The defenders reclaimed, and before the case came out for hearing in the Inner House they lodged a minute of amendment in the following terms:—"Hunter, for the defenders and reclaimers, stated that since the date when the Lord Ordinary pronounced judgment in the case the defenders had become aware of the specification of letters-patent to Thomas Haig Smellie, No. 624 of 1876, and that the invention therein disclosed has a material bearing upon the scope and validity of the pursuers' letters-patent. He therefore craved leave to amend the record by adding to answer 2, after the words "United States of America," and before the word "admitted," the following sentence:—"Further, reference is particularly made to the specification of letters-patent to Thomas Haig Smellie, No. 624 of 1876, and in particular to the second claim thereof, which claims 'the employment in steam steering and other engines having an intermittent motion of an automatic stop-valve on the steam pipe or chest actuated either by the handgear or by the engine, or by both.'"

Argued for the defenders and reclaimers—The amendment proposed was necessary for the purpose of determining the real question in controversy between the parties, and should therefore in terms of the 29th section of the Court of Session Act 1868 be allowed on such terms as to the Court seemed proper—*Guiness, Mahon, & Co.* v. *Coats Iron and Steeel Co.*, January 20, 1891, 18 R. 441, 28 S.L.R. 285. The Act had altered the old law, and an amendment was now competent even although no *res noviter* was thereby averred.

Argued for the pursuers and respondents—The proposed amendment should not be allowed. There was here no new defence proposed to be added as in *Guiness, Mahon, & Company, supra.* No amendment of the record had ever been allowed at this stage unless there was a relevant averment of *res noviter*, and a defence was not *res noviter* when it could have been discovered with ordinary care at the date of adjusting the record—*Campbell* v. *Campbell*, February 10, 1865, 3 Macph. 501; opinion of Lord President M'Neill, 504; *Stewart* v. *Gelot*, July 19, 1871, 9 Macph. 1057, 8 S.L.R. 688. This was merely an attempt to supplement the proof by leading evidence about a patent which existed long before the proof. Such a course of action might go on indefinitely.

LORD JUSTICE-CLERK—If I thought that the amendment here proposed fell under the 29th section of the Act of 1868 as an amendment necessary for the purpose of determining the real question in controversy between the parties I would move that it should be allowed. But I am of opinion that this amendment is not one which in the slightest degree alters the question before the Court. Its real purpose is to bring forward fresh proof in the question which was decided in the Outer House after proof had been led by both parties, and this fresh proof is not on any matter that has occurred since the proof before the Lord Ordinary was taken, but on a matter with regard to which defenders had then the same facilities of information as they have at present. In these circumstances I think their motion ought to be refused.

LORD TRAYNER—The amendment of the record which the defenders now ask leave to make is not in my opinion such an amendment as is within the contemplation or provision of the 29th section of the Act of 1865. The amendments there provided for are amendments necessary for determining the real question in controversy between the parties. Accordingly, had the proposed amendment been one raising any question not previously stated which was essential to the real issue it would necessarily have been allowed. But it is not of that character. The question here raised and determined by the Lord Ordinary is whether the pursuer's patent is valid or invalid by reason of anticipation. No other question or issue is now raised or proposed to be raised. The one purpose of the proposed amendment is to enable the defenders to supplement the proof they have already led and closed by adding some evidence as available to them before closing their proof as it is now. That is not an amendment which raises any new point necessary to the determination of the real question at issue. That question, as I have said, remains exactly where it was as put on the existing record. I am therefore of opinion that the proposed amendment should not be allowed.

LORD MONCREIFF—I concur. What the defenders want here is simply to adduce additional evidence. That being so, I do not think that the case falls within the power of amendment conferred by the 29th section of the Court of Session Act, and accordingly I think that we should refuse the defenders' motion.

LORD YOUNG was absent.

The Court refused the defenders' motion to amend the record.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Sandeman. Agents—Steedman & Ramage, W.S.

Counsel for the Defenders and Reclaimers—Ure, K.C.—Hunter. Agents—Miller & Murray, S.S.C.

Saturday, July 16.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

HOPE *v.* BENNEWITH.

Property—Foreshore—Rights of Public on Foreshore—Right to Shoot.

A proprietor of lands holding a disposition of the foreshore from the Crown brought an action against B,

craving that he be interdicted (1) from "entering upon or trespassing, or from sending any dog" upon the foreshore, and (2) from "shooting, or catching, or killing, or trying to catch or kill, any birds, hares, rabbits, or other animals" there. B in his defences did not allege any right to be on the foreshore, or to shoot there, except that of a member of the public. The Court (Lord Young *dissenting*) *dismissed* the action as irrelevant, holding, as regards crave (1), that a Crown vassal had no right to interdict a member of the public from entering on the foreshore; as regards crave (2), that there was no relevant averment that the respondent had ever done, or asserted his right to do, the acts complained of, and therefore no ground for interdict.

