these facts, and on these questions of law, I do not think we have any alternative but to find that the Sheriff has decided the case rightly.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the appellant on the stated case, answer the second question of law therein stated in the negative; therefore affirm the award of the arbitrator, and decern.

Counsel for the Appellant—Campbell, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Wednesday, December 21.

SECOND DIVISION.

[Lord Low, Ordinary.

MAGISTRATES OF MUSSELBURGH *v.* MUSSELBURGH REAL ESTATE COMPANY, LIMITED.

Property — Superior and Vassal — Feu-Charter—Title to Foreshore—Boundary "by the Sea-Beach."

In a feu-charter granted by the magistrates of a burgh of a portion of the burgh lands the ground feued was described as "bounded . . . on the north by the sea-beach." *Held*, on a construction of this clause in the light of other provisions in the feu-charter, that the feu did not extend beyond the line of ordinary high-water mark, and did not therefore include the foreshore.

Opinions (*per* the Lord Justice-Clerk and Lord Trayner) that in the absence of contrary indications a boundary by the "sea-beach" excludes the sea-beach and gives no right of property in the foreshore; *opinion contra per* Lord Moncreiff.

In November 1902 the Provost, Magistrates, and Councillors of the burgh of Musselburgh raised an action against the Musselburgh Real Estate Company, Limited, and John Downie, contractor, Musselburgh, in which they sought, *inter alia*, declarator that they had "the sole and exclusive right and title to and property in the foreshore *ex adverso* of that piece of waste ground or sea-green . . . lying to the north or seawards of the piece of enclosed ground belonging to the defenders the Musselburgh Real Estate Company, known as Mackinlay's Park, lying within the burgh of Musselburgh." The summons contained a similar conclusion as to a property, Rosehall, with which the present report is not concerned.

The burgh of Musselburgh in August 1670 obtained a grant of burgh lands from the Earl of Lauderdale, which was subsequently confirmed by royal charter. The boundary on the north was "the ebbing and flowing of the sea."

Of dates 18th and 19th April 1826 the Magistrates of Musselburgh, on a narrative that they had by an Act of Council granted a feu to Messrs William and James Aitchison at the rate of £6 per acre of feu-duty of a portion of the Links of Fisherrow (part of the burgh lands) to be "afterwards staked off," in implement of the Act of Council feued to William and James Aitchison a portion of the Links of Fisherrow, subsequently known as Mackinlay's Park and described in the feu-contract as follows:—"All and whole the said piece of ground lying at the east end of the Links of Fisherrow, situated to the north of the park called Chalmers' Park, measuring seven acres four falls and three-fourths of a fall . . . . of ground or thereby, and bounded as follows, viz.—on the east by the [*blank in charter*] river Esk separating the ground hereby disponed from the said river, which bank shall remain open and unfeued not only along the river but also along by the sea excepting to William and James Aitchison or their foresaids; on the west by the town of Musselburgh's common ground still unfeued; on the south by a stone dyke enclosing the ground called Chalmers' Park and partly by the town's common ground; and on the north by the sea beach; And it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river or otherwise, the said William and James Aitchison shall take possession of the ground so left, then and in that case the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north, and partly on the south by the intended road after mentioned, together with all right, title, and interest which the said Magistrates and Treasurer for themselves and in name and behalf foresaid or their predecessors or successors in office had, have, or can claim or pretend to the said piece of ground in all time coming; with privilege and liberty to the said William and James Aitchison and their foresaids of conducting any quantity of water from any part of the said river by open cuts or otherwise, and also liberty to take water from the mill-dam or lead below the Sea Mill by a pipe not exceeding 9 inches in the bore for any purpose whatever so as not to be prejudicial to the said Sea Mill or any other waterfall that may be erected or extended on the said mill-dam or lead, upon condition always of their conveying the surplus water again into the river within the boundary of their own property, and without stagnation; as the said piece of ground was measured by authority of the said Magistrates and Council by James Hay, land surveyor, lying in the parish of Inveresk, regality of Musselburgh, and sheriffdom of Edinburgh, with the teinds, both parsonage and vicarage, of the said piece of ground, and free ish and entry thereto from the bank of the river Esk on the east and by an intended road running along the west wall of the said park, and which road is not of less breadth than 30 feet: . . . Declaring always, as it

is hereby provided and declared, that the said William and James Aitchison shall be bound and obliged, as they hereby bind and oblige themselves and their foresaids, to make payment to the town of Musselburgh or to their collectors or tacksman, of the shore dues levied or that may be leviable at the harbour of Fisherrow, and of the usual and accustomed shore dues, harbour and tonnage dues, upon all vessels carrying grain or other merchant goods that shall be landed or exported from the said ground or the building erected or to be erected on the ground hereby feued if exported from within the jurisdiction of the town of Musselburgh." . . .

The feu was situated at the corner of the Fisherrow Links which is formed by the river Esk and the seashore, and extended to a little over 8 acres, while the foreshore *ex adverso* of it extended to 70 or 80 acres.

The feu ultimately became the property of the defenders the Musselburgh Real Estate Company, Limited.

The pursuers averred that they and their predecessors in office had under their infeftment from time immemorial and without interruption occupied and possessed as proprietors the whole foreshore *ex adverso* of the burgh, including the foreshore *ex adverso* of Mackinlay Park; that they had extensively embanked and reclaimed it, and regulated its use by the public; and that they had let, sold, and controlled the removal of sea-sand and sea-ware, and permitted the erection of military targets. They further averred that neither the defenders nor their predecessors in title had ever possessed the foreshore in any manner of way. The defenders denied the pursuers' averments as to possession of the foreshore, and made counter averments as to possession on their own part, instancing occasions upon which they or their predecessors had protested against the removal of sand from the foreshore by the pursuers.

