*Friday, January 23.*

## SECOND DIVISION.

[Lord Low, Ordinary.

## FISHERROW HARBOUR COMMISSIONERS *v.* MUSSELBURGH REAL ESTATE COMPANY, LIMITED.

*Sea—Foreshore—Boundary—Property.*

*Held* that the foreshore extends landwards to the line of high-water mark of ordinary spring tides, and is not limited (as is the rule in England) to the line reached by the average of the medium high tides between spring and neap.

*Harbour—"Precincts of Harbour"—Boundary — Foreshore — Harbour Extending along the Shore—Foreshore Excluded or Included—Removal of Sand—Rights of Proprietors of Foreshore — Fisherrow Harbour Act* 1840 (3 *Vict. cap.* lxxiii.), *secs.* 2, 49, *and* 76.

By section 2 of the Fisherrow Harbour Act 1840 it is provided that the harbour shall include the whole precincts thereof as after specified. By section 76 it is provided that for the purposes of the Act the harbour shall be deemed to extend along the shore from one burn on the east to another burn on the west, and to seaward to the extent of 100 yards beyond low-water mark opposite to the shore between the two burns. By section 49 it is provided that it shall not be lawful for any person to dig or take away from the harbour or its precincts any sand, gravel, shingle, or stones for ballast or any other purpose, except from such places as shall be appointed by the Harbour Commissioners.

*Held* (1) that the harbour and its precincts included the whole foreshore between the two burns, and (2) that the owners of the foreshore were not entitled to remove sand therefrom for building or any other purpose without the consent of the Harbour Commissioners.

The Provost, Magistrates, and Councillors of the Burgh of Musselburgh, as Commissioners under the Act 3 Vict. c. lxxiii., entitled an Act for Improving, Enlarging, and Maintaining the Harbour of Fisherrow, and John Richardson, clerk to the said Commissioners, for and on behalf of the said Commissioners under and in terms of section 21 of said Act, raised an action against the Musselburgh Real Estate Company, Limited, and John Downie, contractor, Musselburgh. In this action the pursuers concluded for declarator (1) that the harbour of Fisherrow, as defined in the 76th section of the foresaid Act, for the purposes of said Act included the whole foreshore *ex adverso* of the properties belonging to the defenders the Musselburgh Real Estate Company, situated at Musselburgh, and known as M'Kinlay's Park and Rosehall respectively, and that the said harbour extended landwards *ex adverso* of the said properties of M'Kinlay's Park and Rosehall respectively to high-water mark of ordinary spring tides on the shore adjacent to or *ex adverso* of said properties respectively, and (2) that the defenders were not, nor either of them, entitled to dig or take away from the said foreshore any sand, gravel, shingle, or stones, except from such place or places as might from time to time be appointed for that purpose under the authority of the pursuers as Commissioners foresaid.

The circumstances giving rise to the action were as follows:—The defenders the Musselburgh Real Estate Company, Limited, were the proprietors of the properties of Rosehall and M'Kinlay's Park, situated west of the pier at Fisherrow, and adjacent to the sea beach, between the Magdalena and Ravenshaugh burns. They gave permission to the defender John Downie to excavate sand from the Rosehall property. In October 1901 the pursuers prosecuted two carters in Downie's employment for removing sand from the sea beach *ex adverso* of Rosehall outwith the limits permitted by the harbour byelaws. A conviction was obtained in the Bailie Court of Musselburgh. A case was stated for the Court of Justiciary, and before this Court the accused contended, *inter alia*, that under the definition of the harbour of Fisherrow as contained in the 2nd and 76th sections of the Act the shoreward or north boundary was not clearly defined, and that the construction of the Act as regards said shoreward or north boundary was a matter falling to be determined in a civil process, and not in a prosecution under the Act. This view was adopted by the Court, and the conviction was quashed. The case is reported *ante*, 39 S.L.R. 485.

In consequence of this decision the pursuers raised the present action of declarator. The sections of the statute founded upon, and the contentions of parties, are fully set forth in the opinion of the Lord Ordinary.

