westwards, until the said area or

piece of open ground adjoins the subjects recently acquired by the North British Railway Company from the Board of Trade, and reclaimed from the bed of the estuary of the river South Esk, and also from preventing or in any way interfering with the complainers or the members of said community of Montrose from exercising the full right of property in, to, and over the said area or open piece of ground."

Montrose is a royal burgh of great antiquity. By a charter of Robert II. confirming a charter of David II., dated 1st May 1370, there was granted to the burgesses of Montrose the whole burgh with the pertinents.

The title founded upon by the complainers in the action was a charter granted by King David II. dated 18th February 1409, which contained the following—"David, Dei gracia Rex Scotorum Omnibus probis hominibus tocius terre sue tam clericis quam laycis presentibus et futuris Salutem; Sciatis nos Dedissi, Concessissi et hac presenti carta nostra confirmasse, delectis Burgensibus nostris Burgi nostri de Monros Renovacionem carte cuius tenor talis est—David Rex Scocie Episcopis, Abbitibus, Comitibus, Justiciariis, Baronibus, vicecomitibus, ministrisque omnibus et probis hominibus tocius regni sui Francis, Scocis, Anglicis, et aliis alienigenis tam presentibus quam futuris salutem, Sciant omnes me Dedisse Concessisse et hac presenti carta mea Confirmasse Dilectis Burgensibus meis totam terram meam de Salorkio jacentem et situatam juxta portum de Stronnay versus aquilonem sicut Raudus de Grantoun, Camerarius meus Thor Vicecomes, et Ricardus Clericus ea vice proinerunt quando eam metiti sunt pro quatuor Carucatis terre cum dimidia. Habendam et Tenendam dictam peciam terre dictis Burgensibus meis in libero Burgo cum omnibus rectitudinibus et libertatibus ad liberum Burgum pertinentibus adeo libere sicut bona villa mea de Perth de me tenetur et cum omnibus rectitudinibus, empcionis, et vendicionis legitime pertinentibus ad opus et officium Burgensiam et mercatorem de aqua de Thawhoke usque Fyndoune et de Fyndone per partes Boreales usque ad aquam de Carwdy et sic descendendo per partes australes usque ad aquam de Deychty sicut currit in Drumlay." They also produced a series of later charters conferring rights of custom and trading and other rights and privileges.

The complainers averred that under their charters they had right to the whole territory of the burgh, which comprehended the piece of ground in dispute.

This piece of ground, which was about a quarter of an acre in extent, lay in an angle formed by the respondents' garden wall on the east, and by the boundary wall of the adjoining feu on the south; prior to the operations of the North British Railway Company after mentioned, it was bounded on the west and north by the high-water mark of the Montrose basin, and subsequently by the ground reclaimed by the railway company from the basin.

The title of the respondents, the Commercial Bank, flowed from the burgh. The earliest title produced was a disposition dated 1st January 1680 and recorded 28th April 1709, granted by John Ouchterlony to George Ouchterlony, in which the description was as follows—"All and haill that my tenement of land, and haill houses and biggings thereof, back and fore, under and above, with the yeard and pertinents yrof, lyand contigouslie and together on the west side of the Murray Street of the said burgh, bounded with ye High Street on the east, the sand-mark on the west, Archibald Lindsay on the south, and Robert Ronald, Provost, his lands, on the north parts."

The next title produced was a sasine following upon a disposition by George Ouchterlony and his creditors in favour of Alexander Scott, recorded in the burgh register on 10th May 1717, in which the following was the description:—"All and haill those two inner or back tenements of land, haill houses and biggings thereof, high and laigh, with the closs, yeard, taill, and pertinents lyand contigue and together on the west side of the Castlegate of Montrose, bounded with the fore tenement yrof on the east, the flood-mark on the west, the lands belonging to the heirs of the deceast John Scott of Commiestown on the north, and Elizabeth Gray, her lands, on the south." The title in favour of the respondents was a disposition by Mrs Isabella Scott or Baines, dated 11th May and 14th June, and recorded in the burgh register of Montrose 12th August 1875, in which the ground in question was described as bounded "on the west by the flood-mark." The boundary in the intervening titles was the same.

In the statement of facts for the complainers the following averments were made:—(Stat. 1) . . . "From time immemorial large deposits of mud have been carried by the currents in Montrose basin and added to the lands adjoining its foreshores. To these natural deposits the complainers and the community of Montrose have for time immemorial added, by themselves or others on their behalf. There have thus been reclaimed from the sea considerable areas of ground, which the community and burgesses have ever since, and far beyond the prescriptive period, possessed, used, and enjoyed, as parts and pertinents of the burgh." (Stat. 2) "The piece of open ground described in the prayer is a part and portion of the ground so formed *alluvione* and reclaimed by the complainers, or their predecessors in office, as representing the community of Montrose, or others in their behalf. This piece of ground has been possessed, occupied, and enjoyed by the complainers or their predecessors and by the said community, as part of the burgh property, without challenge for upwards of forty years. This piece of ground is within the territory of the burgh and entirely outside the property of the respondents, from which it is now, and has for time immemorial been separated by a wall. The respondents have no access to, and have never in point of fact asserted or exercised any right whatever over, the said piece of ground. It has been used by the inhabitants of Montrose as a recreation ground, as a free passage for people along the shore, and for other purposes from time immemorial. The site of the wall which forms the western boundary of the respondents' property marks the line to which the ancient flood-mark of Montrose Basin reached, and marks the western limit of the respondents' property as described in their title-deeds."

