M'Donald. Then what does this gentleman do in his anxiety to keep quit of responsibility? In place of bringing a multiplepoinding, which he might have done, or taking some steps judicially to put himself into the right, while the parties interested would be allowed to compete for their respective rights, he actually undertakes to fight the battle himself, and takes up the cudgels; and when a demand is made for a delivery judicially, he insists that he is right, and refuses to give them up. I do not mean to say that the Company might not have been placed in a very different situation had they deposited these goods in a separate warehouse, upon being refused by the consignee, and intimated that to the party who had sent them, guarding themselves against competing with those who had an interest in the goods, and that they might not then have been freed from liability; but I go entirely upon this, that at the time these occurrences took place the contract of carriage had not come to an end, and that the responsibilities of that contract had not been removed from the Aberdeen Company, as coming in room of the Highland Railway Company by delivery of the goods, or by depositing them in some safe place previous to delivery.

LORD BENHOLME—I have listened with great satisfaction to the opinion which your Lordship has pronounced in this case, and as I am quite of the same opinion I do not wish to repeat it.

LORD NEAVES—I concur.

LORD JUSTICE-CLERK—We shall substantially repeat the findings of the Sheriff-substitute's interlocutor with some variation, and find the pursuer entitled to expenses in both Courts.

Agents for the Appellant—Murdoch, Boyd, & Co., W.S.

Agents for the Respondents—H. & A. Inglis, W.S.

Friday, June 25.

FIRST DIVISION.

HUNTER *v.* LORD ADVOCATE AND OTHERS.

Property—Bounding Title—Foreshore—Possession—Superior and Vassal—Feu-rights—Barony—Sea-flood. A superior feued out portions of his estate lying along a navigable river at a place where the sea ebbed and flowed, describing the subjects as bounded by the sea-flood on the south, and as conveyed with all his rights and interest in the lands. He did not set out his own boundary seaward. *Held* that the whole right of the superior, sea-ward, was conveyed to the vassal, and that the superior could not lay claim to reclaimed land lying between the feus and the sea.

David Hunter of Blackness brought this action against the Commissioners of her Majesty's Woods and Forests, and against Kay's Trustees and others, proprietors of certain subjects feued out by the pursuer's predecessors, lying to the south of the Magdalen Yard Road of Dundee, and extending along the north bank of the Tay, for declarator that a certain piece of foreshore lying *ex adverso* of the defenders' property belonged exclusively to the pursuer as proprietor of Blackness. He averred exclusive immemorial possession. The first named defenders disclaimed all interest in the action. The other defenders relied on their titles, in which the feus were described as bounded on the south by the sea-flood, and on possession. After a proof, the Lord Ordinary (JERVISWOODE), relying mostly on the possession, assoilzied the defenders.

The pursuer reclaimed.

CLARK and BALFOUR for pursuer.

IVORY for Lord Advocate.

Solicitor-General, (YOUNG, Q.C.,) and THOMS for Kay's Trustees.

GIFFORD and MACKINTOSH for Barrie.

At advising—

LORD PRESIDENT—The pursuer of this action, Mr Hunter of Blackness, sets himself out in his summons as being proprietor of and infeft in the lands and barony of Blackness, situated near Dundee; and in the first and second articles of his condescendence he represents himself as being proprietor of a barony. He says in the beginning of the second article that the "lands, barony and estate of Blackness are situated near Dundee, and extend for about a mile along the north bank of the river Tay, which is there a navigable river, in which the sea ebbs and flows, and which forms the boundary of the said lands, barony and estate." Mr Hunter alleges further in the articles of his condescendence, beginning with condescendence 4, and ending with article 7, that he or his prede cessors feued out certain portions of the estate of Blackness to the predecessors of the defenders; but it is not alleged in any of these articles that the portions of the estate of Blackness feued out are within the barony of Blackness. In his summons he speaks of the lands and barony of Blackness only in describing his title. In his condescendence he speaks of an estate of Blackness, in addition to the lands and barony; and in speaking of the portions of ground which are feued out, he speaks of the estate of Blackness alone, purposely excluding the name of the barony. Thus, in the 4th article he says:—"By contract of feu dated the 21st day of February 1767, Alexander Hunter of Blackness, now deceased, sold and in feu-farm disponed to Frederick Dederickson, merchant in Dundee, and his heirs and assignees, 'all and haill these six acres of land, being part of the estate of Blackness, bounded'" so and so. In the 5th article he says that, on the 26th of September 1767, by contract of feu between the late Alexander Hunter and Thomas Mitchell, there was "sold and in feu-farm disponed 6 acres, being part of the estate of Blackness;" and in the 6th article, "By feu-contract between the late David Hunter of Blackness and William Sturrock, dated in 1789, there was feued out these parts and portions of the estate of Blackness then possessed by Alexander Miller and Thomas Halket." And in the 7th article he says—"The several subjects above described are contiguous to each other and form that portion of the estate of Blackness which lies between the property of the Kirk Fabric of Dundee on the east, and the Magdalene Yard, &c., on the other side." Now, I cannot read these articles of the condescendence without understanding that Mr Hunter declines to allege, and purposely abstains from alleging, that the lands held in feu by the defenders form or ever formed any part of the barony of Blackness There is some evidence upon that subject of a conflicting kind, not very easily followed, but clearly establishing this, that the estate of Blackness is not all within the barony. And therefore I am not prepared to hold that these lands held by the de-

fenders in feu are or ever were any part of the barony. The subject which is claimed by Mr Hunter under the conclusions of his summons is thus described in the 11th article of the condescendence. He says—"The effect of the line of the said railway being constructed as aforesaid was to cut off from the river Tay the portion of the said fore-shore lying to the north of the said line, and between the same and the southern boundary of the said feus, except in so far as the tidal and river water ebbed and flowed through openings or culverts left in the said line of railway, in conformity with a provision to that effect contained in the said Act of Parliament. In consequence of the said space of fore-shore which lies between high and low water mark having been cut off by the said line of railway as aforesaid, and of the ebb and flow of the tidal and river waters through the said openings or culverts, large quantities of alluvial and other deposit have been left upon the said space of ground, and the same is now nearly, and will soon be altogether, filled up and made solid to the height of high water. The said culverts and surrounding foreshore are now filled up by alluvial and other deposit nearly to the formation level of the railway. The said process of filling up has been at some parts of the said space aided by the pursuer Mr Hunter, and others deriving right from the pursuer, depositing soil and rubbish upon the said fore-shore. A considerable portion of the said space immediately to the east of the Magdalen Green has thus been already completely filled up. Some parts of the said space are already, and the whole will soon be, suitable for building and agricultural purposes. The space lying between the said line of railway, and the southern boundary of the said feus, is the space of soil or ground mentioned in the conclusions of the summons." Now, with reference to this ground, the condescendence contains also an allegation of possession by Mr Hunter in the second article. He says "The pursuers and their predecessors have for time immemorial, and they had for time immemorial prior to 1847, occupied and possessed as proprietors the beach or shore down to low-water mark, lying adjacent to or *ex adverso* of the said lands, barony, and estate, and that by all acts of proprietorship and possession of which the same were susceptible, and *inter alia*, by gathering, appropriating, selling, gifting, and disposing of the sea-ware, sand, gravel, clay and other materials thereon as their own property, and by boating therefrom, and landing and depositing stones thereon, and shooting sea-fowl, and otherwise. They have also deposited rubbish on suitable portions of the said foreshore. The pursuers and their predecessors have so occupied and possessed the said foreshore without interruption, and to the exclusion of all others, and, in particular, they have done so at the portion thereof mentioned in the conclusions of the summons," that is the portion particularly described in the 11th article of the condescendence. "This exclusive possession of the foreshore had been had by the pursuers and their predecessors for greatly more than forty years prior to 1847." Now upon these grounds,—the allegation of the feuing only of the portions of the estate of Blackness to the defenders, the description of the condition of the foreshore *ex adverso* of these feus, and the allegation of possession contained in the second article,—Mr Hunter concludes for declarator as follows,—"that the piece of soil or ground extending to six acres and 5158 decimal parts of an acre imperial or thereby," particularly described, and being foreshore between the line of railway and the southern boundaries of the defenders' feus,—"pertains heritably in property, and belongs exclusively to the pursuers as proprietors of the said lands and barony of Blackness, and forms part of the said lands and barony, as also that none of the defenders have any right or title in or to the said soil or ground, or any part thereof, or to exercise any rights of property therein. Now there is one obvious objection to this conclusion, because it is a declarator that this part of the foreshore *ex adverso* of the feus of the defenders forms part of the barony of Blackness, and, so far as I can see, there is no allegation to that effect in the condescendence, and still less is there any proof of it. But I am not disposed to rest my judgment exclusively upon that ground, although I think it a very serious objection to the conclusions of the summons, because I shall take the summons as being capable of being so read or restricted as to be a declarator that this portion of the foreshore pertains heritably in property, and belongs exclusively to the pursuer as proprietor of the estate of Blackness. And the question comes to be, whether under this summons, and looking to the state of the facts as disclosed by the titles and the proof, Mr Hunter is entitled to a decree in these terms. Now, it is not necessary to say very much about the state of possession for time immemorial. It does not appear to me that there has been any great possession in either the one side or the other. I don't think either party takes much benefit by the proof of possession that has been led, but I am quite clear of this, as the result of the proof, that the pursuer has entirely failed to prove that exclusive possession which he has averred on his record. The possession is rather on the other side, and, as far as I can see, there is very little evidence even of a mixed possession on the part of the pursuer or his predecessor.