The pursuers pleaded, *inter alia*—"(1) In virtue of the pursuers' title, and the possession had by them under their infeftments, the pursuers have the sole and exclusive right and title to the foreshores mentioned in the summons, and are entitled to declarator to that effect as concluded for. (3) The pursuers having had conform to their titles prescriptive possession of the said foreshores and of the right to dig and take away sand, gravel, stones, and shingle therefrom, and the defenders having since the date of their titles, and for more than the prescriptive period, had no possession of said foreshores or of the right to dig and take away sand, gravel, stones, and shingle therefrom, the pursuers are entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"The defenders the Musselburgh Estate Company being proprietors of the foreshore mentioned in the summons, they are entitled to absolvitor."

A proof was led before Lord Low. The facts established and the contents of the more important documents put in evidence are sufficiently indicated in his opinion, *infra*.

On 2nd August 1904 the Lord Ordinary (Low) pronounced an interlocutor declaring in terms of the declaratory conclusions of the summons in so far as regards the foreshore *ex adverso* of the property known as Mackinlay's Park.

Opinion.—"The burgh lands of Mussel burgh extend along the sea-shore for a long distance, and include the foreshore. The original charter conveying the lands to the burgh appears to have been granted by the Earl of Lauderdale in 1670, and what is disponed as the common of the burgh is described as bounded on the north 'by the ebbing and flowing of the sea.' I understand that that grant was subsequently confirmed by royal charter.

"The defenders are proprietors of two properties held in feu from the Magistrates and adjacent to the sea-shore, and the question raised in this case is, whether the foreshore *ex adverso* of these properties belongs to the pursuers or the defenders? The properties are named respectively Mackinlay Park and Rosehall, and I shall deal with them in that order.

"The original title to Mackinlay Park was a feu-contract granted by the Magistrates in 1826 to William and James Aitchison. The boundary on the north is described in the feu-contract as being the 'sea-beach,' and when the case was first heard in the Procedure Roll the defenders argued that it was settled that a boundary by the 'sea-beach' was equivalent to a boundary by the 'sea,' and that therefore the foreshore belonged to them. I was by no means satisfied, in view of the terms of the feu-contract, that in this case a boundary by the 'sea-beach' was the same thing as a boundary by the sea, and further there were averments of exclusive possession of the foreshore by the pursuers which seemed to necessitate inquiry. I accordingly allowed a proof, and I have now to determine the question at issue upon the large body of evidence which has been adduced.

"I shall, in the first place, again examine the terms of the feu-contract of 1826, which I think I am in a better position to construe now than I was formerly, because I now know the precise situation of the feu and the local conditions.

"The feu is situated at the corner of the Fisherrow Links which is formed by the river Esk and the sea-shore—a fact which, as I shall afterwards show, appears to me to be of some importance.

"The feu-contract commences by narrating that the Magistrates had by an Act of Council granted a feu to the Messrs Aitchison at the rate of £6 per acre of feu-duty of a portion of the Links of Fisherrow, to be 'afterwards staked off.' Then in implement of the Act of Council the Magistrates disponed to the Aitchisons 'All and Whole the said piece of ground lying at the east end of the Links at Fisherrow situated to the north of the park called Chalmers' Park, measuring 7 acres 4 falls and three-fourths of a fall of ground or thereby, and bounded as follows, viz.—On the east by the [*blank in charter*] river Esk separating the ground hereby disponed from the said river, which bank shall remain open and unfeued not only

along the river but also along by the sea, excepting to William and James Aitchison or their foresaids; on the west by the town of Musselburgh's common ground still unfeued; on the south by a stone dyke enclosing the ground called Chalmers' Park, and partly by the town's common ground; and on the north by the sea-beach; and it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river or otherwise, the said William and James Aitchison shall take possession of the ground so left, then and in that case the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north.'

"Power is then given to the feuars to convey any quantity of water from the river by open cuts or otherwise, . . . upon condition always of their conveying the surplus water again into the river within the boundaries of their own property and without stagnation, as the said piece of ground was measured by authority of the said Magistrates by James Hay, land surveyor, . . . with the teinds, both parsonage and vicarage, of the said piece of ground, and free ish and entry thereto by the bank of the river Esk on the east.'

"The measurement given in by Mr Hay has been recovered, and runs thus—'Measurement of feu on Fisherrow Links from the Honourable the Magistrates of Musselburgh to William Aitchison, Esquire, Drumore, bounded on the south by Mr Thomson's park, on the west and north by a line made by a cut in the turf along the beach, and on the east by a straight line between the north-east angle of Mr Thomson's park to a stake driven in at the mouth of the river Esk.'

"Then the area is given as 7A. 0R. 4¾F. Scotch, or 8A. 3R. 17¼F. imperial, and upon the back there is a calculation of the feu-duty, which is brought out at £42, 3s. 6¾d., the amount which was inserted in the feu-contract.

"I think that the first question is, what was the boundary of the feu riverward, because that has an important bearing upon the boundary seaward. The Esk, I should explain, is at this point a tidal river. The defenders maintain that the property is bounded by the river on the east, just as it is bounded by the sea on the north. That a question in regard to the boundary on the east is possible arises from the fact that in the description of the boundaries there is a blank space left before the words 'River Esk,' and the question is whether any words, and if so what, are to be read into that space?

"I do not think that anyone could read the context without coming to the conclusion that words 'bank of the' must be read into the blank space, because if these words are read in the important clause which immediately follows is quite intelligible, which is not the case if the blank is not so filled up.