On 25th November 1902 the Lord Ordinary (Low) pronounced the following interlocutor—"Finds, decerns, and declares in terms of the conclusions of the summons."

*Note.*—"The defenders argued in the first place that this action is incompetent. The first conclusion of the summons is for declarator that the harbour of Fisherrow includes the foreshore *ex adverso* of the defenders' properties, and the second conclusion is for declarator that the defenders are not entitled to take sand from that foreshore except from such places as may be appointed by the pursuers. It was contended that the natural result of declarator being pronounced in these terms would be that the pursuers would be entitled to apply for interdict if the defenders thereafter took sand from places other than those appointed by the pursuers. Interdict, however, it was argued, could not be obtained, because the Act provided a special penalty for the taking of sand from an unauthorised place, and thereby excluded all other remedies—*Institute of Patent Agent* v. *Lockwood*, June 11, 1894, 21 R. (H.L.) 61, 31 S.L.R. 942.

"I do not think that the argument is well founded. The pursuers do not seek interdict, and therefore no question arises whether that would or would not be a competent remedy. The object of the pursuers is to have the boundaries of the harbour which is committed to their charge defined, especially in view of their rights and duties under the Harbour Act, to control the taking of sand and other materials from the seashore. What are the limits of the harbour as defined by the Act is by no means clear, and questions have arisen between the pursuers and the defenders as to the area within which the former are entitled to control the taking of sand. In these circumstances I think that to have the boundaries of the harbour declared, and thereby to determine the rights of the pursuers to control the taking of sand upon the foreshore, is a legitimate purpose for which to raise a declarator.

"The section of the Fisherrow Harbour Act which deals with the taking of sand is the 49th. It is there first declared that it shall not be lawful for any person to throw 'any ballast, dirt, ashes, rubbish, shingle, sand, stones, or other things into the said harbour,' and then it proceeds, 'nor shall it be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast or any other purpose,' except from such places as shall be appointed by the Commissioners.

"The pursuers' contention is that the expression 'the said harbour or its precincts' includes not only the harbour proper and the various works connected therewith, but a stretch of foreshore running from the Magdalena Burn on the west to the Ravenshaugh Burn on the east. I understand that the distance between these points is about two miles, and that owing to the flatness of the ground a very large extent of shore is left dry at low tide. The defenders claim to be proprietors of the foreshore *ex adverso* of their lands, and the case was argued upon the assumption that that claim is well founded, although it is in fact disputed by the pursuers.

"The word 'harbour' when used in the Act is, by the 2nd section, defined as follows:—'Where the word "harbour" is used the same shall be understood to mean the harbour of Fisherrow, and shall include the whole precincts thereof as after specified, and the piers, quays, wharfs, and other works presently existing or which are hereby authorised to be made or maintained.

"By the 3rd section the Commissioners were empowered to build a new pier, and to construct such other works and conveniences as they should consider to be necessary for the purposes of the harbour, and to make all necessary roads and communications.

"By the 8th section it is enacted 'That the said harbour of Fisherrow, and the piers, quays, breasts, and other works already made, built, and erected, or to be made, built, and erected in and about the said harbour, shall be, and the same are, hereby vested in the said Provost, Magistrates, and Council, as Commissioners, to and for the uses, ends, and purposes of this Act.'

"By the 76th section it is provided 'That for the purposes of this Act, and for no other purpose whatever, the said harbour shall be deemed to extend along the shore from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of one hundred yards beyond low-water mark, opposite to the shore between the aforesaid burns.'

"These are all the provisions which have any direct bearing on what the limits of the harbour are; but section 14 refers to a plan which had been deposited with the Clerk of the Peace of the county, and which, it was enacted, should remain in his custody for the inspection of all concerned. The plan is referred to as being 'a plan and section describing the situation of said harbour, and the line or situation of the intended new pier and other works or improvements connected therewith.' That plan might have given but little assistance in this case; but, on the other hand, it might have thrown light upon the question of the limits of the harbour. Unfortunately, however, it has disappeared and cannot now be found. I must therefore construe the Act as best I can without it, but in doing so I think that care must be taken that the defenders are not prejudiced by the loss of the plan.