Now, that being so, we next come to consider the terms and effect of the contract of feu which are stated in the record; to see what it is that Mr Hunter and his predecessors gave out to the defenders and their predecessors in feuing to them portions of the estate of Blackness. It is enough to take a single example, for they are all substantially the same. The feu-contract between Alexander Hunter of Blackness and Frederick Dederickson—the first one mentioned in the record—is dated the 21st February 1767; and it bears that Mr Hunter "sold, alienated, and in feu-farm disponed, and by these presents, for payment of the feu-duty and other prestations after mentioned, sells, alienates, and in feu-farm perpetually dispones from his heirs and all others his assignees, to and in favour of the said Frederick Dederickson, his heirs or assignees whatsoever, heritably and irredeemably, all and haill these six acres of land, being part of the estate of Blackness, bounded by the lands belonging to the kirk fabrick of Dundee in the east, the king's highway, leading from Dundee to Perth, in the north, by a straight line marked out with march stones betwixt the lands hereby disponed and the said Alexander Hunter's other lands in the west, and by the sea-flood on the south part, which subjects before disponed extend in breadth from east and west at the north end thereof to the number of 3 chains, 35 links square over, and at the south end thereof 3 chains and 42 links square over of Gunter's Scotch chain; and also, the teinds, parsonage and vicarage, of the said 6 acres of land lying within the parish of and

sheriffdom of Forfar, together with all right, title, interest, claim of right, property and possession, which the said Alexander Hunter or his predecessors or authors had, have, or any way might have, claim, or pretend thereto any manner of way whatsoever." Now, the contention on the part of the pursuer is that this is a bounding title, and that the description by measurement is taxative of the extent of the subject. In one sense it may be a bounding title, but I do not think that the measurement is taxative of the extent of the subject. It is a bounding title in the sense that each of the four boundaries,—north, south, east, and west,—are mentioned in the title, but the south boundary is the sea-flood, and that may or may not, under different circumstances, have the effect of a bounding title. As to the measurement being taxative, I think that is quite out of the question. The breadth of the subject is measured by the measurement stated, but not the length of it. There are two measurements of the breadth, one at the north end and another at the south end; but there is no measurement of the length of the subject, and that is the important measurement in the only question that is before us here. Mr Hunter has not told us in this record, and has not shown by his titles, what the boundary of this part of his own estate was before he gave it out. He says, in general and vague terms, on the record, that the lands, barony, and estate of Blackness are situated near Dundee, and extend for about a mile along the north bank of the river Tay, in which the sea ebbs and flows, and which forms the boundary of the said lands, barony and estate. Now, I do not know whether he means by that to say that he has any title to the subjects in question which gives as a boundary the river Tay. If he does mean to say that, then he has not proved it, for he has not produced any title that contains such a boundary. I have already given my reasons for saying that I do not think it is possible to hold upon this record, and with the evidence before us, that the lands we are dealing with are, or ever were, part of the barony, and therefore the absence of a boundary is not to be accounted for by the notion that the lands in question were part of a barony. Now, not being part of a barony, one finds one's self in this position, that Mr Hunter has not shown what his own boundary in his own title to these subjects was before they were feued out. If he had had as a boundary the river Tay, or the sea, he might have maintained that his own boundary was a different one from that which he gave to his feuars, which is the flood-mark. I do not say whether he would have successfully maintained it—that is another question; but it is not a question before us, because he has not shown, and apparently cannot show, that he ever had such a boundary to these lands as the river Tay, or any other boundary than that which he assigned to his feuars when he gave out these lands in feu-contract. It appears to me that the fair presumption is, that the boundary which he gave to his feuars when he gave out these lands in feu was the same boundary as he himself had. Now that being so, the question comes to be—whether, as in a question between superior and vassal, the superior, after feuing out the lands with such a boundary, is entitled to interject himself between his feuar and the sea, and to vindicate a property or an estate in land between the area of the feu and the existing flood-mark. Mr Hunter leaves no room for doubt as to what it is that he demands, because he says that he is entitled to the exclusive proprietorship and possession of the space of ground which has been gained from the sea in the manner described in the 11th article of the condescendence, and is entitled to use that ground for building and agricultural purposes. Now, all I shall say about that is, that that appears to me to be an entirely unprecedented and, I think, a most unreasonable and untenable position. I think the fair import of the titles before us is, that the same boundary by the flood-mark which formed the boundary of these lands in the hands of Mr Hunter became the boundary of the feus which he gave out to his vassals, and that he has no right whatever to interject himself on any supposed ground, either of a barony title or of a title of superiority, between the estate of the feuars and that boundary which he assigned to them in his own contracts of feu, viz., the flood-mark,—that is, high-water mark. If it had not been for the amount of discussion which has taken place upon questions of this kind, and the variety of opinions which have been indicated at different times, I should have thought this too clear almost to require further observation. Indeed, I think that the opinion which I have now stated is the fair result of all the authorities; and I am not aware that there is any authority adverse to the view which I have now stated, unless it be the one authority of *Berry* v. *Holden*; but I think the case of *Berry* v. *Holden* differs in most material respects from the present, and is very easily explained in such a way as to be perfectly reconcilable with the conclusions that I have arrived at. No doubt the case of *Berry* v. *Holden* was a case of superior and vassal, and not a case of barony title; and so far it is on all fours with the present. But then, in the case of *Berry* v. *Holden* the pursuer, who was not superior, was not claiming any right of property in the shore by the conclusions of the summons as Mr Hunter is here. His proceeding was of the nature of prohibition merely. No doubt it was a summons of declarator, but it was intended for the purpose of restraining the feuar from exercising rights of property upon the sea-shore adverse to the rights which the pursuer contended belonged to him. But he was not contending for any exclusive right of property, or any exclusive right of possession of that sea-shore. He was merely endeavouring to prevent the feuar from extending the boundary of his feu by embanking and inclosing a part of the foreshore. In the second place, it must be observed that in the case of *Berry* v. *Holden* the superior's boundary was the Tay in the north, while the vassal's boundary was the flood-mark; and that was an element dealt with as one of very great importance by the Judges in disposing of that case. That is a material distinction between the case of *Berry* v. *Holden* and the present. But, in the third place,—and this also was a consideration that weighed very strongly with the judges in *Berry* v. *Holden*,—Mr Berry as superior had a right of harbour extending over the very shore that was in dispute, and he had not merely a right of harbour given in general terms, but he had a special right, and a power of building piers and quays upon the very ground that was occupied and inclosed by his feuars; and therefore he had a material and direct interest to prevent that appropriation of the ground by his feuar of which he complained. For these reasons, it appears to me that the case of *Berry* v. *Holden* is no authority adverse to the opinion which I have just stated. It will be observed that in what I have said I have not

considered the nature or effect of the feuar's rights at all in regard to this fore-shore, nor do I consider it necessary to do so. As I read this record and the titles, Mr Hunter has not derived from the Crown any higher right to the fore-shore than is given to any other proprietor who holds direct of the Crown. But, I must take leave to say, at the same time, that, even if Mr Hunter had possessed a barony-title, I am not prepared to hold that the result would have been different. That is not necessary for the decision of this case in my view of it; but I am not at all satisfied that it would have led to an opposite conclusion. But the case that we have to deal with is simply the case of superior and vassal, where the superior, Mr Hunter, holds direct of the Crown, but not by a barony title: and in such a case as that I am prepared to hold, as a general proposition, quite applicable to the circumstances of this case, that when a proprietor so holding of the Crown feus out in the terms which we have here, not giving his feuars a different boundary from that which he himself has, he must be held to have given out to them all the estate and interest in the fore-shore which he himself had, whatever that may be. What it is I do not inquire. There are difficult questions there behind, between the superior and the Crown, but whatever it was he derived from the Crown I think he gave out to his feuars by these contracts. And therefore, upon that ground, I am of opinion that Mr Hunter cannot prevail in this action, and that the Lord Ordinary has come to a sound conclusion.