The respondents in their answers stated that any deposits which might have been made on the shore of the Montrose basin contiguous to their property became their property by ac-

cretion; and further, that the ground in dispute was embraced in their title, lying as it did within their boundary on the west, which was the flood-mark.

The complainers pleaded—"(1) By virtue of their burgh title and the possession condescended on following thereon, the complainers are proprietors of said open piece of ground, and are entitled to interdict any interference therewith without their authority. (2) The said open piece of ground being within the territory of the burgh of Montrose, belongs in property to the complainers, and the respondents having threatened to assume possession of said open piece of ground, the complainers are entitled to interdict, as craved."

The respondents pleaded—"(1) The complainers have no title to sue. (3) The area or open piece of ground in question being the property of the respondents and embraced in their titles, the note ought to be refused. (4) The said area or piece of ground being embraced in the respondents' title, it was incapable of being acquired by the complainers in the manner alleged by them. (5) The complainers' statements as to their use and occupation of said piece of ground being unfounded in fact, the note ought to be refused."

A proof was taken. From the evidence led it appeared that the extent of the ground had not varied appreciably within the memory of the witnesses, although the height had been increased by the deposit of rubbish.

John Fitchet, shipmaster, aged eighty-four, adduced as a witness by the complainers, deponed that when he was a boy he used to drill on the ground before Waterloo. "I have seen as many as fifty boys being drilled on this ground at a time. There was plenty of room for them to go through their evolutions when the tide was out. When the tide was in perhaps it did not suit so well. We drilled there whether the tide was in or out. I should say the ground is higher now than it was when I was a boy. My memory does not serve me to say whether it is about the same in extent. I cannot say there is more dry ground now than there was then."

With regard to the possession, John Anderson, burgh surveyor, deponed—"When the railway operations commenced the ground in question was just a piece of waste ground, with material of various kinds lying upon it. It was put to no particular use except for depositing rubbish upon. Rubbish was shot there by any person who wanted to get rid of it. It was just what is called a free toom."

James Ross, Sheriff-Clerk of Forfarshire, and formerly joint-agent for the Commercial Bank at Montrose, deponed—"There was no occupation of this piece of ground by anybody, unless you could say that the Ochterlonys' gardener was in occupation of it by throwing rubbish out of the garden into the place. It lay completely out of the way of foot-passengers. It was a horrid nasty place, and nobody would go there who could help it. . . . There was no occupation of this ground by the burgh Corporation, or anyone on their behalf, all the time I remember."

Alexander Anderson, aged eighty-seven, who was employed as a gardener by the respondents' predecessors from 1832 onwards, deponed—"I was in the habit of throwing weeds and garden rubbish over the back wall of the garden next the Back Sands or Basin. There were some steps inside the garden wall which enabled me to do so."

It was also proved that there was in the wall what had been, or what had been intended to be, an opening, but that this had been built up at a remote date.

Several of the complainers' witnesses expressed the opinion that this wall had been built upon the old flood-mark. They founded this opinion upon the fact that the boundary-walls of the feus to the north, which were admittedly built upon what was flood-mark before the railway company's reclamations, were in line with the respondents' wall; and also on the fact that the wall was built of scurdy, which was stated by one of the witnesses to be a particularly old kind of stone.

The feu immediately adjoining that of the respondents' to the south, also granted by the Magistrates, and upon which a flour-mill had been built, was described as bounded "by the flood-mark on the north and west parts, as the said piece of ground or tail was sometime enclosed on the north and west parts by stone or brick dykes."

In 1842 the proprietors of the mill-feu, on the occasion of their desiring to lay a drain through the ground in dispute, had granted to the respondents' predecessors a declaration that the construction of the drain should not be construed as implying any right on their part to the property of the ground, which it was stated they had no desire to claim. With regard to the right of the burgh to the foreshore, it appeared that when the North British, Arbroath, and Montrose Railway Company wished to extend their line they applied to the Board of Trade for a title to such portions of the foreshore as they required, and obtained from them a feu-disposition dated 2d August 1878. By this disposition the Board of Trade, in consideration of the sum of £912, 10s. paid to them by the railway company, disponed to them those portions of the foreshore and bed of the river South Esk below high-water-mark which were required for their operations. With regard to this James Mitchell, a town councillor, deponed—"When I was in the town council I heard that the Board of Trade proposed to give a title to the railway company. We made no objection, but we caused intimation to be made to the Board of Trade that we wanted certain matters arranged, and certain privileges of the town conserved before a title was given. (Q) Did the town council consider that the Board of Trade was entitled to dispone or feu all the foreshore to the railway company? (A) Subject to the rights the town council had, I am not aware what price the Board of Trade got for the foreshore; if we made any inquiry—which I don't recollect—we got no satisfactory answer. We were content that the Board of Trade should dispone the land and get the price so long as our rights were conserved." After getting the conveyance the railway company proceeded to reclaim from the sea those portions of the foreshore so acquired, and constructed their line over the ground reclaimed.