"Returning now to the sections which I have quoted, the definition of harbour in the second section would be clear enough if it were not for the words 'and shall include the whole precincts thereof as after specified.' Now there is no specification anywhere in the Act of what precisely is included within the word 'precincts.' The same word is used in the 49th section, which prohibits the taking of sand 'from the said harbour or its precincts.' I take it that by precincts is meant, in both cases, all the land and water which, although not forming part of the harbour proper or of works connected therewith, lie within the outward limits or boundaries of the harbour. In that view there would certainly be included within the word harbour, or the phrase 'the harbour or its precincts,' the area (whatever it may be) which is referred to in section 76.

"The defenders founded upon section 8, which vests the harbour and works in the Commissioners. I agree that it is impossible to read that section as including the foreshore in question. I do not, however, think that that is conclusive or even material. The object of the 8th section was to give the Commissioners a vested right to the harbour and works, and it was quite consistent with that object that other subjects not vested in the Commissioners should be included within the harbour for the purpose of giving them a certain limited control over these subjects.

"The question whether the foreshore is included within the harbour therefore seems to me to depend mainly upon the

construction of the 76th section. The difficulty is to ascertain what is the landward boundary of the area referred to in the section. The seaward boundary is specified, and the eastern and western boundaries, but the landward boundary is only described as extending along the shore. Does that include or exclude the shore?

"The defenders maintained that the shore was excluded. They argued that the words 'shall be deemed to extend along the shore' must be read as equivalent to 'bounded by the shore along which it extends.' That may be a possible construction, but it is not one to be lightly adopted, as it involves reading into the Act words which it does not contain. Again, the view for which the defenders contend is that the effect of the enactment was to include in the harbour only a strip of sea below low-water mark. If that had been the intention it would only have been necessary to say that the harbour should be deemed to extend for a distance of 100 yards to seawards from low-water mark between the two burns. There would have been no necessity to complicate the description by references to the shore. As the clause stands it provides two things —first, that the area described is to extend along the shore; and, secondly, that it is also to extend to seaward to the extent of 100 yards beyond low-water mark. I think that the natural inference is that both seashore and water were included in the area. If low-water mark was the boundary landward (which is the defenders' contention), I do not understand why it is provided that besides extending along the shore it should also extend to seaward 'beyond' low-water mark.

"I therefore think that, looking only to the words of the section, the construction put upon it by the pursuers is the one most consistent with the language used.

"The section, however, is by no means clearly expressed, and I think that it is legitimate to see what aid in its construction is obtained by a consideration of other provisions of the Act.

"The most important of these provisions is that contained in the second part of the 49th section which I have already quoted.

"The defenders argued that (assuming the pursuers' construction of the 76th section to be sound), the 49th section was only intended to give the Commissioners power to regulate the taking of ballast, and was not designed to prevent owners of foreshore taking sand or other materials for their own purposes. I am unable to accept that view. The section declares that it shall not be lawful for 'any person' to take sand 'for ballast or any other purpose,' words which not only are wide enough to include proprietors taking sand for their own purposes, but which do not seem to me to be capable of being read in a more restricted sense.

"What then was the purpose for which the Commissioners were given power to regulate the taking of sand? I think that it was to prevent injury to the harbour works. I was informed that gravel and sand run right up to the harbour works on both sides, and that at low tide the sea recedes beyond the harbour mouth. It was therefore reasonable that the Commissioners should have power to regulate the taking of sand and other materials in the vicinity of the works. The defenders argued that there was no necessity to give any special powers to that effect, because at common law the Commissioners could have interdicted any operations tending to affect the stability of the works. That may be so, but proceedings by way of interdict generally involve litigation which may be expensive and prolonged, and the Legislature may have thought it better to arm the Commissioners with the powers of regulation conferred by the 49th section.

"It is no doubt somewhat difficult to understand why so large an area—extending for some two miles along the shore—should have been included. I fancy, however, that it is a matter of common knowledge that the effect of excavations upon the seashore, where the tide ebbs and flows, may extend for a very considerable distance, and there may, for anything that I know to the contrary, be local conditions in the neighbourhood of Fisherrow harbour which render it advisable that the power of control should be given over an extended area.