Lord Ardmillan—Mr Hunter, the leading pursuer in this action, is proprietor of the lands and estate of Blackness, situated near Dundee, and extending along the north bank of the River Tay, which is there a navigable river, where the sea ebbs and flows. It seems to be instructed that part of the pursuer's lands constitute the barony of Blackness. No charter of erection has been produced; but it appears that in point of fact there is a barony of Blackness comprehending a large portion of the pursuer's estate. The shore of the Tay, or in other words the sea-shore, appears on the titles to be the boundary on the south of part of the lands comprehended in the pursuer's estate. I do not find that the sea or the sea-shore is the specified boundary of the barony, though it probably was the actual boundary.

Feu-rights were granted by Alexander Hunter of Blackness in the year 1767. The first contract of feu was granted by him on 21st February 1767 to Frederick Dederickson, merchant in Dundee, and his heirs and assignees, of six acres of land, "part of the estate of Blackness," bounded by the sea-flood on the south part."

The second contract of feu was granted by the same gentleman on 26th September 1767 to Thomas Mitchell, gardener, Dundee, comprehending 6 acres, also "part of the estate of Blackness," bounded by the lands feued to Dederickson on the east, and "the sea-flood on the south part."

A third contract of feu was granted by the late David Hunter of Blackness on 2d April and 3d May 1789 to William Sturrock, merchant, and William Chalmers, town-clerk of Dundee, comprehending 9 acres 1 rood and 30 falls, "parts and portions of the estate of Blackness," bounded on the east by certain specified lands, being the lands feued to Thomas Mitchell, and on the south "partly by the sea-flood, and partly by the Magdalen Yard," of which the pursuer is proprietor. In none of these feu-contracts is there a taxative measurement of the ground from north to south. I advert only to the original feu-rights—for, of course, we have nothing to do with the stipulations in sub-feus. Mr Hunter is in *petitorio*, and he can claim no right of which he divested himself. The terms of subsequent and subordinate conveyances cannot affect his title; and it is with his title and his claim that we have now to deal. It is not instructed by any clear evidence that these feus, or any of them, are parts of the barony of Blackness. It is possible, and even probable, that they are so, but it is not so proved; and I do not think that the Court can assume as matter of fact that these feus, or any of them, are parts of the barony. The granters of these feu-contracts were owners of some lands which were part of the estate of Blackness, and not part of the barony; and I cannot perceive any satisfactory materials for arriving at the conclusion that the lands feued were part of that portion of the estate which was within the barony and not of that portion which was beyond the barony. Why should we take it for granted, that these lands were part of the barony? There is no presumption to that effect—there is no evidence to that effect—there are no materials for discrimination. It is left uncertain. Therefore, if it be important for the pursuer's case, I cannot assume in favour of the pursuer that these feus of Alexander Hunter in 1767, and by David Hunter in 1789, were conveyances of portions of the barony of Blackness. It is not, however, essential to my opinion to hold the contrary. Indeed, my opinion would be the same even if these feus had been part of the barony.

It is more important to observe the terms of these conveyances. In all of them the sea-flood is declared to be the boundary on the south of the subjects conveyed; and from the other boundaries specified it is clear that the subjects are all situated along the north bank of the navigable river, and to the east and north of the Magdalen Yard of Dundee. The granter of the feu-right in all the cases, conveys the land, "together with all right, title, interest, claim of right, property, and possession" which the granter had, or might claim or pretend thereto. Nothing can be clearer than that the proprietor of Blackness conveyed to the feuars not only the lands, but all the rights and titles and claims of right or title which he possessed in relation to these lands, and that he reserved none. Whatever was the right of Mr Hunter, that right he conveyed to the feuar, and whatever was the boundary of Mr Hunter's estate at that place, became the boundary of the feuar's estate at that place. Nay, more, the special character or quality of the marine boundary was the same after the subjects were conveyed to the feuar as it had been when the subjects belonged to the superior. It is not alleged, and certainly not instructed, that Mr Hunter's own boundary was different from that which he communicated.

By the formation of the railway between Perth and Dundee, along the north bank of the Tay, it is alleged by the pursuer that a portion of the fore-shore above low-water mark, and below the medium high tide or flood-mark, was cut off from the river; and although some water still passes into this land through openings or culverts in the railway, the pursuer alleges that the portion of ground so cut off from the river, and now lying to the north of the railway, has been gained by alluvio from the sea, or the navigable river, which

in this question is the same as the sea. These averments by the pursuer are not admitted, and it has been contended on the evidence that they are not correct, and that no ground, or at least no considerable extent of ground, has really been gained from the sea by the construction of the railway. On this question of fact I am disposed to think that on this point the preponderance of evidence is with the pursuer, although, as there is a conflict of testimony, the point cannot be considered free from doubt. I shall accordingly assume that, by the construction of the railway (a work sanctioned by Parliament, and executed neither by the pursuer nor the defenders) a considerable portion of ground has been gained from the sea *alluvione*.

The pursuer claims that ground as his own property, and claims the right of using it in all respects as his own property. The defenders, on the other hand, claim the ground as theirs—as gained from the sea opposite their feus respectively, and as falling within their property; and they deny the right of the pursuer to interfere between the subjects conveyed to them in feu and the sea-flood as actually existing at present. In regard to possession, I think that the pursuer has had very little, and that the defenders have not had much. I cannot say that either party has proved enough of possession to affect this question materially, though the preponderance in the proof of possession is with the defenders.

It is important to observe that there is no question here with the Crown. It is not necessary, as I think, to dispose of the question,—what might be the effect of this alluvial addition to the land, if the dispute had arisen between the pursuer and the Crown, or between the feuars and the Crown? The Crown's right is reserved by the Railway Act; and after the date of the Act, and after the construction of the railway, the Crown, acting through the ordinary channels, granted in 1852 conveyances to the feuars of the portions of the "ground shore or alveus of the Tay" *ex adverso* of their properties below the ancient high-water mark. In any view of these conveyances by the Crown, it appears to me that they must, in reference to the subjects now in dispute, be considered as a waiver of the Crown's rights to resist the feuars' claim to the ground gained from the sea by the construction of the railway; accordingly, the Crown does not claim the ground. The question is here raised between Mr Hunter, who represents the granter of the feus, and the defenders, who represent the original feuars; so viewing the question, and taking it up at the point to which I have now brought it, I have not felt much difficulty in forming an opinion.

If all the title, and all the claim with reference to the title, of Mr Hunter, the granter of these feu-rights, was conveyed to the feuars, then the pursuer, representing the granter, has no interest left in him which the law can recognise as sufficient to entitle him to raise the question—whether ground gained from the sea *ex adverso* of the subjects which he has conveyed away can become the property of the owner of the land bounded by the sea? Whatever title to the subject the pursuer's ancestor had—whatever title the pursuer could have had—has been conveyed to the feuars. Having totally divested himself of the right and title of property in the subject, and having made no reservation in the contract of feu, the granter of the feu-right cannot, in respect of his superiority title only, now interpose between the feuars and the sea. I am unwilling to enter on more difficult questions, which are not necessary for our decision, and I think that this ground of judgment is sufficient for the disposal of the case.