"The draft of the feu-contract has been produced, and both parties referred to it. I confess that I have doubts as to the competency of referring to the draft at all, but however that may be, it does not seem to me to throw much light on the matter. The draft as originally written ran 'on the east by the bank of the river Esk,' then there had been interlined the words 'a road along,' making the clause run 'on the east by a road along the bank of the river Esk.' Then some one had run a pen through both the original words 'the bank of' and the interlined words 'a road along.' Therefore, according to the draft (giving effect to the deletions) the boundary on the east was the river Esk, and the defenders very legitimately found upon that fact. But then the question arises, why was the blank space left in engrossing the deed? It is plain that whoever engrossed the deed did not understand that the river was the boundary. And that is not surprising seeing that the clause which follows is inconsistent with the river being the boundary. That clause is in these terms—'which bank shall remain open and unfeued not only along the river but also along by the sea, excepting to William and James Aitchison or their foresaids.' That is obviously an important clause, because if the boundary was not the river but the river bank it secured to the Aitchisons what would have been one of the chief advantages of having a river boundary, namely, that no one else could be interjected between them and the river. On the other hand, if the river was intended to be the boundary the clause was altogether unnecessary and inofficious; and further, it is unintelligible without reading in words which are not there, because there is no previous mention of any bank. Therefore a blank space having been left presumably for words which were intended but were omitted to be filled in, and the context clearly suggesting that the words which were intended to be written in were 'the bank of the,' because these words make the deed intelligible and consistent, I think that the rules of construction require that these words should be read in.

"The defenders pointed out that when the feu-contract was engrossed other blank spaces were left for the area of the feu and for the feu-duty. These blanks could not be filled in until Mr Hay had made his measurements, and as his report is dated the very day upon which the feu-contract was executed by the Magistrates, the blank spaces must also have been filled in on that day. The defenders argued that as these blank spaces were filled in, while the blank space before the words 'River Esk' was not filled in, the inference is that it was not intended to fill in that space at all.

"I think that there are two answers to that argument. The first is, that if the blank space was not to be filled in with words it ought to have been obliterated by stars or a line drawn along it, and it is to be observed that in the very line above that in which the space in question occurs, the space left for the dimensions of the feu was larger than was required, and the space not required was filled in with stars. In the second place, as I have already

pointed out, if the blank space was not to be filled up it would have been necessary to render that part of the feu-contract consistent and intelligible to delete or alter the immediately following clause.

"Therefore, although I cannot tell why the blank space in question was not filled in, I think that those words must be read in to which the context so clearly points, the words namely, 'bank of the.'

"The defenders however say further that, as matter of fact, there was no bank of the river which could be the boundary, because Mr Hay's measurements and the boundary lines defined by him, when taken in connection with old plans, show that in order to get the area specified it was necessary to go to the high-water mark of the river. I am inclined to accept that view, but it does not lead me to the conclusion desired by the defenders. I think that it is plain enough that the Magistrates did not intend to retain any actual land between the feu and the river, but I also think that the terms of the feu-contract show that they did not intend that the feuars should have a river boundary with all the rights which would result from such a boundary. The construction therefore which I put upon the contract is, that the feu extended as far as high-water mark of the river and no farther; and that by the bank of the river was meant the space covered at high tide but left dry at low water. That space, it appears to me, might very intelligibly be described as the bank of the river, because it was truly the river bank at low tide, when there was no water but that of the river.

"I have dealt fully with the question of the eastern boundary, because both parties, I think, rightly regarded it as very important, seeing that if the defenders were able to show that they had a river boundary on the east it would go far towards establishing that they had a sea boundary on the north, and conversely, if the defenders were cut off from the river, it is more easy to reach the conclusion that they were also cut off from the sea.

"I now come directly to the main question in the case, namely, what in this feu-contract is the meaning and effect of the northern boundary of the feu being described as the 'sea beach.'

"As I have already indicated, the defenders' contention is that it is settled that a boundary by the 'sea beach' is synonymous with a boundary by the sea.

"I do not think that it is necessary to refer in detail to the numerous cases upon this branch of the law. I shall content myself with saying that while in my humble opinion the well-known exposition of the law given by Lord Kinloch in the case of *Hunter* v. *Lord Advocate*, 7 Macph. 899, was somewhat more sweeping and absolute in its terms than the previous decisions altogether warranted, I accept the result of all the authorities as being that, where there is nothing more to indicate the limits of a sea-board property than a description of the boundary as being the 'sea shore' or the 'sea beach,' these terms are regarded as being equivalent to a boundary by the 'sea,' because it is not in the general case to be presumed that the disponer intended to make a reservation which is not expressed, nor on the other hand that it was contemplated that it should be possible to interject another proprietor between the disponee and the sea.

"The expressions, however, the 'sea' and the 'sea beach,' are not according to their ordinary meaning, identical, but as ordinarily used they denote different things. If therefore it appears from the terms of the grant, or from the terms of the grant when read in the light of the circumstances in which it was made, that the parties in using the term 'sea beach' did not mean the 'sea,' I do not think that there is any rule of law which prevents effect being given to their intention.

"Turning now from the general question to the precise circumstances of this case, I think that it is plain that the Magistrates had an interest not to part with the property of the foreshore. The foreshore of the burgh lands is of large extent both along the shore and to seaward. The extent to seaward is illustrated by the fact that the part of the foreshore *ex adverso* of the eight acres of Mackinlay Park amounts to from 70 to 80 acres, or about ten times the area specified in the feu-contract. Then the foreshore, especially near the part where Mackinlay Park is situated, has large deposits of valuable sand and gravel from which a considerable revenue is derived, and further, the Magistrates have certain rights of harbour and of levying shore dues and customs. Their interest, therefore, to maintain absolute control over the foreshore appears to me to be plain enough, and accordingly I do not think that there is the same presumption here as in the ordinary case that in giving out sea-board feus with a boundary by the sea beach they intended to give the feuar a right of property down to the sea at low water.

"The question, however, depends mainly upon the terms of the feu-contract, to which I now return. The first observation which I have to make upon it is that there is no clause of parts and pertinents. In the next place, it is provided that the ground feued is to be 'staked off.' That might perhaps be read as meaning that the boundaries were to be staked off on the landward sides only, and not towards the river or the sea, but the natural meaning of the expression is that the boundaries were to be staked off on every side. If so, the provision, although by no means conclusive, is important, as is shown by the case of *Smart* v. *Magistrates of Dundee*, 3 Pat. 606, 8 Brown's Ca. in Parl. 119, where considerable weight was given to the fact that the property was described as an 'enclosed yard.'