"As I have pointed out, there was a very good reason why control over the taking of materials from the foreshore should have been given to the Commissioners in the immediate vicinity of the harbour, but it seems to me that the power which is conferred either extends over the whole foreshore between the two burns, or it does not apply to the foreshore outside the harbour proper at all. The construction therefore of the 76th section for which the defenders contend would render the provisions of the second part of the 49th section practically inoperative.

"The defenders also founded upon certain sections as showing that it could not have been intended to include the whole foreshore between the two burns within the limits of the harbour. These were in particular sections 25 and 58. By the 25th section the Commissioners are empowered to erect 'in or about the said harbour' sheds, yards, store-houses, and the like for the reception of goods and merchandise. By the 58th section they are authorised to erect inclined planes or slips 'upon any part of the beach of the said harbour or precincts of the same' for the purpose of hauling up ships or vessels for repair.

"The defenders argued that if the harbour included the foreshore in question the Commissioners could at will erect sheds or inclined planes or the like on any part of the foreshore they chose to select.

"I am unable to accept that view. I think that it may be doubted whether the 25th section is not restricted to the harbour proper which is vested in the Commissioners, because notwithstanding the definition of the word 'harbour' in section 2, the word is very frequently (as the context shows) used as denoting the harbour proper,

and when it is intended to include what is outside the harbour proper the words 'or its precincts' are added. That that is so will be seen by comparing the 25th section with the 58th, and the first branch of the 49th section with the second branch.

"Whatever may be said of the 25th section, however, the 58th section plainly includes everything that is within the limits of the harbour. I cannot, however, read the latter section as authorising the Commissioners to erect an inclined plane or slip upon any part of the foreshore they choose without the proprietors' consent. The foreshore is not vested in the Commissioners, but is only declared to be within the limits of the harbour for the purposes of the Act. It would therefore be within the scope of the Commissioners' authority to erect a slip or slips upon the foreshore, but before they could do so it would, I apprehend, be necessary for them to acquire the property of the ground to be used under the powers conferred by the 17th section.

"For these reasons, I have formed the opinion that the contention of the pursuers is well founded, and that the whole foreshore between the Magdalena Burn and the Ravenshaugh Burn is included within the limits or precincts of the harbour, and forms the area within which they are empowered to regulate the taking of sand and other materials.

"Another question is raised, and that is, what at common law are the limits of the foreshore?

"It is now settled in England that the foreshore is limited by the line reached 'by the average of the medium high tides between the spring and the neap' — *Attorney-General* v. *Chambers*, 23 L.J., Ch. 662. The defenders contended that what were the limits of the foreshore had never been authoritatively determined in Scotland; that there was no reason why the law upon the subject should be different in England and Scotland, and that the English rule having been settled by a judgment of the House of Lords should be held to apply to Scotland also.

"I agree that it might be convenient for the same rule to apply in England and in Scotland, and I am sensible of the weight of the reasons for which the line reached by the average of medium tides was adopted in England. It seems to me, however, that the rule by which the limits of the foreshore are regulated by the ordinary spring tides has been sufficiently recognised in Scotland to render it impossible for me sitting alone to adopt any other rule.

"It has never been suggested by any authority in Scotland that an average of tides should be taken. Thus Stair (ii. 1, 5) says — 'The shore in the civil law is defined to be so far as the greatest winter tides do run, which must be understood of ordinary tides and not of extraordinary spring tides.' Erskine (ii. 6, 17) says that though by the civil law 'the sea-shore reached as far from the sea as the highest spring tide, it goes no further by the custom of Scotland than the sand over which the sea flows in common tides.' Again, Bell in his Principles (sec. 641) says—'The shore comprehends all that is covered by the sea in ordinary tides.'

"According to these writers, therefore, it is an ordinary or common tide, and not an average of tides, which gives the rule, and as it is not maintained that the ordinary neap tides are to be taken, it follows that the ordinary spring tides must be referred to.