Opinion (*per* the Lord Justice-Clerk) that members of the public have the right to shoot on the foreshore.

John Hope of St Mary's Isle, Kirkcudbright, brought an action in the Sheriff Court at Kirkcudbright against John Bennewith, residing in Peter Street, Workington, Cumberland.

The prayer of the action was in the following terms—"To interdict the defender from entering upon or trespassing, or from sending any dog, upon the following subjects, or either of them, the property of the pursuer, viz., the island known as 'The Inch,' in the parish and stewartry of Kirkcudbright, lying adjacent to St Mary's Isle in said parish and stewartry, and the foreshore of Kirkcudbright Bay adjacent to St Mary's Isle aforesaid, and extending from high-water mark to the black line shown on the plan annexed and subscribed as relative to a disposition and conveyance of said foreshore granted by the Honourable James Kenneth Howard, one of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, and the Commissioner to whom the management and direction of and the duties and powers in relation to the Land Revenues of the Crown in Scotland had been assigned, in favour of the Right Honourable Dunbar James Earl of Selkirk, dated 23rd, and recorded in Chancery 31st, both days of October 1860, or in any other way interfering with the pursuer's possession thereof, and also from shooting, or catching, or killing, or trying to catch or kill any birds, hares, rabbits, or other animals on said subjects; and to find the defender liable in expenses."

The pursuer averred that he was proprietor of the lands of St Mary's Isle, and of an island known as the Inch, in Kirkcudbright Bay. He further averred that he was proprietor "of the foreshore of Kirkcudbright Bay adjacent to and *ex adverso* of St Mary's Isle and the Inch, as disponed by disposition and conveyance by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, in favour of the Right Honourable Dunbar James Earl of Selkirk, dated 23rd, and recorded in Chancery 31st, both days of October 1860, conform to notarial instrument in pursuer's favour recorded in said Division of the General Register of Sasines 16th June 1894."

In support of the prayer for interdict the pursuer made, *inter alia*, the following averments—"The pursuer and his predecessors have been in the undisputed exclusive possession and use of said lands and estate of St Mary's Isle for two hundred years, and of said foreshore since it was acquired by purchase from the Crown in the year 1860. All the rights incident to the ownership and occupancy of said foreshore, including that of wildfowl shooting, have been exercised exclusively by the pursuer and his predecessors since its acquisition in 1860. Denied that the public generally have at any time, or at least since the year 1860, exercised any right of entering upon the foreshore in question, or of shooting wildfowl thereon. The said foreshore belonging to the pursuer was acquired from the Crown by the said Earl of Selkirk for the express purpose of preserving the privacy and amenity of St Mary's Isle and preventing trespassing. The possession and use of said foreshore by pursuer is necessary for the privacy and amenity of St Mary's Isle and the Inch. The said foreshore is of no utility for purposes of navigation or white fishing, and since it was acquired from the Crown in 1860 the public have been excluded from it, and have never entered upon, or made use of, or claimed any rights over it for any purpose. On 21st October 1903, between the hours of six and seven p.m., defender, who was armed with a gun and had a bag slung on his back, entered or trespassed upon said foreshore belonging to pursuer between St Mary's Isle and said island. At same time a retriever dog which accompanied defender hunted on said island. Defender was challenged by an under-gamekeeper in the employment of the pursuer for trespassing, but he asserted his right to enter upon said foreshore, and refused to desist from doing so. When challenged defender was on the foreshore about thirty-six yards north of the said island, and between it and St Mary's Isle. On one occasion prior to said 21st October 1903, viz., in the month of January 1901, defender, armed with a gun, entered or trespassed upon said foreshore, near the same spot, and was warned by the pursuer that he must not do so again. On that occasion the defender gave a false name when asked by the pursuer who he was. The pursuer apprehends that the defender may continue his acts of trespass, and is desirous of preventing him from doing so."

Bennewith lodged defences, in which he did not aver any right to the foreshore except that of a member of the public. He pleaded, *inter alia*—"(3) The pursuer's averments are irrelevant and insufficient to support the prayer of the petition."

On 15th January 1904 the Sheriff-Substitute (NAPIER) pronounced the following interlocutor:—"Finds in fact that the defender admits that he was on the foreshore surrounding St Mary's Isle on or about 21st October 1903 with a gun which he had with him for the purpose of shooting on the foreshore: Finds in law (*first*) that the

pursuer has no right to prevent the defender from being upon the said foreshore; (*second*) until the pursuer establishes judicially, if he be able to do so, in a suitable process, such as an action of declarator, that he has the exclusive right to the shooting on the said foreshore, he has no right to prevent the defender from shooting on it: Therefore assoilzies the defender from the conclusions of the action so far as these purport to interdict him from being on the said foreshore: *Quoad ultra* dismisses the action."