But, if it were necessary to enter on the larger question which has been argued, I should be prepared to say that, in my humble judgment, the boundary by the "sea-flood" is in its nature a fluctuating boundary, meaning the highest point of ordinary flood-tides; and that if by natural causes, or by works executed under the high authority of Parliament, and not being encroachments by individuals, the line of the sea-flood has been shifted so as to gain ground from the sea, then, in a question with the subject-superior, the ground so gained becomes the property of the owner of the land *ex adverso* of the line of sea-flood boundary so shifted. If I were to enter on the verbal criticism of the subject, I should be disposed to think that a boundary by the sea or the sea-flood is, in that view, even more favourable to the feuar than the boundary by the sea-shore. But I do not dwell on such criticism.

I do not overlook the distinction between such a case as the present and the cases of *M'Allister* (7th February 1837, 15 S. 490), of *Paterson* v. *Lord Ailsa* (11th March 1846, 8 D. 752), and *Lord Saltoun* v. *Park* (24th November 1857, 20 D. 89), and others of a similar character. These last-mentioned cases related to the claims of proprietors on the sea-shore, either having the sea as a specified boundary in their titles, or having lands actually bounded by the sea, to certain shore rights or privileges connected with gathering of sea-ware, sea-shells, sea-sand, &c. On that subject, and with reference to such uses of the fore-shore, I retain the opinion which I expressed in the case of *Lord Saltoun* v. *Park* on the question there raised, and I refer particularly to the very able and elaborate opinion of Lord Wood in the case of *Paterson* v. *Lord Ailsa*. When the boundary of an estate is the sea-flood or the sea, and where no question is raised of encroachment on Crown rights, or of injury or disturbance to public uses and purposes of the sea, I am of opinion that no one can interpose between such a proprietor and the sea-flood, or the sea, which forms his boundary. The shifting of the boundary by natural causes, or by operations in the exercise of a paramount authority, such as a statutory work, does not entitle any person, and particularly does not entitle the granter of the feu-right, to interpose between the proprietor and the sea, to the effect of giving to that proprietor a different boundary from the sea-flood as it now exists.

In this view I am supported by the opinion of the first Lord Meadowbank in the case of *Campbell* v. *Brown* (18th November 1813, Fac. Col.), and in the case of *Boucher* v. *Crawford* (30th November 1814, Fac. Col.).

The opinion of Lord President Campbell in the case of *Innes* v. *Downie* (27th May 1807, Hume's Decisions, 8552), which is pointedly adopted by Lord Moncreiff in the case of *Kerr* v. *Dickson* (28th November 1840, 3 D. 154) is of great authority; and in a question between two subjects, one representing the granter and the other the grantee, of a feu-contract such as this, I cannot help thinking that these decisions are authoritative illustrations of the principles which ought to be applied. The granter of the feu having conveyed all his own right to the feuar cannot deprive that feuar of his boundary by the sea. The only authorities which are said to be opposed to the views which I have expressed

and to the authorities which I have mentioned, are the decisions in the case of *Smart* in the House of Lords (26th November 1797, 3 Pat. App. 306), and *Berry* v. *Holden* in this Court (10th December 1840, 3 D. 205). The case of *Smart* was in its circumstances peculiar, as your Lordship has already explained. It was a case with the magistrates of a burgh, and is in many respects special, and the judgment therein can be explained and supported without holding it to be a decision in opposition to the stream of authorities which I have mentioned. The case of *Berry* v. *Holden* does present more difficulty. But even in that case there are specialties. In the first place, the superior's boundary in his title was not the same as the feuars', and the boundary of the feuars' title was not the "sea-flood," but the "flood-mark," which may perhaps mean a definite and visible mark existing at the date of the title, and in that respect distinguishable from the boundary by the sea or the sea-flood, which is a fluctuating boundary. I do not rely on this distinction; but it has been suggested, and there is certainly a difference of expression.

In the next place, the pursuer in the case of *Berry* v. *Holden* had under his titles a right of harbour, and an express right to construct piers, wharfs and bulwarks for the formation of a harbour. And in the third place, as Lord Jeffrey, who was Lord Ordinary, points out, the encroachment on the shore within the old flood-mark was in that case by the grantee—the pursuer Mr Berry only seeking to maintain the existing state of matters. Now in the present case the pursuer is interposing. He has no right under his own titles, for he is divested, and he has reserved no right in the title of the feuars. He cannot succeed in this demand unless he can establish a right as created for his benefit by this alluvial gain, and he is not seeking to preserve the existing state of matters, but he concludes for declarator of his rights as proprietor, including of course the exercise of all the powers of a proprietor, in the ground gained from the sea. If the pursuer's action is well founded he may erect buildings, and he craves declarator of the right to erect buildings, between the defender's subjects and the sea, so as to deprive the defenders of the boundary by the sea-flood which is in their titles, and to substitute for that boundary the walls which the pursuer may erect.

It is by no act of these defenders that the line of boundary by sea-flood has been shifted, and the alluvial accession of ground obtained. There has been no enroachment upon their part. The Railway was constructed by others and by authority of Parliament; the effect of that construction has been to gain from the sea the ground which the pursuer seeks to appropriate, and on which when, so appropriated, he claims a right to build at his pleasure.

For this claim of right on the part of the pursuer I think he has not instructed any sufficient ground in legal principle or authority, and since there is no question here with the Crown, or in reference to the rights of the Crown or of the public uses of the sea, I am of opinion that the defenders should be assoilzied from the conclusion of this action.

Lord Kinloch—The conclusion to which I have come in this case involves, I think, as necessary grounds of judgment, considerations of a somewhat wider scope than those on which the Lord Ordinary has proceeded.

The case stated by the pursuer of the action, Mr Hunter of Blackness, is rested on the allegation that he is proprietor, under a Crown title, of the lands and barony of Blackness, lying along the north bank of the River Tay, where that river is navigable, and the sea ebbs and flows. Under this title he became, as he contends, proprietor not merely of the lands of Blackness, properly so called, but of the adjacent shores between high and low water mark. The defenders (other than the Lord Advocate) hold under feu-charters granted by a previous proprietor of Blackness, conveying portions of the estate of Blackness lying on the bank of the river, and describing the subject conveyed as "bounded by the sea-flood on the south part." By a conveyance thus worded, the pursuer maintains that there is no right given to the sea-shore, the boundary of the subject conveyed being high-water mark. The result was to leave the shore *ex adverso* of these feus in Mr Hunter of Blackness, the superior. By virtue of this reserved right, the pursuer contends that he has the exclusive property of the subject brought into controversy in the present action, which is a piece of ground lying between high-water mark and the line of the Dundee and Perth Railway, and which is now in process of being recovered from the sea, and made available for similar purposes with the adjoining land. Such, in substance, is the pursuer's case.

I assume, in disposing of this case, that the pursuer is right in maintaining that his title to the lands of Blackness gives him right to the sea-shore *ex adverso* of these lands as a part and pertinent of the lands. I would go still further and say that, in my apprehension, such is his true legal right. I entertain a decided opinion, to the expression of which I think the parties entitled, that, according to our law, the sea-shore is not *in patrimonio principis* more than are the adjacent lands. In legal theory the Sovereign is proprietor of all lands to which no one else can show a title. When the Crown gives off lands locally situated on the sea-shore, I am of opinion that, whether the title declares the sea to be the boundary or not, there is thereby given off a right to the sea-shore as part and pertinent of the lands. The right is, and can only be granted subject to the public uses of the shore for navigation, fishing, passage, recreation, and the like. And to the effect of maintaining these uses there may theoretically be said to be a trust vested in the Crown. But except to this effect, I am of opinion that in such a case no right in the sea-shore is reserved to or belongs to the Crown. Professor Bell, in his Principles of the Law of Scotland, sect. 642, expresses what is my opinion on this subject:—"The shore," he says, "according to the law of Scotland, shifts with the shifting of the tide, always corresponding to the description of whatever is covered by the sea in ordinary tides. It is not, as in England, held to be property reserved to the Sovereign, but presumed to be granted as part and pertinent of the adjacent land, under burden of the Crown's right as trustee for the public uses."