"The measurement made by Mr Hay I take to have been the staking off of the ground, and the terms of his report, which I have already quoted, seem to me to be important. The boundary on the north is there said to be 'a line cut in the turf along the beach.' That shows that the northern boundary line laid down by Mr Hay was

above the sea shore and upon the Links, otherwise there would not have been turf in which to cut a line. The existing wall upon the north side of Mackinlay Park is very strongly built and appears to be the original wall which was presumably built soon after the feu was granted, and I think that there is little doubt that it substantially follows the line cut by Mr Hay in the turf. The wall stands upon the Links a little back from the point where the Links slope down to the sand of the shore.

"I may here say that the eastern wall, that towards the river, is not built upon the line laid down by Mr Hay, but is further from the river, with the result that the ground enclosed within the walls is a little less than the extent of the feu. I think, however, that the expert evidence shows that that was almost certainly done on account of the large expense which would have been necessary to build the wall upon the softer ground close to the river.

"I now come to the clause to which I have already referred, following the description of the eastern boundary, to the effect that the bank, 'not only along the river, *but also along by the sea*,' shall remain open and unfeued except to the Aitchisons, and also to the clause immediately following the description of the north boundary, to the effect that if ground is left by the receding of the sea, or the river, or otherwise, and the Aitchisons take possession thereof, they shall be bound to pay additional feu-duty.

"The first question is, what is the meaning of the words in the first clause, 'but also along by the sea?' I have already pointed out that the feu lies at the corner of the Links formed by the river and the sea shore, and I have also expressed my opinion as to what was meant by the bank of the river. Now the only natural feature which could be referred to as the bank along by the sea seems to me to be the slope which leads down from the Links to the sand of the shore, which might quite appropriately be described as a bank. If that is what was referred to, then all the provisions are rendered intelligible and operative, whereas, if that is not what is referred to, the clauses which I have quoted are unintelligible and inofficious, and might as well have been scored out of the contract, and I need hardly say that that construction is to be preferred which gives meaning and effect to all the language used.

"The conclusion to which I come, therefore, is that the foreshore was not included in the feu-contract, but in order to prevent the feuars from being thereby prejudiced it was agreed that in no event should anyone else be interjected between them and the river or the sea, but that if land was gained from the river or from the sea the feuars should, if they chose to do so, be entitled to take possession of it upon condition of paying feu-duty at the specified rate.

"In regard to the possession which has followed upon the feu-contract, it is only necessary to say that it appears to me not to have been inconsistent with the views which I have expressed as to the rights of parties. The pursuers have, generally speaking, possessed the foreshore in practically every way of which the subject is capable. It is the case, however, that since 1868 onwards the proprietors of Mackinlay Park have from time to time complained of and objected to the removal of sand and gravel from the foreshore *ex adverso* of their ground. I think, however, that the natural inference from the documentary evidence is that at first the complaints were not based upon alleged property in the the foreshore but upon apprehended injury to land or buildings at Mackinlay Park from inroads of the sea consequent upon removal of banks of sand and gravel from the foreshore. There does not appear to have been any definite claim to the foreshore put forward by the proprietors of Mackinlay Park until 1892, but the correspondence shows that from that date they have claimed right to the foreshore while the pursuers have maintained that they had no right, that unsuccessful attempts were made to come to a settlement of that and other questions which had arisen between the parties, and that finally the present action was brought.

"Therefore, although the possession alone might not have been conclusive the one way or the other, I repeat that it appears to me to have been certainly not inconsistent with the title as I read it, and I am accordingly of opinion that the pursuers are entitled to decree that the foreshore belongs to them. I am not, however, to be taken as indicating an opinion that the defenders' property does not extend to high-water mark of ordinary spring tides, a question which I understand has been raised in another action."

The defenders reclaimed, and argued — Under their title they had exclusive right to the foreshore. A boundary by the "sea-beach" included everything down to low-water mark, and was equivalent to a boundary by the "sea" or "sea-flood." This was settled by a series of decisions and dicta— *Magistrates and Town Council of Culross* v. *Earl of Dundonald and Others*, 1769, M. 12,810; *Magistrates of Culross* v. *Geddes*, November 24, 1809, Hume's Decisions, p. 554; *Leven* v. *The Magistrates of Burntisland*, May 27, 1812, Hume's Decisions, p. 555; *Campbell* v. *Brown*, November 18, 1813, F.C.; *Boucher* v. *Crawford*, November 30, 1814, F.C.; *Berry* v. *Holden*, December 10, 1840, 3 D. 205, Lord Medwyn at p. 212; *Hunter, &c.*, v. *Lord Advocate*, June 25, 1869, 7 Macph. 899, 6 S.L.R. 593; *Lockhart* v. *National Lifeboat Institution*, November 20, 1902, 5 F. 136, 40 S.L.R. 106; *Cameron & Gunn* v. *Ainslie*, January 21, 1848, 10 D. 446; *Kerr* v. *Dickson*, November 28, 1840, 3 D. 154, *aff.* 1 B. App. 499; *Macalister* v. *Campbell*, February 7, 1837, 15 S. 490; *Innes* v. *Downie*, May 27, 1807, Hume's Decisions, 552. That it was the intention of the granter of the feu to include the foreshore in his grant could be gathered from various clauses in the deed. The stipulation for extra feu-duty for ground reclaimed indicated an assumption that the ground to be reclaimed formed part of the

feu, and that the vassal could take it without a conveyance. The clause dealing with the "landing" of goods pointed to a boundary conterminous with the sea. The Lord Ordinary founded on the eastern boundary, arguing that if it did not extend to the river the northern boundary did not extend to the sea. Although there was no analogy between the two, the boundary on the east did extend to the river, as it was illegitimate to read in, as the Lord Ordinary did, before "river Esk" the words "bank of"—*Inglis* v. *Buttery & Company*, March 12, 1878, 5 R. (H.L.) 87. *Morris* v. *Bicket*, May 20, 1864, 2 Macph. 1082, was an authority upon the meaning of "bank" of a river. The Lord Ordinary seemed to attach importance to certain measurements, but measurements could not be used to interpret a title when there were definite boundaries. The pursuers had failed to prove prescriptive possession, and they, the reclaimers, had proved possession on their part, and repeated interruptions of the pursuers' possessory claims.