The harbour rights which were originally in the burgh were given to harbour trustees by statute, for a valid consideration, about 1839.

The Lord Ordinary (KINNEAR) on 19th December 1885 sustained the third plea-in-law for the respondents and dismissed the note.

"*Opinion.*—I think it unnecessary to determine whether the complainers have a title under which they can claim to hold land lying to the seaward of the respondents' boundary, because they have failed to prove that the piece of ground in dispute has been reclaimed from the sea since the date of the respondents' title. The respondent's boundary under their title is the flood-mark, and they make no claim to the foreshore. But the piece of ground in question is within the high-water mark of ordinary spring tides, and the greater part of it at least has been so during the whole period to which the evidence relates. It has long been used as a place for shooting rubbish, and the surface is formed for the most part of deposited material. It can hardly be doubted therefore that some portion of the ground has been gained from the sea. But there is no satisfactory evidence as to the extent to which the land has advanced or as to the time when the advance was made. The evidence which goes furthest back is that of John Fitchet, a man of eighty-four; and from his account of it, it appears that although the ground may have gained in height it has gained nothing material in extent since the earliest time to which his memory reaches back; and if anything has been gained, it has not been from operations for reclaiming land, but from the use of an existing piece of waste land for shooting rubbish.

"The complainers' argument was rested mainly on an assumption that the respondents' sea-wall must have been built on the extreme verge of their property—that is, on the flood-mark, as it was at the date when the wall was built. But this is a mere assumption; or if it can be supported to any extent by inference from the position of the neighbouring sea-walls, the reasoning is too speculative to justify a conclusion that would deprive the respondents of property that, in the existing condition of the land, is admittedly within their title.

"It is not immaterial to observe that the title has been frequently renewed by cognition during a period for which it is certain that the ground in dispute has been either entirely, or with no material exception, above high water-mark. It may be that these renewals of the investiture being mere recognitions of the right of succession to an existing estate will not preclude the burgh from recurring to the state of things at the date of the original grant, to ascertain the true extent of the estate. But there is no evidence whatever as to the condition of the land at the date of the original grant. It may be that the sea has at one time receded. But it is equally possible that at an earlier time it may have gained on the land. There is some evidence to suggest that there may have been a considerable fluctuation, and at all events there is no evidence inconsistent with that hypothesis.

"The result is that the ground in dispute as it now stands is within the respondents' title, and that it is not proved that it was covered by the sea at the date of the original grant."

The complainers reclaimed and argued—(1) Upon the evidence the Lord Ordinary was wrong, as it was proved that the respondents' wall was built upon what was the flood-mark at the date of their title. (2) The respondents held under a bounding title, and could therefore not prescribe a right to anything beyond the boundary. The right to the foreshore was in the burgh. Under the charter of King David II. the boundary of the burgh to the west was the water of Tayock, which was to the west of the flood-mark, and only visible at low water. The boundary in the complainer's charter was different from that in the respondent's title, and therefore the case did not fall under the principle of *Hunter* v. *The Lord Advocate, infra cit.*, but under that of following cases, viz.—*Smart* v. *The Magistrates of Dundee*, November 22, 1797, 3 Paton's App. 606, 8 Brown's Parl. Cas. 119; *Todd* v. *The Clyde Trustees*, January 23, 1840, 2 D. 357, *aff.* 2 Rob 333; *Berry* v. *Holden*, December 10, 1840, 3 D. 205.

The respondents replied—(1) The complainers had failed to prove that the ground in question had been reclaimed since the date of the respondents' title. There had been no possession on the part of the burgh of such a character as to establish any right of property—*Magistrates of Edinburgh* v. *Magistrates of Leith, &c.*, July 10, 1877, 4 R. 997. (2) The complainers had no title to interfere. They had not proved that they had any right to the foreshore. Under their charter the burgh was merely the proprietor of lands *de facto* bounded by the sea—*Agnew* v. *The Lord Advocate*, January 21, 1873, 11 Macph. 309; *The Lord Advocate and the Clyde Trustees* v. *Lord Blantyre*, June 17, 1879, 6 R. (H.L.) 72. The description of the boundary in the charter founded on could not be applied The extent of the burgh was there said to be four and a half plough-gates of land, and the latter part of the description merely applied to privileges of trading. The complainers had therefore by their feu to the respondents divested themselves of all right seaward—*Hunter* v. *The Lord Advocate, &c.*, June 25, 1869, 7 Macph. 899; *Blyth's Trustees* v. *Shaw-Stewart*, November 13, 1883, 11 R. 99; *Paterson* v. *M. of Ailsa*, March 11, 1846, 8 D. 752, *per* Lord Wood; *Campbell* v. *Brown*, November 18, 1813, F.C.; *Boucher* v. *Crawford*, November 30, 1814, F.C.; Bell's Prin., secs. 642, 643; Rankine on Land Ownership, pp. 95, 97; Ersk. Inst. ii. 1, 14, ii. 6, 17.