Note.—"In this case the defender avers that he has regularly from time to time entered upon the foreshore of St Mary's Isle and has shot wildfowl thereon. The pursuer denies that he has done so to his knowledge, but he avers, and the defender admits, that he was on the foreshore with a gun on 21st October last for the purpose of shooting. In these circumstances the pursuer asks that the defender be interdicted (1) from being on the foreshore; (2) from shooting over it. In my opinion the pursuer is not entitled to obtain such an interdict. First, as to the crave for interdict against entering on or being upon the shore. In my opinion no proprietor can prevent a member of the public from being upon the foreshore, and in particular that the pursuer cannot. The pursuer's title to the foreshore is a disposition by the Commissioners of H.M. Woods and Forests in favour of the pursuer's author, the late Earl of Selkirk, granted in 1860. It conveys to the pursuer — not the foreshore itself—but 'all and whole the right, title, and interest of Her Majesty and her foresaids in and over that parcel of the foreshore of Kirkcudbright Bay' which is described in the disposition, under burden of all servitudes or rights-of-way over it.' Now I take it that the pursuer could not have a higher right than the Crown title gave him, and not only is a Crown title strictly construed against the grantee (*vide* Lord Cockburn in *Officers of State* v. *Smith*, 8 D. 711), but the Crown is trustee for the public as regards foreshores (E. 2, 1, 6, and 2, 6, 17). It therefore cannot be supposed to have granted away a right on the part of the public to be on the foreshore, which in normal circumstances the public clearly possesses. A private person may undoubtedly acquire right to a foreshore, but the right so acquired is very different from the right which the owner of land has to it. The terms of the pursuer's title in a marked manner point to this distinction. In particular, private rights in the foreshore are burdened with all public rights. The public rights are (1) the public right of navigation—B.P. 645; (2) the public right of fishing—B.P. 646; (3) other uses of the shore. These are such rights or uses as taking kelp, the convenience of bathing, the right of the public to use the seashore for passage or recreation—B.P. 647. Of these the only one that is absolutely inalienable is navigation. The other rights and uses, including fishing, are apparently alienable. But it is not to be assumed that the Crown would alienate in favour of a private proprietor any rights which the public have over it. At least if it does so it is thought that it must do so expressly, as it certainly can do. For instanse, no one can doubt that the Crown can confer an exclusive right to an individual to a part of the shore, as when it grants the shore for the purpose of making a harbour. Again in the Kessock case (*Baillie* v. *Hay*, 4 Macph. 625) the owner of a ferry was allowed, without objection on the part of the Crown, to build a quay on the foreshore (*vide* the opinion of the Lord Justice-Clerk). In the present case, besides, one would certainly have expected to find a clause expressly conferring right on the pursuer to exclude the public, because he avers (Cond. 2) that the foreshore was acquired by the Earl of Selkirk for 'the express purpose of preserving the privacy and amenity of St Mary's Isle and preventing tresspassing.' The natural inference, therefore, from the absence of such a clause, is that the Commissioners of Woods and Forests refused to insert it, either because they did not want to do so or because they considered that they had no right to do so. In the next place it is to be noted that no proprietor has ever before tried to interdict a member of the public from being on the shore. This fact is all the more noteworthy when it is remembered that an interdict against being on the shore at all would be such a very simple remedy to protect rights which proprietors of foreshores have hitherto tried to protect. There are many cases in the books where proprietors have interdicted, or tried to interdict, persons from taking sand, seaware, shell-fish, &c., from the sea-shore. It seems to me that it would, in many of the cases, have been a much simpler remedy, if it had existed, to have interdicted the persons who were taking the sand or seaware from being on the shore at all. The presumption is therefore against a proprietor having the right to do so. In the next place, distinguished judges have expressed opinions in which the right of the public to be on the shore is, I think, recognised. Thus in *The Officers of State* v. *Smith*, 8 D. 711, Lord Cockburn said that 'it (namely, the encroachment which was interdicted) *may* injure navigation and *must* injure recreation and free passage. The Lord Justice-Clerk said — 'I have no doubt, however, in further holding that one of the public uses to protect which the Crown has either a right of property in or of guardianship over the shore, is the common use of the shore by the subjects.' This statement is the more valuable because it was expressly approved of by Lord Brougham (*Smith*, 6 Bell's Ap. 487). Again in *Saltoun* v. *Park*, 20 D. 89, where Lord Saltoun claimed the foreshore *ex adverso* of his property of Philorth, near Peterhead, Lord Justice-Clerk Hope stated that his Lordship's right 'to the sea-shore is necessarily burdened with the prerogative of the Crown as trustee for such rights of the public as can be exercised without interfering with the rights of the proprietor.' Subject to that qualification, the