Argued for the respondents—The Lord Ordinary was right. A boundary by the sea beach did not include the foreshore, and only extended to ordinary high-water mark. The cases quoted by the reclaimers were all cases where the circumstances were very special, and which at most contained *dicta* in favour of the reclaimers' contention, but were not authoritative decisions. Any preumption there might be in a question between ordinary proprietors that a boundary by the sea beach included the foreshore was displaced in the case where the party disponing was the Town Council and Magistrates of a burgh to whom the foreshore was a subject of peculiar value for public purposes—*Smart* v. *Magistrates of Dundee*, 1797, 3 Pat. 606, 8 Brown. Cas. in Parl. 119; *Todd* v. *Clyde Trustees*, January 23, 1840, 2 D. 357, *aff.* June 8, 1841, 2 Robin. 333; *Berry* v. *Holden*, *ut supra; Officers of State* v. *Smith*, March 11, 1846, 8 D. 711, *aff.* 6 Bell's App. 487. But if the meaning of "sea beach" was doubtful the Lord Ordinary was right in looking to other parts of the deed for assistance. He was further right in inserting the words "bank of" before the words "river Esk," as he was only interpreting one clause of a deed by another. The case of *Inglis* v. *Buttery & Co.* (*supra*) was quite different, and dealt with a deletion. The clause giving "free ish and entry" from the north supported their view—*Logie* v. *Reid's Trustees*, May 30, 1903, 5 F. 859, 40 S.L.R. 649. There was no clause of parts and pertinents in the deed. Where there was doubt as to boundaries, measurements and possession might be appealed to to interpret the title—*Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898, 25 R. 1160, 35 S.L.R. 897; *Stewart, &c.* v. *Greenock Harbour Trustees*, January 12, 1866, 4 Macph. 283, 1 S.L.R. 103. But even if they were wrong on the question of title they had had prescriptive and uninterrupted possession from time immemorial.

At advising—

Lord Justice-Clerk—In this case there are two separate properties, the extent of which is in dispute, the question being whether the feuars under their titles have right to the shore *ex adverso* of their feus extending to low-water mark. The first subject to be dealt with is that called Mackinlay Park. In the title the north boundary, being the boundary towards the sea, is described as the "sea beach." This the defenders maintain is equivalent to a boundary by the "sea," which would carry the right of the defenders over the shore to low-water mark. It is true that in some early cases there are *dicta* which may be read as tending in that direction, but it has never been authoritatively decided that the two expressions must be read as meaning the same thing; and giving the best consideration I can to the matter I am unable to come to the conclusion that there is any ground for holding that "sea" and "sea beach," when used as descriptions of boundary, do mean the same thing. On the contrary, I think that they are essentially different. The word "sea beach" seems to me to describe a boundary by which the subject given off is bounded to the exclusion of the thing described as the boundary. In other words, that when the subject is said to be bounded on the north by the sea beach, the line of boundary is reached when the beach is reached, and that to pass on to the beach is to pass the boundary, just as in the case of a boundary described as a certain wall, or a certain building, or a certain strip of plantation, when the wall or building is reached the extreme limit of the feu is reached, or when the plantation is entered the person entering it is past the boundary. The case is not the same as where a river or a road is named as a boundary. The water of a river and the surface of a road are peculiar, inasmuch as there are rights of coterminous and higher and lower heritors over the whole water of the river, and the rights of coterminous proprietors on either side of the road are restricted by the existence of the highway set apart for public traffic. But the *solum* in such cases, unless there is anything to the contrary in the titles, belongs to the proprietors, each up to the *medium filum* subject to the flow of the river and the maintenance and use of the road respectively. But there is and could be no such presumption in the case of lands next the sea, and it appears to me that "sea beach" as a boundary must be held to exclude the beach itself, for that which is bounded by another thing cannot include the whole of that thing itself.

Even if it were otherwise, and it could be held that unless there was something in the context to exclude the idea of "sea beach" being read as equivalent to sea it might be so read, I agree with the Lord Ordinary in thinking that in this case that result could not be arrived at. In saying this I feel bound to express my view that there is much to be said against what the Lord Ordinary does in reading into a blank left in the feu-contract certain words, viz., "the bank of the," whereby he gives a limitation to the grant so far as it relates to the east boundary at the river Esk, and founds on this and the words which follow, to which

it is difficult to give an intelligible meaning unless some such words are supplied. I do not think it is competent to guess at words where there is a blank, and to read words in, and if the impossibility of reading what immediately follows in an intelligible sense without inserting words is apparent, then I fear the proper course is to disregard them. But, on the other hand, I am satisfied that all the terms of the feu-contract as fully expressed are quite consistent with the reading that "sea beach" as the boundary meant the line at which the land ended and the beach over which the sea flowed began. One of the stipulations seems very plainly to point to this, for the feu-contract bears that "it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river or otherwise, the said William and James Aitchison shall take possession of the ground so left, then and in that case the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rates of £6 sterling per acre, with free ish and entry thereto from the east and north." It seems to me that that plainly reads as referring to ground freed from the tide and immediately adjoining the ground for which feu-duty was to be paid at that rate from the first, which was described as "a portion of the links of Fisherrow," an expression which undoubtedly refers to land, and to land never covered by the ordinary spring tide. To read this clause as referring to ground to be uncovered below low-water seems to me to be quite out of the question.