At advising—

LORD PRESIDENT—The prayer of the note of suspension and interdict in this case is to have the Commercial Bank, the respondents, "interdicted, prohibited, and discharged from interfering with that area or piece of open ground lying immediately to the west of the west boundary-wall enclosing the respondent's property on the west side of the High Street of Montrose, and extending said area or open piece of ground from said wall westwards until the said area or open piece of ground adjoins the subjects acquired by the North British Railway Company from the Board of Trade."

Now, in support of that prayer the complainers state that they are infeft by and under a very old charter in the whole area of the burgh of Montrose. They state that the complainers have right to the whole territory of the burgh, comprehending the portion of ground in dispute in the present action, and then they proceed to say

that from time immemorial large deposits of mud have been carried by the currents in Montrose basin and added to the lands adjoining its foreshores. To these natural deposits the complainers, the community of Montrose, have from time immemorial added by themselves, or others on their behalf. And they say further that the piece of open ground described in the prayer is part and portion of the ground so formed *alluvione*, and reclaimed by the complainers or their predecessors in office as representing the community.

Now, that shows clearly that according to the view of the complainers the piece of ground in dispute was originally part of the foreshore opposite the burgh of Montrose forming part of the basin, as it is called, of Montrose, which is all covered by the tide at high water, and all lying dry at low water. It seems to me therefore very clear that unless the complainers have a good title to this foreshore they have no right to interfere with the respondents at all. The Lord Ordinary says that he thinks it unnecessary to determine whether the complainers have a title under which they can claim the whole of the lands lying to the westward of the respondents' boundary; and if the case were absolutely clear otherwise perhaps it might not be necessary to inquire into the title of the complainers; but as there is a good deal of doubt in the evidence, and a good deal of difficulty in ascertaining the precise facts as to how this ground was gained, and also whether the wall enclosing the respondents' property on the west was really built upon the extreme verge of their property, so it seems to me rather desirable to dispose of that question of title in the first place; and as I have formed a very decided opinion against the complainers upon the question of title, I rather prefer to put my judgment on that ground.

The burgh of Montrose is a royal burgh, and a very old one. The original charter of the burgh bears to have been granted by David I. in the twelfth century, and although that charter is not now extant, we have it recited at length in a subsequent charter of King Robert I. in 1384, and that bears to grant to the burgesses and community of the burgh of Montrose the "whole of that our said burgh of Montrose, with the pertinents, to be held by the community and burgesses of the said burgh, and their heirs and successors in perpetuity, by all its ancient meiths and marches," and so far as I can see with the exception of some fisheries in the North Esk and the South Esk, and the usual privileges and immunities of burghs, there is nothing else in the charter at all.

Now, it has never been contended, and it certainly never was held, that a mere infeftment in that part carries with it the right to the foreshore adjacent to the burgh, and there is no mention of anything of that kind in this original charter. But just as little is there in that charter of King Robert I. which confirms that charter of David I. There is no mention of boundaries at all. We have farther what is called a notarial transumpt of charters by King David II. and King Robert II., and these are printed at length, and I think they require a little more examination, because it has been represented that these charters, and particularly one of them, does contain a specification of the boundaries of the burgh—I mean the charter of King David II. Now, the subject granted by that charter to the burgesses of Montrose is the lands of Salorkium, lying and situated near to the port of Stronnay, and which is measured to contain four plough gates of land and a-half. It is to be observed that the subject conveyed by this charter is not the burgh of Montrose, but the lands of Salorkium. Whether that is another name for the burgh, or whether it is an additional piece of land given to the burgh because it lay adjacent to it we have no means of determining, but I do not think that is of very much consequence in this question. Take it to be the burgh, or take it either way, the boundaries are stated to be contained in this charter of David II. and are made mention of. And in order to be quite sure what the meaning of these boundaries is, it is necessary to read a portion of the charter, and I shall endeavour to translate it into English in order to make myself more intelligible. It is said that this piece of land near Stronnay is to be held in free burgage, with all the rights and privileges belonging to a free burgh, as freely as my good town of Perth is held of me, with all the privileges of selling and buying legitimately belonging to the work and office of burgesses. And then follow the words founded upon by the Magistrates—"from the water of Tayock to Findon, and from Findon by the north to the water of Cardwy, and so descending to the south parts, to Dichty as it runs in Drumlay." Now, are these intended to represent the boundaries of the lands conveyed by this charter, viz., Salorkium? I apprehend not. In the first place, if they were so it would be a most vague and indefinite boundary, and one that no human being could trace at the present day. But I cannot doubt for one moment that these lands are not described and are not intended to be described by these boundaries, but that these are the boundaries within which the privileges of the burgh of Montrose may be exercised—that is to say, the right of exclusive trading and all the other privileges and immunities that belong to the burgh—as freely as these are possessed by the burgh of Perth. The words which are said to be descriptive of boundaries follow immediately after the words regarding the exercise of privileges, and do not connect in the slightest degree with the lands of Salorkium, which are previously conveyed. In that charter, therefore, I can find no boundaries of the burgh, and nothing but a sort of general description of a district of country within which the burgesses of Montrose are to be entitled to exercise their privilege of exclusive trading and such other privileges as then belonged to royal burghs.