Court held that Lord Saltoun's right to the foreshore had been made out. Again, in a case regarding the foreshore of the Clyde at Port Glasgow — *Hagart v. Fyfe*, 9 Macph. 127 — Lord Neaves said, 'Even if the petitioner had a title which gave him an absolute right to the foreshore, that would not give him a right to exclude the public from the shore so long as it remained a shore.' This opinion was stated by the same distinguished Judge, who, two years later, took part in deciding the leading case of *Agnew* v. *Lord Advocate*, 11 Macph. 309, which Mr Blackburn in his able argument for the pursuer founded on, where the Court held that the shore in question belonged to Sir Andrew Agnew. In that case Lord Neaves, who concurred in the judgment, again stated, 'In one sense the foreshore is undoubtedly *inter regalia*, that is so far as regards public uses for navigation and other public purposes.' Again in *Buchanan* v. *Lord Advocate*, 9 R. 1218, Lord Mure stated that the fact that a witness for the Crown having taken a walk or a shot on the shore did not prevent it from belonging to Mr Buchanan. In the same case Lord Deas also says that the public may have a right to walk on the shore. On the other hand, there are dicta in the Books, such as a statement of Lord Justice-Clerk Hope in the case of *The Officers of State* v. *Smith*, which may point to the conclusion that a proprietor might by exclusive possession exclude the public from the shore. I do not presume to question any such dicta. But even if they are binding on me, in my opinion they do not help the pursuer, as he cannot possess a higher right than the Crown title gave his author in 1860. Now, the Crown title did not, I think, give him the right to exclude the public from the shore, because in 1860 I infer and hold that the shore was public. I need only add further that, as far as I know, the Crown or a proprietor of the shore has every beneficial use to which it can be put, such as the exclusive right to take some shell-fish, sand, or sea-ware, &c., and prevent others doing so. *Parker* v. *Lord Advocate*, 4 F. 698, decided two years ago, for instance, establishes that the Crown has the exclusive right to mussel-beds. But such rights can be exercised without excluding the public. On the whole matter, for these reasons, my opinion is that the pursuer has no right to interdict the defender from being on the shore. In the second place, the pursuer also wants to interdict the defender from shooting on the shore. On this part of the case it is, I think, correct to say that there is no authority for the proposition that the public have the right to shoot on the shore. But on the other hand these considerations may be kept in mind—(1) It is, I fancy, at least doubtful if the pursuer's rights in the foreshore give him any special right to the wildfowl. They are in law wild animals, and therefore belong to the first captor. (2) It is notorious that the public shoot over a large part of the foreshore in Scotland; (3) the law does not protect game on the foreshore, as in my opinion, it is very doubtful if either the Day Trespass Act or the Night Poaching Act apply to foreshores; (4) so far as the shore resembles the highway, the public may have the right to shoot on it, because they have still at common law, except so far as restricted by statute, the right to shoot on a highway (*vide*, in the opinion of Lord Craighill in *Simon* v. *Reid*, 4 Coup. 220); (5) *Erskine* v. *Masson*, reported in Guthrie's Select Sheriff Court Cases, 453, is, if good law, directly in point and in the defender's favour. It was not appealed, though Mr Erskine had the same interest as the pursuer has here. In the absence of higher authority, therefore, I follow it to the extent of holding, not that shooting on the shore is a public right, but of refusing to grant interdict until the pursuer has, if he can, established his exclusive right to shoot. For these reasons, it appears to me that before asking interdict the pursuer must, if he can, have his right to the exclusive right to shoot on the foreshore made good in an action of declarator. No doubt the present case could be easily amended by having declaratory conclusions and suitable averments added. But I understood that both parties desire my judgment on the record as it stands. Accordingly, as regards this crave, I have dismissed the action."

The pursuer appealed, and argued — The pursuer was entitled to the interdict craved. The question raised was as to the right of members of the public on the foreshore in a question with a disponee from the Crown. Admitting that certain rights were held by the Crown in trust for the public, and were therefore inalienable, these rights were only to use the foreshore for navigation and white-fishing. Except for these purposes a member of the public had no right to be on the foreshore at all, unless wider rights had been acquired by prescriptive use—Bell's Prin., sec. 646, 647; *Nicol* v. *Blaikie*, December 23, 1859, 22 D. 335; *Darrie* v. *Drummond*, February 10, 1865, 3 Macph. 496; *Duncan* v *Lees*, December 10, 1870, 9 Macph. 274, 8 S.L.R. 218. Thus it was held, in an action of declarator of right-of-way, that the foreshore could not be the terminus of the way, because it was not a public place—*Darrie, supra*. The *dictum* of Lord Watson in *Young* v. *North British Railway*, December 8, 1885, 13 R. 314, 14 R. (H.L.) 53, 24 S.L.R. 763, where, speaking of the foreshore, he said, "The proprietor cannot exclude the public from it at any time," meant that the proprietor could not interfere with the rights of fishing and navigation. Here it was relevantly averred that from the nature of the ground neither fishing nor navigation were possible, and therefore the interdict might be in absolute terms. English authorities clearly showed the limitations of the right of the public in the foreshore. Thus there was no right to bathe—*Blundell* v. *Catterall*, 1821, 5 B. & Ald. 268; *Brincqman* v. *Matley*, [1904], 20 T.L.R. 180; or to hold a prayer