I do not refer at all to the draft with the interlineations and deletions, as I do not think that it is legitimate to look at drafts of deeds for the purpose of interpreting them or modifying them in any way.

Further, while there may be difficulty in giving its full meaning to what follows the blank in the deed to which I have referred, I think it sufficiently and intelligibly appears that what lay to the north "along by the sea" of what was feued was to remain open and unfeued to any but the Aitchisons, they alone having the right to claim feu northwards, if ground came to be left by the sea, and the burgh not being entitled to interpose any feuars between them and the sea—the feuars to have free ish and entry from the north. These stipulations would have been quite unnecessary had the feuars' right been one covering and not one bounded by the beach.

I do not think it to be necessary to notice what took place when questions were raised as to the removal of sand and gravel by persons authorised by the burgh from the shore to the north. Suffice it to say that the complaints made by the feuars of Mackinlay Park were not complaints of interference with or obstruction of property but of alleged danger to the feu as occupied by them from the shore in front of them being removed. Their first claim to anything else but protection to what they were actually occupying seems not to have been made until 1892.

I am, therefore, of opinion that the Lord Ordinary has rightly decided in favour of the pursuers as regards Mackinlay Park.

LORD TRAYNER—The pursuers of this action seek a declarator that they have the sole and exclusive right to and property in the foreshore *ex adverso* of two separate properties belonging to the defenders, known respectively as Mackinlay Park and Rosehall. The defenders on the other hand maintain that the foreshore belongs in property to them. Both parties found in support of their several contentions upon their titles and the possession following thereon. In my opinion the determination of the question at issue depends entirely on the construction and effect of the defenders' titles, and is not (as the case stands) affected by the possession had on one side or the other. But this matter of possession bulked so largely in the discussion and occupies so prominent a place in the evidence that it cannot be left unnoticed. I therefore deal with that matter first in order to discharge the case of it.

The defenders maintain that their infeftment covers the foreshore. If that is so, then their infeftment gave them (in the words of the old instrument of sasine) real, actual, and corporal possession of the subject. They needed no possession beyond that to perfect and complete their right. But if the defenders' title did not cover the foreshore, their possession otherwise will not avail them. They have not had such possession of the foreshore as would by prescription confer a right to it as part and pertinent of their subject, even if their title was one "with parts and pertinents," which it is not. So far therefore as the defenders' case is concerned, their title is the only criterion of their right.

Again, the pursuers by their titles had undoubted right to the foreshore and have it still, unless they divested themselves of it in favour of the defenders' authors. Here again we are sent back upon the defenders' title to see what was disponed to them. The pursuers however argued, as I understood, that even if the foreshore had been conveyed by them to the defenders' authors, they had by exclusive, uninterrupted, and adverse possession for more than the prescriptive period reacquired right to the foreshore. I think there is no sufficient proof of such adverse possession as would reinvest the pursuers.

The question therefore between the parties is narrowed down to this, what was conveyed by the pursuers to the defenders' authors? In dealing with this question it is necessary to consider separately the title to Mackinlay Park and Rosehall, and in regard to the former of these properties the question at issue, as I have above stated, is further narrowed by the fact that the parties only differ (at least in the present process) as to the boundary of the subject conveyed—namely, the boundary to the north. In deciding this question of the northern boundary the Lord Ordinary finds some aid in a consideration of the description of the eastern boundary, and by supplying some words in a blank left in that description in

the conveyance to the defenders' authors. I cannot concur with his Lordship in thinking that the Court may supply the missing, or supposed to be missing, words; but I say no more on that subject, because the eastern boundary, whether well or ill defined, is not here in question. What we have to decide is, what is the northern boundary of the defenders' feu? It is thus given in the feu-charter—"On the north by the sea beach." The pursuers say that such a boundary does not carry any right beyond ordinary high-water mark, and does not therefore include the foreshore. The defenders maintain that a boundary by the "sea beach" is synonymous with a boundary by the "sea shore" or "by the sea," and includes the foreshore. The Lord Ordinary has given effect to the view urged by the pursuers, and I agree with him.

I think it has never yet been decided in express terms that a boundary "by the sea" and one by the "sea beach" are synonymous or were equivalents. There have been no doubt opinions to that effect expressed by eminent judges, from whom I venture to differ with great diffidence. But, as I think the question is still an open one, I feel bound to state my own view. It appears to me that the descriptions "sea" and "sea beach" are not only different in expression but apply to subjects which are distinct and different in themselves. "Sea" and "sea flood" may be the same, but "sea" and "sea beach" in my opinion are not. These two things are so distinguished and distinguishable that in ordinary parlance they could never be confounded; and they have not (as yet at least) acquired any technical meaning differing from their ordinary meaning. Their character is different, for the one is water and the other is land. As a boundary one of them is fluctuating, varying with the rise and fall of the tide; the other is practically fixed. Accordingly I am unable to treat "sea" and "sea beach" as synonymous or convertible terms. If they are not, then what does the boundary "by the sea beach" confer on the defenders. The ordinary rule is that the thing by which a subject is bounded is excluded from the subject conveyed. It is not part of the subject conveyed, but is outside that subject. Applying this rule, the defenders' property extends to the sea beach, not beyond it. If the northern boundary had been a wall three-quarters of a foot wide, no one would have suggested that the wall was covered by the conveyance. It makes no difference to my mind that the boundary is three-quarters of a mile broad—that it is a stretch of sand and not a wall of stone and lime. The defenders reach their boundary—that is the limit of their right—when going north they reach the beach. This I take to be the sound construction of the conveyance to the defenders' author.