The other charter of Robert II. is in the same terms, and it is needless to go through it.

Now, there are a number of charters of later date to which it is unnecessary to refer as throwing any light upon this question. I have gone over them for the purpose of seeing whether any light can be derived from them, but can get none.

In these circumstances it is perfectly clear that the Magistrates of Montrose have not produced any title to the foreshore of the basin of Montrose, and in confirmation of this it is not unimportant to observe that when the Montrose and Arbroath Railway Company desired to acquire a

very considerable space of ground in this basin for the purpose of constructing their line and works connected with their station, they did not go or think of going to the Montrose Magistrates for a title, but they went to the Board of Trade, clearly showing that in their understanding the foreshore belonged to the Crown, and had never been given out to a subject, and the Magistrates of Montrose took no steps to prevent that being done, but, on the contrary, in the full knowledge of what was being done, acquiesced in it. It was said, in explanation of their conduct, that they really had no interest in the matter, because as long as they got a good arrangement for the construction of the railway works, and a convenient access for the railway station, and a road along the subject which they got by agreement, it was of no consequence from whom the railway got their title. No doubt it would have been of very little consequence if the railway company had not had to pay for their title. But as they had to pay upwards of £900 to the Board of Trade, I think it is highly probable that the Magistrates would, if they had thought the foreshore belonged to them, have liked to get the £900. At least it would be very unlikely that the Magistrates would not, and therefore as the Magistrates have not produced any title to the tidal basin, or any right to the foreshore under any charter in their favour, and after the clear acquiescence in the transaction to which I have referred, I am of opinion that the Magistrates themselves were perfectly conscious that they had no right to the foreshore.

Now, the title of the respondents is a title flowing from the burgh, and the boundaries of the feu are given in the earliest conveyance that they have applicable to it—I mean in the deed of 1709, and the subject is described as lying contiguously and together on the west side of the Murray Street of the said burgh, bounded by the High Street on the east, the sand mark on the west, Archibald Lindsay on the south, and Robert Ronald, provost, his lands, on the north parts. In another deed, dated shortly afterwards, the sasine on which is dated in 1717, we have it described as the subjects lying contigue and together on the west side of the Castlegate of Montrose, bounded with the fore-tenement thereof on the east, the flood-mark on the west, the lands belonging to the heirs of the deceased John Scott of Commeston on the north, and Elizabeth Gray, her lands, on the south. Now, the two expressions there, "sand-mark" in the one title and "flood-mark" in the other, have been taken to be synonymous, and I think they are, and there is no doubt therefore that the western boundary of the Commercial Bank's feu was high water-mark. But when a proprietor feus out a subject lying adjacent to the sea with such a description as this, giving his feuar the flood-mark as his boundary, and has himself no title to the foreshore, the result is, as has been adjudicated in the case of *Hunter* v. *The Lord Advocate and Others*, that he gives to his feuar everything that lies between the land boundaries of the feu and the sea, and that he is not entitled to interpose himself between his feuar and the sea. Now, giving effect to that judgment and to the principle on which it is founded, I think the Magistrates of Montrose here was precisely in the position in which Mr Hunter was in that case, and therefore I am clearly of opinion that they have no right whatever to interfere with any ground acquired by the Commercial Bank from the foreshore of the basin of Montrose. The Crown might have interfered with that, but the Magistrates have no right to do so.

While I found my judgment upon the ground of want of title, as I think the clearest ground of judgment, I may say at the same time that I am not at all disposed to differ from the Lord Ordinary upon the ground upon which he has decided the case, but I do not think it necessary to go into it. It is a good deal more difficult and a more complicated question than that which I have disposed of, and I therefore am for adhering to the interlocutor which dismisses the note of suspension and interdict. I see it sustains the third plea-in-law for the respondents, so we ought to add to the interlocutor that we sustain the first plea-in-law also.

Lord Mure—I quite agree with your Lordship that to entitle the complainers to the interdict here asked, it is necessary for them in the action as laid to shew (1) that the garden wall of the respondents is, as the complainers allege, built upon the line of the flood-mark of the sea, which is the boundary of the respondents' property, as described in their titles, on the west; and (2) that the ground here in question which lies to the west or westward of that garden wall is the property of the Magistrates of Montrose.

In the view I take of the case the complainers have failed to establish either of these propositions.

As regards the question of title, assuming the garden wall to have been built on the line of the sea flood-mark as they allege, all the shore to the west is substantially foreshore, and to succeed therefore in their action the complainers must shew a title to the foreshore.

Now, I agree with your Lordship in thinking that they have not produced any such title, and that they have not only failed to produce any title to the foreshore but it is clear from the transaction between the railway company and the Board of Trade at the time that the railway was taken through, when the Magistrates allowed the company to take a conveyance of the foreshore from the Board of Trade, at a price that was nearly £1000 for the ground so conveyed lying in the vicinity of the bit of ground here claimed and allowed that transaction to be carried through without objection, it is clear, I say, that the Magistrates of Montrose did not act as if they had right to the foreshore at the place here in question.