meeting — *Llandudno Urban Council* v. *Woods* [1899], 2 Ch. 705. In the cases where the right of the public to be on the foreshore had been sustained—*Smith* v. *Officers of State*, March 11, 1846, 8 D. 711, *affd.* 1849, 6 Bell's App. 487; *Hagart* v. *Fyfe*, November 15, 1870, 9 Macph. 127, 8 S.L.R. 113; *Keiller & Scott* v. *Magistrates of Dundee*, December 7, 1886, 14 R. 191, 24 S.L.R. 120—there was evidence of prescriptive use by the public. Any observations in the judgments extending the public rights were merely *obiter*. But even assuming that a member of the public had a right to be on the foreshore, he had no right to shoot there. The right to be on land carried no right to shoot—*Livingstone* v. *Breadalbane*, April 13, 1791, 3 Pat. App. 221; *Wellwood* v. *Husband*, February 11, 1894, 1 R. 507, 11 S.L.R. 240. Shooting on the foreshore had been regarded as an evidence of prescriptive use adverse to the proprietor — *Geils and Buchanan* v. *Lord Advocate*, July 20, 1882, 9 R. 1218, 19 S.L.R. 842, *per* Lords Mure and Deas. It was a right which might be acquired by prescription, but which did not otherwise exist. That was sufficient to justify interdict here, as there was a relevant statement that the respondent had shot and asserted his right to shoot.

Argued for the respondent—The action was irrelevant. The crave for interdict against entering on the foreshore could not be granted, because it would exclude the respondent from a right which he admittedly possessed, to enter on the foreshore for purposes of navigation and white-fishing. But the right of a member of the public was to be on the foreshore quite apart from navigation or white-fishing. This was established by a train of authorities—*Smith* v. *Officers of State*, *Hagart* v. *Fyfe*, *Keiller & Scott* v. *Magistrates of Dundee*, and *Buchanan & Geils* v. *Lord Advocate*, *cit. sup.*; *Paterson* v. *Marquis of Ailsa*, March 11, 1846, 8 D. 752; *Young* v. *North British Railway*, *cit. sup.*; *Darrie* v. *Drummond*, *cit. sup.*, *per* Lord Deas, 3 Macph. 500. Although it might be true that the right of the public to be on the foreshore merely for purposes of recreation or passage was not definitely decided in these cases, because there was evidence of prescriptive use, that did not derogate from the generality of the law as laid down in the opinions of the Judges. If a member of the public had, as the cases above cited established, the right to be on the foreshore, there was no law to prevent his shooting there. By shooting wildfowl no right of the proprietor of the foreshore was infringed. Wildfowl were not property like kelp or mussels. The only right which a proprietor had to prevent shooting was founded on the law of trespass—Stair, ii. 1, 5. The English cases referred to by the pursuer were not authorities in questions of this kind, which must be decided by Scots law solely—*Parker* v. *Lord Advocate*, March 18, 1902, 4 F. 698. 39 S.L.R. 537, *affd.* May 17, 1904, 41 S.L.R. 491. If they were to be considered, the case of *Blundell* v. *Catterall*, *cit. sup.*, had been much criticised, and followed with reluctance—Moore on Foreshore (3rd ed.), 833, 851; Callis on Sewers, 91; Elphinstone on Deeds 580; *Mace* v. *Philcox*, 1864, 15 C.B. (N.S.) 600, *per* Earle, C.J., at p. 611. Even if the pursuer had an exclusive right to shoot on the foreshore, he could only establish that right by a declarator, not by a summary process such as interdict. The right of the members of the public was that of the beneficiaries in a trust held by the Crown for their benefit, not merely a right of servitude, and the limitations of that right, if they existed, must be established by declarator before any summary proceedings could be competent—*Dalrymple* v. *Chalmers*, February 3, 1886, 1 White 37, 13 R. (J.C.) 34, 23 S.L.R. 358; *Colt* v. *Webb*, November 13, 1898, 2 Adam 91, 1 F. (J.C.) 7, 36 S.L.R. 57.