But I think there is a plain indication in that conveyance that what I regard as its legal construction is in accordance with the intention of the parties to it. In that part of the dispositive clause which is made somewhat difficult of interpretation through the want of some words bearing upon the eastern boundary, there is a statement that a certain bank "not only along the river (*i.e.* the east) but also along by the sea" (*i.e.* the north), "shall remain open and unfeued," but to which the defenders' authors were to have a preference in the event of feuing. I think this indicates that ground which then was or might become suitable for feuing lay between the ground then conveyed and the sea, and that is inconsistent with the idea that the sea itself was the boundary on the north. I do not lay much stress on this, but it is worthy of being noticed. My opinion, agreeing with the Lord Ordinary, is that the foreshore *ex adverso* of Mackinlay Park was not conveyed by the pursuers to the defenders' authors, and that it is still vested in them.

LORD MONCREIFF—As I read the Lord Ordinary's interlocutor he has only disposed of the first two declaratory conclusions of the summons, which are to the effect that the pursuers have the sole and exclusive right, title to, and property in (*a*) the foreshore *ex adverso* of Mackinlay's Park; and (*b*) the foreshore *ex adverso* of Rosehall, both belonging to the defenders the Musselburgh Real Estate Company, Limited. The remaining conclusions of the summons may have to be disposed of either by the Lord Ordinary or by this Court, but in the meantime I shall deal only with those conclusions which the Lord Ordinary has disposed of.

I. To deal first with the case of Mackinlay's Park, the first title to it is a feu-contract in favour of William and James Aitchison, dated 18th and 19th April 1826. The feu granted bears to be bounded "on the north by the sea-beach." Now, I may say at once that in a question between subject-superiors and their vassals I am of opinion that, in the absence of distinct conditions in the title or presumptions arising from the natural formation of the ground, or adverse possession which go to limit the grant, a boundary by "the sea-beach" or "sea-shore" is equivalent to a boundary by "the sea," and gives the feuar a right of property in the foreshore down to low-water mark subject always to public uses. The great bulk of authority is in favour of this view, beginning with the two cases of *Culross* (1) M. 12,810, 1769, and (2) Hume p. 554, 1809, and ending with *Hunter* v. *Lord Advocate*, 7 Macph. 899.

It is true that in some of the cases cited the observations of the Judges were *obiter*, in this sense, that the point was conceded but the opinions are of importance, because the distinguished Judges who delivered them held the point to be settled. I may refer to the case of *Campbell* v. *Brown*, November 18, 1813, in which the boundary of one of the feus was "the sea-shore," and particularly to the opinion of the first Lord Meadowbank. In the case of *Boucher* v. *Crawford*, November 13, 1814, F.C., the boundary was "the sea on the north." In that case the Lord Justice-Clerk, referring to the case of *Culross*, said (p. 69)—"The Magistrates had there granted a feu bounded

by the sea-shore; a public road intervened, but by certain operations on the shore Geddes was going to make a garden, and the argument was that a distinction was to be made between being bounded by the sea and the sea-shore. That argument was rejected." His Lordship also refers to the case of *Campbell* v. *Brown*, and says—"Even there the property feued was limited in point of extent, yet your Lordships were clear that he was entitled to make what encroachment he chose on the sea. This case appears to me to be inoperative. The only doubt was whether any of the operations would interfere with the right of harbour, but it is evident they would not have that effect."

The cases relied on as against the view that a boundary by "the sea-shore" carries with it a right of property in the foreshore seem to me to have been all decided upon what were or were considered to be specialties. In *Smart* v. *Magistrates of Dundee*, 1797, 3 Paton's Appeals 606, the boundary was "the sea flood," a term not so favourable to the feuar as "the sea" or "the sea-shore," and it was held not to comprehend the sea-shore. But in that case, in addition to the ground being within the limits of a burgh which possessed extensive rights of harbour and other rights in the shore, the ground feued was described as being an enclosed yard. Again, in *Berry* v *Holden*, 1840, 3 D. 205, the boundary was "the flood-mark," and this was held not to include the shore uncovered by the tide. But in that case also the superior had rights of harbour, piers, and wharfs, and those peculiarities, coupled with the fact that the boundary was "flood-mark" and not "shore," were held sufficient for the decision of the case against the feuar. The next case cited is the case of *Tod* v. *Dunlop*, 1841, 2 Robinson's Appeals, p. 333, in which the boundary was the "sea-flood," and the case was held to be ruled by the case of *Smart*.

It is to be observed that all these cases were in the view of the Court which decided *Hunter* v. *Lord Advocate* in 1869, 7 Macph. 899, in which, notwithstanding that the boundary was "the sea flood," the Court decided that the lands being situated on the banks of a navigable river, the superior had no title to alluvial ground subsequently deposited between the feu and the sea.

The only other class of case to which I need refer is that of which the *Officers of State* v. *Smith*, 1846, 8 D. 711, 6 Bell's App. 487, is an illustration, in which it was held that the feuar's operations on the shore were incompatible with the public uses of the shore.

I have only to add that I find in the first edition of Bell's Prin., sec. 154, published in 1829, the law is stated to be as I understand it; and in the latest edition, sec. 643, the law is stated in similar terms.

I cannot say that the *dicta* in all the cases can be easily reconciled, but I entertain little doubt that the great balance of judicial authority is in favour of the view which I have expressed.

I have been speaking hitherto on the general question without reference to the specialties of the present case, and I now proceed to consider whether there is anything in the titles of either property to take the case out of the general rule.

I shall deal first with the case of Mackinlay's Park. The pursuers represent a burgh which has certain rights of harbour, as in the cases of *Smart* and *Berry*. But it is to be observed that the pursuers sue as Magistrates and not as Harbour Commissioners. Further, they do not maintain that it was beyond their power to grant right to the foreshore, or that the interests of the harbour are affected, although they do found upon their right of harbour, as making it improbable that they should make such a grant.