Mr Mitchell, a gentleman who was convener of the town council's railway committee at the time the railway was carried through, was examined as a witness for the complainers, and he says in his evidence most distinctly that the town council made no objection to the Board of Trade giving the railway company a title to the piece of foreshore. And then he is asked "Did the town council consider that the Board of Trade was entitled to dispone or feu all the foreshore to the railway company?—(A) Subject to the rights the town council had, I am not aware what price the Board of Trade got for the foreshore; if we made any inquiry—which I do not recol-

lect—we got no satisfactory answer." It is clear therefore that the Magistrates knew quite well of the transaction, and that they allowed the Board of Trade to sell a piece of the foreshore to the railway company at the price of £900, and therefore the case of the complainers on the question of title entirely fails.

Now, with reference to the second point I also agree with the view which your Lordship has expressed. I think the Lord Ordinary has taken the right view in regard to the question of boundary. The case of the Magistrates is that the boundary wall was built upon the line of the flood-mark upon the western boundary of the property, and they say that that is to be presumed because of certain appearances which builders and others find about that wall. I am not satisfied that that is a presumption that holds good in all cases. A man might possibly build upon the line of the flood-mark, but then he might expect to get his building all knocked to pieces by the sea washing in upon it. My opinion is that a sensible man would take care to have his wall within the flood-mark, and where it would not be in danger of being knocked to pieces by the action of high winds or the sea, and of high or even ordinary spring tides, and therefore I cannot share in the presumption drawn from the appearances of this wall and its alleged position at flood-mark.

But, on the other hand, I agree with the Lord Ordinary when he says that upon the evidence it is proved that as far back as anybody goes there has been no great change on the ground, and the preponderance of evidence seems to me to show that there has been very little gained from the sea at this particular place. His Lordship refers to the evidence of a man named Fitchet, which goes furthest back, and adds, that from his (Fitchet's) account of it it appears that although the ground may have gained in height it has gained nothing material in extent since the earliest time to which his memory reaches back. Fitchet is a man of 84 years of age, and his evidence is confirmed to the above effect by various other witnesses, by a man of the name of William Anderson, who was called by the complainers, and who says that the ground in dispute has not increased in size at all during his recollection, and he is a man of 70. Then a man of the name of Henry Ross gives evidence to the same effect. A still older man, who was examined on commission—Alexander Anderson, a gardener at the place in question at one time—says distinctly that he sees no change in the extent of the ground from what he first recollects it. There may have been some rubbish thrown here and there, but not to his recollection any change so far as he can see; this witness goes back to 1840 if not further.

In these circumstances I think there is a total failure on the part of the Magistrates to prove that the wall is the boundary of the property of the respondents. On the contrary, I think it was farther in on the ground in question than flood-mark. The ground in dispute was not considered to be an object to anybody, being considered of very little value, and probably little attention was paid to it or its condition.

For these reasons I agree with your Lordship that we should adhere to the interlocutor of the Lord Ordinary.

Lord Shand—One of the questions raised by the defence stated by the respondents is the question of the complainers' title, and upon that question I entirely concur in what has fallen from your Lordship. The title to this foreshore was rested I think almost entirely upon the terms of the charter of 1409, in which we find a reference to the water of Tayock and it was said that that reference to the Tayock was sufficient to show that the whole of the basin of Montrose extending to the line of the Tayock—I think it flowed into the Esk—was within the territory feued by this charter and therefore was the property of the Magistrates. I think it impossible to read the charter to that effect. Parties were really in difficulty in attempting to give any explanation upon the following words "Thawhoke," "Fyndoune," "Deychty," &c., but so far as we could learn from their names they referred to districts at a very considerable distance beyond Tayock, some of them considerably to the north of it, and I think it is plain that the reference to the water of Tayock in the charter is this, that it is referred to simply as the line or boundary having reference to the two last charters which precede it, in which there is given to the burgh of Montrose a right of market within a certain district and nothing else. And that being so, the case confessedly upon the part of the complainers rests upon this, that they have right to the territory of the burgh, and that *de facto* the burgh is bounded by the sea at the point in question, and that the burgh extends to the basin of Montrose with the tides ebbing and flowing upon the shore. We have no reference to a sea boundary in the title, but we have in fact a sea boundary.