At advising—

LORD JUSTICE-CLERK—This is a case of interdict and nothing else. The pursuer asks that the defender be interdicted from trespassing on his lands forming an island called the Inch, but there is no averment of his having committed such trespass on any land there not being foreshore. The main purpose of the interdict really is to exclude a member of the public from the foreshore opposite the pursuer's lands. He maintains that he is the proprietor of the foreshore by Crown grant since 1860. But he admits also, as he could not help admitting, that the Crown right is burdened with the public right to use the foreshore. As regards the foreshore two interdicts are asked—one against the defender being on the foreshore, the other against his shooting with a gun on the foreshore. Now, it is clear that the pursuer's title does not profess to place him in the position of being able to exclude the public from such uses as the public can put the foreshore to. The Sheriff-Substitute is I think right in saying that an interdict to exclude a member of the public from the foreshore is a novelty. All the authorities are against it. It has been held over and over again that a right to the seashore, while it remains seashore, is burdened with the rights of the public which can be availed of without interfering with the legitimate rights of the proprietor. The right of the public is necessarily a very limited right, but can a proprietor put a stop to such public rights as exist on the bare ground of proprietorship? I hold that he cannot. I am therefore unable to see how the pursuer can succeed in a demand for an interdict expressed in the bare terms of "entering and trespassing." Such an interdict would be an absolute negation of any public right, and there is nothing in the pursuer's title which can give him a ground for so strong an assertion of a right to exclude involving penal consequences if the interdict was broken.

The pursuer further asks interdict against shooting on the foreshore. It is an interdict so wide that it includes "any bird or other animal." There is no averment of the shooting of game or of any animals to which the Game Acts apply. Certainly no such

interdict could be granted except upon the footing, as is asked, that there was a right to prevent the discharge of a fowling-piece at all. I am unable to hold that the pursuer has a right at law to say that if a member of the public is upon the foreshore by right he can be stopped by an interdict from using a gun. I know of no authority for that, and there is certainly abundance of general practice of firing upon the foreshore, the right to do which has apparently not been hitherto challenged, as no case was quoted where such a question had been raised.

The rights of the public as regards the foreshore seem to me to be higher than those of ordinary servitude. They are truly rights remaining in the Crown for public benefit. If a citizen is to shut out the public on the ground that their right has been lost, then a declarator to that effect would seem to be the appropriate mode of ascertaining that it was so.

In the present process of interdict I find no sufficient relevant statement on which such an interdict as is asked could be granted. On the whole I am of opinion that the Sheriff-Substitute has acted rightly in refusing to grant the interdict asked by the pursuer, and that the proper course will be to sustain the third plea for the respondent, and to do this it will be best to recal the interlocutor so as to dispose of the case by simply sustaining that plea and dismiss the petition.

LORD YOUNG—The appellant's property of St Mary's Isle and Inch is situated in the estuary of the Dee, which is a tidal river. In his petition to the Sheriff he complains of distinctly specified recent trespasses by the respondent on the foreshore thereof, injurious, as he avers, to his rights as proprietor. The respondent does not question the validity of the appellant's title to the land and the foreshore, and alleges none of his own, but contends that what the appellant complains of as trespass was lawful, being within his right as one of the public, and that the complaint is therefore irrelevant and indeed unfounded. This contention the Sheriff has sustained—for although the parties are very far indeed from being agreed upon the facts, he has without evidence or inquiry in any form assoilzied the defender (the respondent) from part of the conclusion against him, and *quoad ultra* dismissed the action. If the appellant's averments are relevant the judgment cannot in my opinion be upheld. The only question of law in the case regards the right of the public in the foreshore of the appellant's property and the relevancy of his averments of trespass thereon by the respondent, the repetition of which he desires to prevent by interdict. It is to be kept in view that the respondent is complained of only as an individual trespasser, and that the question of public right is raised only by his defence, whereby he justifies his conduct and resists the hindrance to its continuance only by pleading the right of the public. The appellant denies the existence of such right, and avers that the respondent is the only member of the public who has ever asserted such right or acted on the notion of its existence. St Mary's Isle, which for many generations has been a peninsula, was for long the seat of the Earls of Selkirk, the whole of it consisting of the site of the family residence and the policies, gardens, and pleasure grounds surrounding it. It is in the same condition now—the only change being that the appellant is now the owner and occupier thereof. Of the character and extent of the foreshore we have no information, except in the appellant's averment that it is "of no utility for the purposes of navigation or white fishing, and since it was acquired from the Crown in the year 1860, the public have been excluded from it" (not by expulsion but by embankment and building), "and have never entered upon it, or made use of or claimed any rights over it for any purpose." In Cond. 4 the appellant says that on the "Inch," which is a very small island situated immediately to the south of St Mary's Isle, there is a summer-house used by the appellant and the residenters at St Mary's Isle, and also a plantation of about an acre in extent, which is frequented by game. There follows the following statement which I regard as important—"At low water communication is had between St Mary's Isle and said island by means of a gravel bank and stepping stones, which were placed purposely for forming such communication. At high water there is only on an average a depth of about three feet of water over the foreshore belonging to the pursuer. Said gravel bank is then little more than covered. The distance between high water-mark at St Mary's Isle and high water mark at said island is about one hundred yards." For trespass on this piece of shore on specified occasions the appellant thus complains in Cond. 6—"On 21st October 1903, between the hours of 6 and 7 p.m., defender, who was armed with a gun and had a bag slung on his back, entered or trespassed upon said foreshore belonging to pursuer between St Mary's Isle and said island. At same time a retriever dog which accompanied defender hunted on said island. Defender was challenged by an under-gamekeeper in the employment of the pursuer for trespassing, but he asserted his right to enter upon said foreshore, and refused to desist from doing so. When challenged defender was on the foreshore about thirty-six yards north of the said island, and between it and St Mary's Isle. On one occasion prior to said 21st October 1903, viz., in the month of January 1901, defender, armed with a gun, entered or trespassed upon said foreshore, near the same spot and was warned by the pursuer that he must not do so again. On that occasion the defender gave a false name when asked by the pursuer who he was. The pursuer apprehends that the defender may continue his acts of trespass, and is desirous of preventing him from doing so." The extent and character of this piece of foreshore as averred by the