I am of opinion that the doctrine thus laid down by Professor Bell is amply supported by the decided cases, running downwards from that of the *Magistrates of Culross* v. *Earl of Dundonald*, 15 June 1769, M. 12,810; from which they may be said to start. It was decided in that case that a Crown charter of lands declared to be bounded by the sea conveyed to the grantees the right to the beneficial occupancy of the shore, in preference to an after

Crown grant, purporting specially to convey the sea-shore as a reserved Crown property. In an after series of cases, it was decided not to be necessary that the sea should be expressly set forth in the title as the boundary, but that the same result was operated by the fact that the lands conveyed actually lay on the sea-shore. I refer especially to the cases of *Innes* v. *Downie*, 27th May 1807, Hume 552; *Macalister* v. *Campbell*, 7th February 1837, 15 S. 490; *Paterson* v. *Marquis of Ailsa*, 11th March 1846, 8 D. 752; *Lord Salton* v. *Park*, 24th November 1857, 20 D. 89. It is true that, in the case of *Macalister*, the successful party did not plead the Crown grant except in connection with the possession alleged to follow on it; but in determining the question of title, the Court were necessarily compelled to construe the grant; and could not, as I think, sustain the title to pursue without finding by implication what one of the learned judges expressly lays down, "that the conveyance of an estate which is notoriously bounded by the sea, conveys the shore as effectually as if the words 'bounded by the sea' were in the charter." The other cases which I have mentioned involve in their decision precisely the same assumption. For although the Crown was not in any of them directly a party, the construction of the Crown grant of the adjacent lands, as giving a right to the shore without any mention of the sea as a boundary, was in all of them competently brought in issue by the person whose interference with the shore was sought to be checked. Except on the construction I contend for, I conceive that the preferential right of the adjacent proprietor could not have been sustained as it was. In the present case, the Crown has appeared as a party, but not to contest the right claimed by the pursuer; on the contrary, to give consent that, so far as the Crown is concerned, decree should be pronounced in his favour, in terms of the conclusions of the summons; and the expenses occasioned by the Crown's appearance paid to the pursuer.

In the view which I thus take, the only remaining question necessary to be determined is, what is the effect to be given to the feu-charters from the proprietor of Blackness, which constitute the foundation of the defender's rights? In all these feu-charters, the ground conveyed is expressly set forth to be a portion of the lands of Blackness. The question has been raised and largely discussed, whether they are within the barony of Blackness? I think the point immaterial; for whether a barony or not, I conceive the lands of Blackness equally to have had attached to them, under the Crown grant, a right to the fore-shore, subject to the public uses of the shore. The proprietor of Blackness, in so giving off a portion of his lands, expressly declares the subject disponed to be bounded "by the sea-flood on the south part." What, in point of law, is the meaning and effect of this conveyance?

I am of opinion that the granter of the deed thereby gave off to the feu-vassal the whole right in the fore-shore which he himself held under his Crown title. I consider nothing whatever to have been reserved to him between the lands disponed and the sea. Whether it was competent for him to have reserved the fore-shore as a separate tenement in his own person, I need not consider. I am satisfied that, on the legal construction of the right, he did not do so; but that the fore-shore was conveyed by him to the vassal as part and pertinent of the lands feued, as completely and unreservedly as he had previously held it himself.

I consider the term "sea-flood" to express that the lands are bounded by the sea, exactly as if the term "sea" had been used; or as if, without an express phrase, the locality of the lands had been left to imply their boundaries. A great deal of discussion has occurred in previous cases as to the meaning of these and analogous phrases, considered as indicating the boundaries of lands adjacent to the sea. I think that these discussions have employed a great deal of superfluous ingenuity. For, generally speaking, I conceive the whole of the varied phrases to express one and the same thing: namely, that the property is given as a sea-board property; and that, being such, the shore is conveyed as part and pertinent of the lands, so that no one shall be entitled to interpose between the disponee and the sea. I consider the words "sea," "sea-flood," and "sea-shore," to express all of them, in this respect, one and the same thing. It has been contended, with some apparent plausibility, that the term "sea-shore" cannot indicate a grant of the shore; because that by which a subject is bounded cannot be viewed as within the subject. But this argument ignores what I think the true object in using this and all the other phrases, which was not to draw a boundary line in the strict sense of the expression, but simply to make it clear and indubitable that the property was dealt with as a property on the shore of the sea; implying thereby that the shore was given by the conveyance to the fullest extent to which the flood of the sea runs out.

In the leading case of the *Magistrates of Culross* v. *Dundonald*, the boundary was declared to be the sea. But that this was, in legal construction, the same as if the boundary was declared to be the "sea-shore," was evidenced by the decision in the second case of Culross—*The Magistrates of Culross* v. *Geddes*, 24th November 1809, Hume 554. The same extent of shore which the Court had in the first case found conveyed by the Crown title declaring the boundary to be the sea, the Court, in this second case, found conveyed by a subordinate grant, in which the "sea-shore" was declared the boundary. And this was found where the case had this peculiarity, that the public highway ran along the line of high-water mark, so as to create a clearly defined separation between the lands and the shore. But this notwithstanding, the shore was found by the Court to have been not reserved but conveyed.

In *Leven* v. *The Magistrates of Burntisland*, 27th May 1812, Hume, 555, the boundary was, exactly as in the present case, declared to be the "sea-flood." In *Campbell* v. *Brown*, 18th Nov. 1813, Fac. Coll., the declared boundary was the "sea-shore." In *Boucher* v. *Crawford*, 30th Nov. 1814, Fac. Coll., it was indifferently "sea" or "sea-shore." In all these cases, and with all the variety of expression of "sea," "sea-shore," and "sea-flood," as marking the boundary, it was found that the right to the shore was equally conveyed to the proprietor of the adjacent lands.

I conceive the general principle settled by these cases to remain unaffected by any counter authorities. The case of *Smart* v. *The Magistrates of Dundee*, 22d Nov. 1797, 3 Paton, 606, has been frequently quoted as if determining that ground bounded by "the sea-flood" did not comprehend the sea-shore, but excluded it. But I consider that case to have been decided, not on the general

principle (about which there was no controversy), but on the specialties of the title, which bore to grant an "inclosed yard," and this situated within the burgh of Dundee, the magistrates of which, it was contended, possessed rights of harbour and other rights over the shore, fairly to be presumed reserved in a way not applicable to the case of ordinary proprietors. Such specialties constituted, so far as can be traced from the only reports possessed of the case, the grounds on which the original judgment, to an opposite effect, by Lord Monboddo, was altered by the Inner-House, and their judgment affirmed by the House of Lords.

The case of *Berry* v. *Holden*, 10th Dec. 1840, 3, D. 205, I conceive also to have been decided on specialties. If it were not so, I should think it an erroneous judgment, at variance with the tenor of the general body of the authorities. The leading peculiarity of that case is, that the boundary specified in the disposition by the superior (on the precise locality of which the superior's reserved right depended) was the "flood-mark,"—which was with great plausibility maintained to signify high-water mark, and so to exclude the shore. But, besides this, there were rights of harbour, piers, and wharfs vested in the superior, the maintenance of which was strongly argued to be incompatible with an alienation of the shore, and was thought to indicate a reservation to the superior of more than usual extent. I am not prepared to say that these circumstances are sufficient to justify the decision; but at least they serve to explain it consistently with the maintenance of the general principle as already expounded.

The case of *The Officers of State* v. *Smith*, 11 March 1846, 8 D. 711; 6 Bell's Appeals 487; is sometimes cited in connection with those others. But the report of the judgment in the House of Lords makes it clear that the operations on the shore, performed by the proprietor of the adjacent lands, were found illegal on the special ground that they were incompatible with the public uses of the shore, and that thus no general principle, such as that now brought in controversy, was involved in the decision.