I may say generally that I agree with the Lord Ordinary as to the terms of the title. I think there is intrinsic evidence that notwithstanding the description of the north boundary as being "the sea-beach," it was not the intention of the Magistrates of Musselburgh to make a grant of anything beyond at most high-water mark. As I read the description of the boundaries of the ground, there must have been at the date of the grant a fringe of ground along the side of the river Esk and along the sea-shore which it was not the intention of the granters of the deed to convey to their feuars at that time—a bank, however, which admitted of being feued, and which the town undertook not to feu except to William and James Aitchison. Again, it was provided that, if ground was gained from the sea by alluvium, the feuars should pay feu-duty for the increased quantity of ground at the rate of £6 per acre. These conditions are somewhat confused, but I take their meaning to be this, that the feuars should be entitled on payment of the feu-duty named to a feu, not only of the fringe of ground which I have mentioned, but of ground gained by alluvium from the sea—a provision which is not consistent with the idea that the feuars had an unqualified right of property down to low-water mark.

Again, the title bears that the feuars are to have free ish and entry from the north, which would not have been necessary if they had been bounded by the sea on the north. I therefore am inclined to hold that, apart from the proof of possession there are specialties in this case sufficient to interpret the boundary by "the sea beach" in a sense adverse to the defenders' claim.

In regard to possession, it is sufficient to say that while possession of the foreshore by the pursuers or those in their right may not have been enough to enable them to prescribe against their own grant, the evidence of possession is considerably stronger in favour of the town than in favour of the defenders, and helps to interpret the grant. It is true that there is evidence that since 1868 the feuars or their agents repeatedly complained of sand and gravel being removed *ex adverso* of their feu. But I agree with the Lord Ordinary that these com-

plaints mainly related to damage caused or apprehended to the land occupied by the feuars. On the whole matter, I am of opinion that the Lord Ordinary's judgment in regard to the Mackinlay Park is right.

The Court adhered.

Counsel for Pursuers and Respondents —Guthrie, K.C. — Cullen — D. Anderson. Agent—H. Hume MacGregor, S.S.C.

Counsel for Defenders and Reclaimers— Lord Advocate (Dickson, K.C.)—Younger— Armit. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, December 22.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

M'CALLUM *v.* M'CULLOCH'S TRUSTEES.

Marriage Contract—Trust—Liferent Provisions to Wife—Assignability—Spouses a Majority of Trustees—Power to Advance to Husband at Discretion of Trustees—Life Interests Declared not Affectable by Deeds of Spouses.

By antenuptial marriage contract a husband conveyed certain heritable property to trustees, *inter alia*, for payment to his wife during her lifetime of the free annual income for her liferent use allenarly, "declaring that the same shall not be affectable by the debts or deeds or the diligence of creditors of either of" the spouses. The contract also contained a conveyance by the wife of her whole estate to the same trustees, with a similar provision for the payment to her of the free annual income, and a corresponding declaration that it should not be affectable by the debts or deeds of the spouses or the diligence of their creditors.

The contract contained the following clause:—"With power also to the said trustees to lend or advance (but only if both are surviving and at the joint request of said spouses) to the" husband "such portion or portions of said whole estates hereby conveyed as they may think right, and as he may desire."

The trustees were three in number—viz., the spouses themselves and the wife's father.

The spouses having assigned their whole rights under the contract to a creditor in security of an advance, the creditor raised an action to enforce his rights under the assignation, and for payment to him of the free annual proceeds of the trust estate until the debt due to him had been satisfied. The trustees pleaded that the assignation by the spouses of their life interest in the marriage contract was ineffectual.

Held (*rev.* judgment of Lord Stormonth Darling, Ordinary) that as the spouses were a majority of the trustees, and were in a position to exercise all the powers of the trustees, and as the marriage contract conferred power on the trustees to advance to the husband such portions of the estate as they might think fit, the spouses had power to make, and had made, an effectual assignation of their life interest in the trust estate.

By antenuptial contract of marriage dated 17th March 1882, and registered in the Books of Council and Session 28th July 1885, John Findlay M'Culloch, residing at 9 Binnie Place, Glasgow, disponed to Archibald Nicol (his father-in-law), Mrs Euphemia Nicol or M'Culloch (his wife), and himself, as trustees, certain heritable property in Glasgow then belonging to him, for the following amongst other purposes, namely—"(*First*) for payment to the said Euphemia Nicol during her lifetime of the free annual income and revenue thereof for her liferent use allenarly; declaring that the same shall not be affectable by the debts or deeds or the diligence of the creditors of either of us, the said parties hereto."

By the same deed Mrs Euphemia Nicol or M'Culloch conveyed to the said trustees the whole estate, heritable and moveable, belonging to her, for payment to her of the free annual income and revenue thereof for her liferent use allenarly, "declaring that the said free annual income and revenue shall not be affectable by the debts or deeds of either of the parties hereto or the diligence of their or either of their creditors."

The contract contained provisions in fee for behoof of the children of the marriage (of whom there were six), it being declared that the fee should vest in the children on the dissolution of the marriage.

The deed further contained the following clause:—"With power also to the said trustees to lend or advance (but only if both are surviving and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates hereby conveyed as they may think right and as he may desire."

The trustees accepted office under the marriage contract, and managed the marriage contract estate.

On 26th January 1897 John Bunting M'Callum, 289 North Woodside Road, Glasgow, advanced on loan to Mr and Mrs M'Culloch the sum of £200. In security thereof the spouses, by assignation dated 26th January 1897, assigned to him and his heirs, executors, or assignees whomsoever, their and each of their whole right, title, and interest, present or future, whether of liferent or fee, under their antenuptial contract of marriage, together with all their right, title, and interest in and to the annual rents, interests, and proceeds payable from the properties therein described, with power also to him or any factor appointed by him to enter into possession of the subjects and draw the rents.

The assignation was granted under the declaration that the lender should out of the rents received from the subjects pay, *inter alia*, the interest due under the assignation, and also the premiums on two life