appellant seems to me to be obviously consistent with the averment that it is of no utility for public purposes, and that the public have never entered upon or claimed any rights over it for any purpose. It is, however, sufficient for the present to say that the pursuer makes the averment, and that it is in my opinion undoubtedly relevant.

I should have desired to avoid any statement or indication of my opinion regarding the foreshore rights of the public until the facts in dispute regarding the foreshore immediately in question, and the use or non-use of it by the public and its fitness or unfitness for the exercise of any public right in foreshore have been ascertained. I may, however, I hope properly and not unusefully, say that I cannot assent to the views which I understand to be expressed by the Sheriff in his interlocutor and explanatory note of opinion. It will not be understood that I indicate a doubt that there are numerous and extensive foreshores which the public cannot be hindered from using, not only for navigation and business, but also as a public place open to all for pleasure and healthful resort, and that there are or may be such public rights as will not be extinguished or even affected by a Crown conveyance of the property of the foreshore to the owner of the adjoining land. On the other hand, such Crown conveyances of foreshore in property may, and generally if not always do, give noticeable and valuable rights to the shore proprietors, enabling them to restrain trespasses and injurious conduct by the public, which they would otherwise have found it difficult and perhaps practically impossible to hinder. For example, such owner on a Crown title may himself profitably use the foreshore for pasturage on sea grasses) or lease it for such use at a considerable rent. Many such shores are pastured by horses, cattle and sheep, and the public may be restrained from doing anything on the shore offensive or hurtful to such lawful proprietary use. Most if not all such Crown conveyances are made, as that in favour of the appellant is, with reservation of and without prejudice to public rights, but the public rights included in such reservation are only the really important rights which the public legitimately and constitutionally require—such as landing and embarking, exporting and importing goods—rights of way. In the case before us—assuming the truth of the appellant's averments—there is not and indeed never was a public right-of-way on the shore in question, any landing or embarking, exporting or importing, or, to put it all in brief as the appellant does, any use of it ever made or claimed by the public.

What then is the right which the respondent asserts for himself as one of the public? It is, if I understand his claim aright, to use the foreshore as he pleases, resorting to it with dog and gun for his personal amusement, sport, and it may be profit.

Before concluding I ought, I think, to refer to the second finding in the Sheriff's judgment and express my opinion of it. The finding is—"(Second) Until the pursuer establishes judicially, if he be able to do so in a suitable process, such as an action of declarator, that he has the exclusive right to the shooting on the said foreshore, he has no right to prevent the defender from shooting on it." With reference to this finding the Sheriff in the note of his opinion says—"No doubt the present case could be easily amended by having declaratory conclusions and suitable averments added. But I understood that both parties desire my judgment on the record as it stands. Accordingly as regards this crave I have dismissed the action." I cannot assent to the views thus indicated by the Sheriff. The appellant has admittedly no case except on the assumption that his averments (including of course his denials) shall in the result be held to present a relevant case of trespass by the respondent, of which, having regard to his proprietary title, he is entitled to have stopped by interdict. On that assumption it is, I think, not doubtful that the Sheriff Court process before us is the right and certainly most familiar process to be resorted to. I have stated, I hope intelligibly, my reasons for thinking that it is expedient to allow a proof of the facts before pronouncing judgment on the relevancy, the prominent reasons being that we are ignorant of the extent and physical character of the foreshores in question, what uses have in fact been made of them, and what other uses they are fit or unfit for. I have indeed indicated my inability, as at present advised, to accept the proposition that every strip of sea-sand, gravel, or turfed ground on which sea-grass grows, where the tide ebbs and flows, and to which therefore the term "foreshore" applies, is open and free as a place of public resort. If I rightly understand the Sheriff's note of opinion, he does not doubt that the appellant's averments and pleas on record would in an action of declarator at his instance against the respondent, or even in this petition were a declaratory conclusion added, be relevant to entitle him to have interdict against the respondent to prevent him from shooting on the foreshores in question. It is not disputed or disputable that the appellant has a proprietary title to these foreshores and that he has an exclusive right to the shooting thereon, unless indeed it is open and free to the public, that being the only alternative. If the appellant has a title to have the respondent interdicted from shooting on these foreshores the process before us is, as I have already said, the proper and familiar process by which to obtain interdict, and if the appellant has no such title it is, as I have also already said, clear that no other has, and certain that no other has ever claimed to have.