Now, taking that to be the state of the title of the burgh of Montrose, it is quite true that according to the recent authorities such a title may form the ground for acquiring right to the foreshore by prescriptive possession, and it may very well be, that if the town of Montrose, having right to this territory of the burgh, and having that territory bounded by the sea, had been able to instruct that from time immemorial they had exercised possession of the foreshore by reclaiming it at this point, digging it out, and exercising the general rights and privileges which have formed the subject of proof in many cases which we had before us, the title might have been complete in the burgh. And I observe in the condescendence in this case that the complainers aver in statement 2nd that "the piece of open ground described in the prayer is a part and portion of the ground so formed *alluvione*, and reclaimed by the complainers or their predecessors in office as representing the community of Montrose, or others in their behalf. This piece of ground has been possessed, occupied, and enjoyed by the complainers or their predecessors, and by the said community, as part of the burgh property without challenge for upwards of forty years;" and so with reference to averment it appears to me that the case of the complainers entirely fails. I think there has been no occupation or possession whatever in the exercise of the rights of proprietorship with reference to this ground on the part of the burgh, and therefore although they had a title fortified by prescriptive possession for the requisite period giving them a right to the fore-

shore, I think that possession is entirely awanting, and therefore I think as their case is presented to us the complainers have no title whatever to this ground.

That being so, I think it is unnecessary to discuss the second point to which your Lordships have referred, and upon which the Lord Ordinary has proceeded, further than to say that I find I have considerable difficulty in holding as his Lordship has done, that it has been proved that this ground was within the original feu as given off. I think there are considerations with reference to the wall built upon this property excluding this piece of ground altogether, and the nature of the wall as forming part of a range of walls all along the shore at that point makes it difficult to draw the inference that ground which is not enclosed by that wall was originally given off in that feu-contract, and so having that difficulty I merely give expression to it. The ground of judgment upon which I proceed is that whether the Commercial Bank have a good title to the ground in question or not, the other party, the Magistrates of Montrose, at all events, have none, and therefore they have no right to insist in their present claim.

Lord Adam—I think the first question to be determined is—Have the complainers any right to interfere with this piece of ground? I think it has been decided by the case of *Agnew* v. *Lord Advocate* that where an estate lies on the seashore, and the grant or Crown charter contains no special conveyance of foreshore, and no boundaries going below high water-mark, that in that case there is no presumption that the foreshore is a pertinent of the lands. I think that is decided by the case of *Agnew*.

Now, in this case it is clear that there has been no exclusive possession on the part of the complainers, and therefore the result is this, that unless the complainers can show by their Crown charter that they have an express grant of foreshore, or a boundary going below high water-mark, they have no right whatever to the foreshore.

Now, with reference to the charters which are produced, there are only two which, as your Lordship has pointed out, throw any light upon the subject. The first of these is that of David II., which, as your Lordship has said, contains simply a grant to the burgh, and no boundaries, and no mention of lands; all that it contains is a grant of various rights and privileges belonging to the burgh and burgesses, which are said to be "tam intra dictum burgum quam extra," which means that these privileges were to be exercised within the territory of the burgh only. That is in the earliest grant which we have.

Then the next charter which was referred to contains a special grant of the lands of Salorkium, and that is said to be the old name for Montrose. But whether it was a different piece of land or another description of the territory of the burgh nobody seems to know; but we know this fact, that it was not a large piece of land, for it extended to no more than 4½ plough-gates of land. Now, if the description of boundaries which follows in this charter had been meant to apply to that only, we would naturally expect to find them inserted there; when the lands are described we would expect the boundaries to follow, and then any pertinents and privileges. But we do not find that in this charter, because the only description of boundaries does not follow, but occurs at the end of the description of the rights and privileges given to the burgh and burgesses, and then there is a boundary prescribed for them. I think that is the true construction of that charter.

Now, if that be so, of course this charter is like the first one so far as the territory is concerned, that it contains no description by boundary and no specific grant of territory.

But I think further, assuming that the words descriptive of boundaries apply to the lands of Salorkium, they would not benefit the complainers' case at all, for this reason, that the only name now known there is the last word "Tayock." None of the others are known, and nobody can tell us where they are. Nobody knows at this hour. One witness thought they were in the neighbourhood of Montrose, and if that had been so one would have supposed that they would all have been recognisable to this day. But the water of Tayock only is known, and it is only taken as a point from which the boundary line starts. It is not said that the burgh is bounded by the water of Tayock. Now, that being so, it follows, as it humbly appears to me, that there is not in this charter an express grant of foreshore, nor a boundary below flood-mark, and the result is that the complainers have no right to foreshore at all. And if they have no right to the foreshore at all, then this case comes within the case of *Hunter*, and indeed I think it is *a fortiori* of *Hunter's* case, and for this reason, that the description in the respondent's title is flood-mark. Now, if that is, as I think, the construction of the Magistrates' title—also flood-mark—the two boundaries given are identically the same, and in that state of affairs the presumption is that where the boundaries are identical as here, everything that was in the one party was given by them to the other. Now, if that be so, it comes to this, that the Magistrates gave everything they had to their vassal, and if that is so, they have nothing left beyond flood-mark. I think therefore that the complainers have no title whatever to interfere with what the respondents are desiring to do, and that is I think the clear and safe ground of judgment.

The Lord Ordinary's judgment depends on whether it is proved in point of fact that the wall at the back of the respondents' subjects was or was not built on the line of the flood-mark. Now, I think there are a good many considerations pointing in both directions as to whether that is so or not, and I should not be willing to rest my judgment upon that. I think the more clearly that Mr Ure proves that the wall was built upon the line of flood-mark, the more clearly he shows that nothing was given off below flood-mark, and that the superiors, the Magistrates, gave their vassal everything they had, and therefore I ground my judgment upon the want of title on the part of the Magistrates to claim this ground.