For these reasons, I am of opinion that the pursuer possesses no reserved right in the ground now claimed by him, and that the defenders are entitled to *absolvitor* from the conclusions of the present action. The practical result is the same with that arrived at by the Lord Ordinary; but I reach it on different grounds from those assigned by his Lordship. I do not think the case is one to be determined by a mere consideration of the respective possession. The question, in my apprehension, is a question not of possession but of title. So far as the evidence goes, the preponderance of possession seems to have been greatly on the side of the defenders, some of whom appear actually to have their present houses and gardens within what was originally the line of high-water mark, a feature of possession than which few can be stronger. But I forbear further inquiry into this subject, for I consider the precise extent of possession on either hand comparatively immaterial to the determination of the case. If I am right in holding that the feuars by their charters obtained all the superior's rights to the sea-shore *ex adverso* of the subjects conveyed, they do not, in a question with the superior or those representing him, require any possession either to constitute or confirm their right.

I would only further add that, in reaching the conclusion I have indicated, I lay entirely out of view the title to the fore-shore alleged to have been obtained by the defenders from the Crown in 1852. In the view which I take of the case, the Crown was thereby disposing of property which had been previously given off to the proprietor of Blackness. But the possession of this additional title does not derogate from the efficacy of what I conceive the primary right. It affords, in opposition to the pursuer, the alternative plea, that, either by the transmission of the original Crown right in the feu-charters granted by Mr Hunter's predecessor, or by their own direct title from the Crown, the defenders possess the entire right to the fore-shore *ex adverso* of their feus; and the pursuer's claim is, in either view, equally excluded.

Lord Deas—The question raised here is who has right to that piece of ground, extending to upwards of six acres, upon the shore of the Tay between the railway and the ground hitherto possessed by the defenders. It is claimed by Mr Hunter of Blackness upon the one hand, and by his feuars upon the other. It is necessary in the outset to attend to what the nature of the piece of ground in dispute is. It is a portion of ground which, until recently, was undoubtedly part of the fore-shore of the Tay, and which has so barely ceased to be a part of the fore-shore that it might have been doubtful whether it was not a part of the fore-shore still, if it were not that both parties take it as having ceased to be so, and your Lordships take it as having ceased to be so; and I don't object to its being so considered, because if it has not completely ceased to be a part of the fore-shore, it has all but so ceased, and it is quite plain that it would only be postponing the question a little longer if it were to be dealt with on any other footing than ground which has ceased to be a part of the fore-shore. It is material, however to see how it did cease to be so. I think it is quite clear that it ceased to be a part of the fore-shore by what is called alluvio. It is not a piece of ground gained suddenly from the fore-shore by artificial operations: it has ceased to be part of the fore-shore by the gradual changes going on in the state of the river Tay, and which apparently have been going on as far back as the matter can be traced. It is quite clear that a large portion of the ground possessed by these feuars was within living memory part of the fore-shore. There is no doubt about that upon the titles and upon the evidence. There now exists a wall which runs along the whole south boundary (using that word descriptively) of these feus, betwixt them and the river. What they have actually possessed as their own private property hitherto is bounded by a wall, separating them from the fore-shore and the river. As I have already indicated, it is quite clear that there are considerable portions of ground to the landward of the wall, which were portions of the fore-shore. But there neither is, nor can be, any question about these, because, while it is distinctly proved that these portions of ground were part of the fore-shore, it is equally clearly proved that for considerably more than forty years they have ceased to be so; and I can have no doubt at all that any proprietor upon the sea-shore who incloses and occupies a portion of the fore-shore, and possesses it as part of his property under his titles for more than forty years, is just as secure in that property as he can be in any other. And accordingly there is no question about that here. One

important thing to deduce from that fact is that the retirement of the water of the Tay has been long going on, and obviously would have gone on although the railway had never been there. And the railway which came along that shore, and was made by virtue of Act of Parliament about 1848, has had no effect upon this, except perhaps to facilitate and hasten to some extent that which is naturally going on. Large culverts or openings were left under the railway on purpose not to impede the flow of the water, but to allow it to come up as far as it did before, and it did come up as far as it did before, and it does so still. The only effect of the railway has been to impede to some extent the reflux,—to impede the matter which is washed up going back again so readily as it would otherwise have done. The ground we are now dealing with, I say, has been gained by alluvio and I hold that it clearly belongs to the private proprietor upon the shore, be he who he may, and not to the Crown, in any view which can be taken of the rights of the Crown. If I am right in that, it leaves a question only between Mr Hunter upon the one hand, and these feuars upon the other. I don't think, according to any view that can be taken, or ever has been taken, of the law of Scotland, that ground formed from the sea-shore by alluvio can be claimed from the Crown when the Crown has parted with the whole property upon the shore. There is no authority for that, and no principle for that.

Let us see next what was the title of Mr Hunter, and how he would have stood if he had never granted these feus. Mr Hunter is proprietor of the barony of Blackness, which extends for about a mile along the north shore of the river Tay. The barony is situated to the seaward of Dundee, and where the river Tay forms a large and important estuary of the sea. Now, I don't know that there can be any doubt that the grant of a barony situated upon the seashore carries to the grantee all the rights to the shore which usually go along with the property of the land—carries to him (not to speak of more important things) the right of property in all which happens to be gained by alluvio from the sea; and, if that be so, it is plain enough that had Mr Hunter granted no feus upon the margin of the Tay, this ground would have belonged to him. We all know that one peculiarity of a barony is that there never are any boundaries mentioned. Everything belongs to the barony which has been possessed along with the barony. A grant of barony carries with it many things that other grants don't carry. A grant of barony may carry any of the *regalia minora* which can be shown to be possessed along with it, and I am not aware that there is any room to doubt upon the authorities that the grant of a barony of land upon the seashore carries to the baron the right to whatever may be gained by alluvio from that seashore. The question therefore comes to be whether, by granting these feu-rights, Mr Hunter has conveyed away the right to ground, whatever the extent of it may be, which may be gained by alluvio, opposite the different feus that he has given out. That this action proceeds upon, or founds upon, his right and title to that barony, I can have no doubt at all. The summons sets forth what the ground is that is claimed—6 acres and upwards—and then it goes on to say that that ground pertains heritably in property and belongs exclusively to the pursuers, *i.e.*, Mr Hunter and his trustees, as proprietors of the said lands and barony of Blackness, and forms part of the said lands and barony, and that the defenders have no right to this ground. And in art. 2 of the condescendence it is set forth that considerable portions of the "lands, barony, and estate have been from time to time feued out, and a large portion of the town of Dundee is built upon feus forming parts of the said estate. Among other feus the pursuer's authors granted those mentioned," &c. I cannot therefore entertain any doubt that the action as laid is quite sufficient to entitle Mr Hunter to found upon his right of barony, if that he considered material to his case, and that was not disputed in the whole course of the argument. Now it must be observed that Mr Hunter's claim to ground of this kind upon the fore-shore is not limited. I mean—although the question in this case may be limited to the particular piece of ground—his title and right is not limited to a particular part of the ground. What he claims is those rights in the fore-shore which belong to the proprietors of a barony extending about a mile along that fore-shore, extending east of these feus and west of these feus, and the possession which he says he has had (whatever may have been the value of it) is east and west of these feus and *ex adverso* of these feus, all in virtue of his baronial title; and I don't very well see that there is any necessity for a very minute inquiry as to whether some particular feu upon the beach can be shown distinctly to be a part of the barony or not. If it be the baronial title alone that carries a right of this kind, Mr Hunter has it although there might be some small portions of ground on the margin which did not form part of the barony. But, apart from that, although it cannot be perhaps very distinctly shown whether these particular feus were part of the barony or part of a few acres of land, not more than 18, which seem to have been acquired by the proprietor of the barony some time or another, we don't know when, although it cannot be precisely traced, I can see no presumption whatever that these feus are part of the 18 acres rather than part of the barony, which extends all round them and on both sides of them. On the contrary, if I were going into it, which I don't mean to do, I think the reasons assigned by Mr Balfour in respect to the title go to show that in all human probability, so far as the thing can be traced, that all these feus were part of the barony, and I see no gronnd for taking them on any other footing, though I don't say it would make any material difference on the result. Now, if this ground in dispute would have belonged to Mr Hunter had he never granted these feu-rights, the only question that remains is, whether he parted with that to these feuars, or whether he only gave them certain limited portions of ground, reserving all his rights to the barony to any other extent and effect remaining in him. There are ten feuars here who are defenders, and it will scarcely do in a case of this kind to take all their titles in the slump, and to hold that if any one has a title that is somewhat favourable to the feuars, they are all to be held as in the same position. We must look at each of these feu-rights to see what they are, and we have excerpts from them all in the print. The first is that of Kay's Trustees, which is described as 80 feet 6 inches in breadth, giving the breadth only, and the northern boundary is mentioned, and the south boundary is stated to be the sea-flood. I would just remark here that no pertinents are conveyed with that feu-right, nor, so far