I think the judgment appealed from should be recalled, a proof before answer allowed, interim interdict being granted unless the respondent shall undertake meanwhile to avoid resort to the foreshores referred to.

LORD TRAYNER—The prayer of the petition before us consists of two parts—the first craves interdict against the respondent entering upon the foreshore with a dog, and the second craves interdict against the respondent shooting, catching, or killing birds, hares, rabbits, or other animals *on* the foreshore, or trying to do so. I am of opinion that no such interdict can be granted.

As regards the first part of the prayer, it is to be observed that while the authorities are not quite at one as to the extent or limits of the public's right in and on the foreshore, they are all of opinion that the public have right to be there at all times if there in connection with the rights of navigation and fishing. The petitioner, however, craves interdict against the respondent being there at all—a crave clearly in excess of anything to which the petitioner can lay claim, and contrary to the undoubted right of the respondent as one of the public. That part of the prayer therefore cannot be granted.

The second part of the prayer is not supported by any relevant statement. It craves, as I have said, interdict against the respondent killing rabbits, hares, birds, or other animals on the foreshore, or trying to do so. But there is no averment that the respondent ever did, or threatened to do, or maintained his right to do, the things which he is sought to be interdicted from doing. There is, therefore, no reason or ground for granting interdict against him. The respondent admits having shot wild fowl on the foreshore, but in doing so he invaded no right belonging exclusively to the petitioner.

Although I have come to the same conclusion as the Sheriff-Substitute, I do not think it necessary to express any concurrence in or dissent from the ground set forth in his note. I think the better course would be to recal the interlocutor of the Sheriff-Substitute, sustain the respondent's third plea, and dismiss the petition.

LORD MONCREIFF, who was present at advising but had been absent at the hearing, gave no opinion.

The Court sustained the third plea-in-law for the respondent and dismissed the action.

Counsel for the Pursuer and Appellant—C. N. Johnston, K.C.—Blackburn. Agent—David Campbell, S.S.C.

Counsel for the Respondent—Mackenzie, K.C.—Macmillan. Agents—Simpson & Marwick, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

GRAHAM *v.* GRAHAM'S TRUSTEES.

Public-House — Goodwill — Heritable or Moveable—Legitim.

In a claim by a son against the trustees of his deceased father for legitim from the estate of his father, who at the date of his death carried on business in different licensed houses in Glasgow which he occupied as tenant, *held*, after a proof which established that the value of the business in the licensed houses in question was dependent on the nature and locality of the premises and on the subsistence of the licences, that the goodwill was heritable, and therefore that the price received by the trustees for goodwill was not a fund from which legitim was payable.

Peter Macpherson Graham, gunner in the 15th Company of the Royal Artillery, son of the late Alexander Graham, wine and spirit merchant, Glasgow, brought this action in the Sheriff Court of Lanarkshire at Glasgow against Alexander Lang, distiller and wine merchant in Glasgow, and others, trustees of the said Alexander Graham, Terregles Avenue, Pollokshields praying the Court to ordain the defenders to produce full accounts of their intromissions as trustees aforesaid with the moveable estate of the said Alexander Graham and to pay to the pursuer £2000 with interest thereon from the date of the said Alexander Graham's death.

The pursuer was the eldest son of the late Alexander Graham. Alexander Graham died on April 27, 1900, leaving a trust-disposition and settlement and relative codicil, whereby he directed his trustees to pay the pursuer his legitim.

At the date of his death Alexander Graham carried on business in several licensed public-houses in Glasgow, held by him on lease, and the pursuer averred that the valuations placed on these public-houses by the defenders in the statement of legitim fund furnished to him by them were wholly inadequate, and that the defenders refused to allow him facilities for making up correct inventories for himself.

The pursuer pleaded, *inter alia*—that he being entitled to payment of his legitim, the defenders were bound to give an accounting and to make payment of his share of legitim.

The defenders pleaded, *inter alia*—"(1) The action is irrelevant. (2) The pursuer having no interest in the goodwills which follow the leases, and there being no estate otherwise available for legitim, the defenders should be assoilzied."

On July 6, 1901, the Sheriff-Substitute (BOYD) found that the goodwills of the premises could not be regarded as forming part of the moveable estate of the deceased,