Lord President—As we are not all of one opinion in regard to the third plea-in-law, we shall recal the Lord Ordinary's interlocutor, sustain the first plea-in-law for the respondents, refuse the prayer of the note, and find the respondents entitled to expenses.

Counsel for Complainers—J. P. B. Robertson, Q.C.—Graham Murray—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Jameson—C. K. Mackenzie. Agents—Melville & Lindesay, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, June 8.

(Before Lords Justice-Clerk, Young, Craighill, and M'Laren.)

CLARK AND BENDALL *v.* STUART (P.-F. OF MIDLOTHIAN).

Justiciary Cases—Criminal Law Amendment Act 1885 (48 *and* 49 *Vict. cap.* 69), *sec.* 11—*Sir William Rae's Act* (9 *Geo. IV. cap.* 29), *sec.* 19—*Competency of Complaint under Summary Jurisdiction (Scotland) Acts* 1864 *and* 1881.

The penalty provided by section 11 of the Criminal Law Amendment Act 1885 for a contravention of that section is that a person convicted under it may be imprisoned "for any term not exceeding two years, with or without hard labour." A charge of having contravened that section, brought by way of complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, in which the prosecutor restricted his demand for imprisonment to a term not exceeding sixty days, *held*, in respect of the Act 9 Geo. IV. cap. 29, sec. 19, to be competent.

Criminal Law Amendment Act 1885 (48 *and* 49 *Vict. cap.* 69), *sec.* 20—*Admissibility of Witness.*

Section 20 enacts that the "party charged with an offence under this Act, . . . and the husband or wife of the party so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge." . . . *Held* that "at every stage" means at every stage at which the production of evidence is competent, and that consequently an accused party who tendered himself after the proof was closed and parties heard, and after the Sheriff had indicated his opinion, could not be admitted as a witness on his own behalf.

Jurisdiction—Sheriff.

Remarks per Lord M'Laren on the considerations to be applied in determining whether a new crime introduced by statute is or is not to be regarded as falling under the jurdisdiction of the Sheriff. Where the statutory provision merely strengthens the common law in cases already cognisable by the Sheriff, his jurisdiction will not be held to be excluded.

Andrew Clark and James Bendall were charged, in a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, in the Sheriff Court at Edinburgh with a contravention of section 11 of the Criminal Law Amendment Act 1885. The term of imprisonment to which the complaint alleged the accused to have become liable was a period not exceeding sixty days. The accused pleaded not guilty. The case went to trial, and after the prosecutor and the accused had concluded their proof, and had been heard upon the evidence, and after the Sheriff (RUTHERFURD) proceeded to sum up the evidence, and after he had indicated that in his opinion the charge was proven but had not yet proceeded to pronounce his sentence, Clark interposed and offered himself as a witness on his own behalf. The Sheriff refused to allow him to give evidence at that stage, holding the opportunity to be past, and the accused were convicted and sentenced to thirty days' imprisonment.

The Act 48 and 49 Vict. cap. 69, sec. 11, enacts that "Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission, by any male person, of any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour."

Section 20 enacts that "Every person charged with an offence under this Act or under section forty-eight and fifty-two to fifty-five, both inclusive, of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, or any of such sections, and the husband or wife of the party so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge, except on inquiry before a grand jury."

Sir William Rae's Act (9 Geo. IV. c. 29), sec. 19, enacts—"That in the prosecution of criminal offences before Sheriffs of counties in Scotland, where the prosecutor shall in his libel conclude for a fine not exceeding £10, together with expenses, or for imprisonment in jail or in bridewell not exceeding sixty days, accompanied, when necessary, with caution for good behaviour, or to keep the peace for a period not exceeding six months, and under a penalty not exceeding £20, it shall and may be lawful to proceed to try such offences in the easiest and most expeditious manner, without the pleadings or evidence being reduced to writing." . . .

The accused presented a bill of suspension and liberation, and argued—(1) That summary trial was incompetent, and the accused were entitled to have the case sent to a jury. It was no doubt true that the Sheriff might try common law charges of lewdness, and that in that case the demand for penalty might be restricted—*M'Kenzie* v. *Whyte*, November 14, 1864, 4 Irv. 570; *Mitchell* v. *Macwatt*, February 5, 1871, 2 Coup. 13—but where such offences are the creatures of statute the case is different. The public prosecutor was not entitled to restrict his demand when the penalty was fixed by statute, for that would limit the discretion conferred on the Court—*Chisholm* v. *Black and Morrison*, June 12, 1871, 2 Coup. 49. Moreover, a person charged with an offence so gravely affecting character could not be competently tried under the Summary Jurisdiction Acts. Every statute which created a new offence must, in order to render it competent to try that offence summarily, make a special provision to that effect—*Bute* v. *More*, November 24, 1870, 1 Coup. 495. Summary Jurisdiction was in cases of this sort not conferred by Sir William Rae's Act, for