as I see, with any of these feu-rights. Now, it would look a little startling to suppose, even upon that title, that it was a title the rights under which might be extended to any extent into that which otherwise would have belonged to the granter, because the boundary in the south was stated to be the sea-flood. But when you came to the next one, viz., Thomas Nicholson's, we find that what is conveyed to Mr Nicholson is 43½ falls Scotch measure, with no pertinents at all, bounded by the sea-flood upon the south. I don't say that that measurement is taxative, although it is very near it, but unquestionably it is a very important element in considering what it was that was intended or understood to be conveyed by that feu-right. It is described as 43½ falls Scotch measure. It is not "43½ falls Scotch measure thereby," words which would have given very considerable latitude, but it is 43½ falls Scotch measure, and I don't have in my memory at this moment any case which has gone the length of holding that not to be taxative. The next disposition is to John Kerr's Trustees, and that is a piece of ground bounded by the sea-flood on the south. Then Mackay's Trustees have a piece of ground 74 feet from east to west, bounded by the sea-flood upon the south. Robert Mackenzie's title is "all and whole that space of fore-shore or alveus of the river Tay *ex adverso*," &c. The proprietor of Blackness deals there with the foreshore as that which he was entitled to convey to the feuar, and it is expressly stated to be a portion of that foreshore which belonged to him, and which alone was conveyed to that feuar. The next title is that of Miss Macpherson and others, conveying "all and haill that small spot of ground in the south side of the road leading from the Nethergate Port of Dundee to the Magdalene Yard, being a part of these six acres of land of the ground of Blackness, feued out and disponed by Alexander Hunter of Blackness to the said Thomas Mitchell, and which spot or piece of ground is bounded" so and so, and the boundary there again is the sea-flood on the south. The next one is that of John and William Thoms—"all and whole that piece of ground as now inclosed with a stone wall or dyke, lying," so and so. Is there anything there conveyed outside the dyke? I know no rule of construction that has ever been recognised that will construe that in any other way than as taxative—that the thing conveyed is that which lies within and is inclosed by that dyke; and when you come to the boundaries this is described only as a part of six acres feued to Mitchell by Mr Hunter,—"which piece of ground before disponed is bounded by the ground still belonging to me on the east, by the sea-flood on the south." Besides the impossibility of that feuar claiming anything outside of that wall, you have here the strongest possible illustration of the meaning of these grants,—that bounded by the sea-flood does not imply a right to anything beyond the sea-flood, because here the piece of ground which is conveyed as inclosed by a wall is still mentioned as bounded by the sea-flood, showing that there the sea-flood and the wall were meant to be synonymous, and that it was not in the contemplation of the granter or the feuar that he would be enabled to extend his possession beyond that wall. The next title is that of Paterson & Low, and the first title conveys 3 acres of land, in which there is no mention of sea-flood at all. The next title, which conveys a part I suppose of these three acres, conveys "all and whole that piece of ground, consisting of 18 falls or thereby, lying," so and so. And that is described as bounded by the sea-flood. Then we have the title of Barrie which conveys a piece of ground, and that is bounded by the sea-flood like the first one alluded to. Lastly, we have the title of Garland's Trustees, conveying "all and whole that piece of ground, being part of the Marine Garden lying on the south side of the road leading to the Magdalen Yard, which piece of ground hereby disponed is situated immediately to the westward of that part of said garden lately disponed by me to William Barrie, and is bounded by the sea-flood on the south, by a mutual wall six feet high, &c., on the east, and by front walls on the north and west parts, and which walls on the north and west, and also the sea-dyke on the south, form part of the property hereby disponed." The boundary here is stated to be the sea-flood, and yet the ground is described as upon the south side of the road leading to the Magdalene Yard. The sea had apparently come up to that at that time, but the road and the sea-flood are spoken of as identical, and the sea-dyke is expressly mentioned as part of the ground conveyed—showing in the strongest possible manner that it was not dreamt of that anything south of the sea-dyke was conveyed, otherwise that certainly would not have been necessary. Now the question to my mind is, whether these are, or are not, what we familiarly call bounding charters; and the only conclusion thrt I can come to upon principle or authority is that they are bounding charters. What the superior gave out was the pieces of ground particularly mentioned there, and the sea-flood on the south is mentioned as a boundary, to show where the grant terminates, just as much as the boundary upon the north, or the east, or the west. And I must say that the case of *Berry* v. *Holden* appears to me to be an express authority to that effect. The boundary there was the sea-flood upon the north—that was on the other side of the Tay—and the question was between the superior on the one hand, and the feuar on the other, to which of them a piece of barren ground belonged, which had been gained from the sea, and on which the feuar had formed a bleachfield, and built a wall. That was a case very fully discussed both in written argument and in verbal argument. I wrote the printed pleadings on the one side, and I have quite a sufficient recollection of it to remember that there never was a case more fully discussed at the bar, and more deliberately considered by the Court than that was. It was reported by Lord Jeffrey just from its general importance, and particularly in consequence of what his Lordship considered the startling results to which any other view than that ultimately taken by the Court would lead, viz., that a superior giving out a small bit of ground of a feu-right might be giving out hundreds of acres in some cases, and interfering, as his Lordship observes, with the right of the superior himself to gain thousands of acres it may be, for he puts in his note the case of a shallow bay running up into the land for a long way, which, either by the sea going back, or by a wall being thrown across the neck of it, might reclaim from the sea thousands and thousands of acres; that the feuar who got the little spot of ground, as it is called in one case, or 23 falls in another, or the piece of ground surrounded by a wall, might claim to extend across the whole of this immense bay,—it was considerations of that kind which led his Lordship, in place of deciding the case, to report it to the Inner-House as a case

of importance in which the whole authorities required to be considered; and the Inner-House, after full discussion and consideration of all the authorities, came to the conclusion that where a feu-right is granted with a boundary by the sea-flood, that is a bounding charter beyond which the feuar cannot go. That is the important thing that the case decided. They held that the boundary was the highest mark of ordinary spring tides. That was ascertained by a remit to a man of skill, and accordingly that was held to be the boundary of the feu. It is quite true, as has been observed by Lord Kinloch, that there were considerations brought in aid of that construction, such as that very vague grant of right of harbour which the superior had, and some other views of that kind. But these were only taken as illustrations strengthening the view that this was a bounding charter, that the mention of the sea-flood on the north was the boundary of the vassal's right; and, whether that be a sound decision or not, I do not hold that sitting here we would be entitled to go against that decision. It was a well considered case, it was so decided, and I am disposed to think it was rightly so decided. Now, taking that view of the case, and holding that Mr Hunter would have had this ground if he had not granted these feus, I cannot think he has parted with that right by granting them. A superior who grants a feu-right is never understood to give away anything more. He does not part with his title even in the ground that he feus. The radical title remains in him. The radical title to these pieces of ground is in Mr Hunter at this moment. The feu-right as described by our institutional writers is substantially of the nature of a burden on the right of the superior, in so much that the superior under many circumstances requires no title back from the vassal at all. If the vassal, although he has a charter and infeftment, ceases to possess for forty years, and the superior possess, the superior's title is perfectly good, and no conveyance is required from the vassal. That has been decided in many cases. The doctrine was very fully recognised in this Division of the Court in the case of *The Board of Ordinance* v. *The Magistrates of Edinburgh*, where the magistrates claimed the property of the esplanade of the castle, the castle bank, and the ground running round the base of the rock, and produced an express Crown Charter giving them all that—and yet it was held that they had no right to it at all, that it belonged to the Crown, because the Crown was the superior; and, although it had given all that out in express terms, the possession of it for time immemorial had been with the Crown and not with the vassal. That decision was affirmed in the House of Lords. I see that in the House of Lords' report, Mr M'Queen says that there was no point of law involved in it. There never was a case involving more a point of law. It may be, and very likely was, that that was to be accounted for in this way, that besides the question of title, which was the great leading question decided, there was a subordinate question as to the precise boundary. The magistrates undoubtedly had the property of the North Loch west of the mound, and there was a very perplexed and intricate question of boundary, and I presume from what Mr M'Queen says, that when the case went to the House of Lords, the magistrates found it hopeless to maintain any longer the claim which they made here to the property of the whole, and probably pleaded only that subordinate question of boundary. But whether that be so or not, the question was fully discussed and decided. Mr Hunter has the radical title here to the whole ground of these feus, as well as to the rest of the barony, subject only to the burden of what he has given off to the vassals, and in my humble opinion that which he gave off to the vassals was simply the pieces of ground described as bounded by the sea-flood, subject always to this, that if prescriptively they possess beyond this boundary, that may add to the ground conveyed, but will not give them right to any ground that may be gained afterwards in this way from the sea. It may be a very great hardship in many cases to a man who has a piece of ground bounded by the sea, that he ceases to be bounded by the sea. That hardship applies equally if the right to the interjected portion of ground was in the Crown, and if it was in the baron or superior. But surely it is not to be inferred from that, that if there be acres and acres of ground which happen to be added to the shore by the sea receding naturally, that is neither to belong to the Crown nor to the proprietor of the barony, but is to belong to the feuars of the spot of ground or of the falls of ground. Unless they were to get it, the hardship would be the same whether it went to the Crown or to the superior. I don't see any principle that entitles a man in all cases, because a thing is mentioned as his boundary, to have it for ever to remain as it was at the time that it was described as his boundary. But my humble opinion here is, that Mr Hunter had this right in his Crown grant, and that he has not given it to those feuars who have mere bounding titles.

Lord President—I wish to make an explanation in regard to the descriptions in the feu-rights to which I referred in giving judgment. I said that the feu-contracts which are alone mentioned in this action, and *ex adverso* of which this foreshore lies, were all substantially in the same terms; and that is so, there is no variance whatever. There are just three of them,—the 1st, upon page 15 of the print, Dederickson's; the 2d upon page 16, James Mitchell's, and the 3d upon page 17, Sturrock and Chalmers. They are all descriptions of precisely the same kind: and the titles that my brother Lord Deas referred to are all sub-feus, and seem to me to have no bearing upon the question what it was that the superior gave out by these feu-contracts. The form of the interlocutor may require a little consideration. I think the general result of the opinions of the majority seems to be that Mr Hunter has no title to this ground, and probably some finding to that effect is the proper foundation for the absolvitor finding that the pursuer has no title to the property of the ground embraced in the action, and therefore that he has no title to prevail in the conclusions of declarator, and assoilzie.

Lord Deas—I suppose I am not wrong in thinking that all these ten people are defenders?

Mr Clark—They are all defenders.

Lord Deas—And that these are the titles they found upon?

Mr Clark—Yes.

Lord President—The only thing that I wanted to explain was this, and I hope my brother has not misunderstood me, that the whole of my opinion is founded upon Mr Hunter, the superior, having given out these feus in these terms, and so I think

divested himself of all title to the ground in question.

Lord Deas—I quite understand your Lordship's view. Whether it infers that these particulur feuars had this or no remains behind.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Lord Advocate—A. Murray, W.S.

Agents for Kay's Trustees—Lindsay & Paterson, W.S.

Agents for Barrie—Hill, Reid, & Drummond, W.S.

Saturday, June 26.

AITCHISON *v.* THORBURN.

Lawburrows—Suspension—Caution. In a suspension of lawburrows, unless there is *prima facie* some evidence of malice and want of probable cause, the note will only be passed on caution.

This was a suspension and liberation in which the complainer, Aitchison, sought to have a lawburrows (obtained against him by Thorburn, and under which he had been incarcerated) suspended. In the application for lawburrows, which was presented on the 17th May, it was alleged by Thorburn that the complainer Aitchison had threatened his life in the month of February last, and that, on the 15th May, he found him trespassing within his grounds with a loaded gun, when he (Aitchison) threatened to shoot him, and assaulted him by kicking him on the legs and throwing stones at him. In the note of suspension and liberation it was averred by the complainer Aitchison that, on the occasion last referred to, he was assaulted by Thorburn, and that the procurator-fiscal had in consequence raised a criminal prosecution against Thorburn, under which he was convicted and fined by the Sheriff, and that the application for lawburrows was malicious and without probable cause.

The Lord Ordinary on the Bills (Lord Manor) passed the note, and granted liberation as craved, adding this note:—

"*Note.*—It is an admitted fact in this case that, so lately as the 25th May 1869, the respondent was convicted and fined in the Sheriff-court of Roxburghshire for an assault committed by him upon the person of the complainer on the 15th day of the same month; and it appears that, on the 17th May, just two days after the said assault, the respondent presented a petition to the Justices of Peace of the county, stating that he had just cause to dread harm to himself from the complainer, and setting forth various alleged threats used against him by the complainer in the month of February preceding, and more particularly that the complainer had threatened and assaulted him on the 15th day of May current, referring to the very occasion on which he, the respondent himself, was subsequently convicted of being the assailant and wrongdoer, and converting what had passed on that occasion into a ground of charge against the complainer. On the same day (17th May) the respondent appeared before one of the Justices and made oath to the verity of what was contained in his petition; and thereupon the Justice, without further inquiry, or giving the complainer an opportunity of being heard, proceeded upon this *ex parte* statement and oath to grant warrant for serving the petition on the complainer, and ordering him, within forty-eight hours, to find caution of lawburrows under the penalty of £25; failing which, to imprison him until caution be so found. It is plain that the respondent's petition, in its main and most material allegation, was not only without probable cause, but absolutely false; and the Lord Ordinary is of opinion that, on that ground alone, apart from all the other reasons set forth in the note of suspension, this note ought to be passed, and *interim* liberation granted."

The respondent in the suspension reclaimed.

Solicitor-General (Young, Q.C.,) and Strachan for reclaimer.

M'Kie for respondent.

Aitchison objected to the competency of the reclaiming note, on the ground that the Lord Ordinary's interlocutor had been fully implemented by liberation without objection on the part of the reclaimer, and cited *Masson*, 13 S. 367.—Objection repelled.

The reclaimer then maintained that, until the allegations of malice and want of probable cause were established by legal and competent evidence, the lawburrows must be upheld by the incarceration of the complainer, or his finding caution; and that, so far from the conviction establishing the falsehood of the respondent's allegations, it was not in any way inconsistent with their truth. The complainer, after the hearing, offered to find caution of lawburrows to the extent of £10, and the Court accordingly recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note only on such caution being found.

At advising—

Lord President—While we are relieved by the offer of caution now made from determining what is a very nice question, I think it right to say that in no view of the case could I concur with the grounds of judgment stated by the Lord Ordinary, for his Lordship says, "It is plain that the respondent's petition, in its main and most material allegation, was not only without probable cause, but absolutely false;" while, in point of fact, the main and material allegation was not the assault committed in May, which is what his Lordship refers to, but the allegations of threats made in February "that he would do for the petitioner," &c.; and which there is certainly no reason to suppose are false.

But supposing the material allegation to be the fact of the assault which the respondent alleged the complainer committed on him on 15th May, it by no means follows that that allegation is false because he himself was convicted of an assault on the complainer, for it may turn out when the respondent has the benefit of his own evidence that he committed no assault on Aitchison; and therefore I cannot concur with the Lord Ordinary's view that the statement is false merely because of that conviction.

Taking away that ground of judgment then, the only other on which the note can be entertained at all is the allegation that the proceedings are malicious and without probable cause. At present that stands on bare averment, without anything appearing on the face of the record from which the Court can determine whether it be so or not, and I think it consists with the practice of the Court as laid down in many cases, of which the recent case of *Randall* is an example, that unless there is *primâ facie* some evidence of malice and want of probable cause, the note cannot be passed except upon caution for lawburrows.

Looking to the position in life of the party here, I think £10 a fair enough sum.