"Going now to the decided cases, there are *dicta* of great weight to the same effect. Thus in the *Officers of State* v. *Smith*, March 11, 1846, 8 D. 711, where the question was whether the Crown was entitled to prevent an encroachment upon the sea-shore at Portobello, the opinions delivered by Lord Justice-Clerk Hope and Lord Moncreiff show that in their view the test whether the wall which had been erected by the defender did or did not encroach upon the shore was whether it extended further seawards than the line of ordinary spring tides. Again, in *Nicol* v. *Blaikie*, December 23, 1859, 22 D. 335, the Lord Justice-Clerk (Inglis), in considering what was carried by a Crown charter of lands bounded by the sea, said 'It gives the heritor the exclusive beneficial use and right of possession of the shore between high and low water mark of ordinary spring tides.'

"Further, in the case of *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309, where it was held that right to the foreshore might be acquired by possession upon a Crown title which contained no express grant, the foreshore was assumed to be, and was described in the interlocutor as, 'the shore of the sea above low-water mark of ordinary spring tides.'

"Finally, in the case of *Bowie* v. *Marquis of Ailsa*, March 18, 1887, 14 R. 649, it was held by Lord Trayner that the sea-shore extends to the line of high water of ordinary spring tides. In the view which the Judges of the Second Division took of the case it was not necessary for them actually to decide that question, but I think that the inference from what was said is that the learned Judges would have taken the same view. The question was whether the river Doon was, between certain points, a tidal river, and the Division, differing from the Lord Ordinary, held that it was not so. The Lord Justice-Clerk (Moncreiff), Lord Craighill, and Lord Rutherfurd Clark, however, all expressed the opinion that the point down to which the river was a private river was the high-water mark of ordinary spring tides.

"I am accordingly of opinion that the pursuers' contention that the foreshore extends to high-water mark of ordinary spring tides must also be sustained.

"The result upon the whole matter is that, in my judgment, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defenders reclaimed, and argued—(1) On a construction of the Act the harbour and precincts of the harbour did not

include the foreshore on either side of the harbour proper. The 76th section provided that the harbour was to extend "along the shore." This excluded the shore, just as in a case where one property was described as extending on the north along another property, the first did not include the second. The precincts of a harbour were the extent of water on each side of the harbour within the bounds of which dues must be paid for goods landed or removed. The proprietors on each side of the harbour could erect piers within the precincts, but if they did so they required to pay dues to the Commissioners. The object of including a stretch of water within the precincts of the harbour was to protect the payment of the harbour dues—*Magistrates of Edinburgh* v. *Scot*, June 10, 1836, 14 S. 922, opinion of Lord President Hope, 934; *Magistrates of Campbelltown* v. *Galbreath*, December 14, 1844, 7 D. 220. The precincts of the harbour were entirely water, and were bounded on the land side by low-water-mark. (2) Even if the precincts of the harbour included the foreshore the rights of the proprietor in the foreshore were preserved intact. There was always a presumption against interference with private rights by Acts of Parliament—*Smith* v. *Hunt*, 1885, 54 L.T. (n.s.) 422; Hardcastle on Statutory Law, 3rd ed., 489. In any event, while the Harbour Commissioners might have the power of regulating the taking of sand for ballast they had no right to prevent the proprietors taking it for building purposes. (3) The foreshore was limited by the line reached by the average of medium tides. This was the law of England—*Attorney-General* v. *Chambers*, 1854, 4 De G., M. & G. 206—and formed "an intelligible criterion" to be adopted as the law of Scotland—Rankine on Landownership, 3rd ed., 230. Stair, ii. 1, 5, and Bell's Prin. s. 641, specified "ordinary" tides as the boundary, and Erskine "common tides." None of them said "ordinary spring tides." Lord Brougham regarded the question as open in *Smith* v. *Earl of Stair*, July 13, 1849, Bell's App. 495, which was the appeal in the *Officers of State* v. *Smith*, founded on by the Lord Ordinary. This opinion of Lord Brougham had not been brought under the notice of the Judges in *Bowie* v. *Marquis of Ailsa*, *supra*. The law of Scotland on the point had never been authoritatively fixed, and it was desirable that it should be similar to the law of England.

Argued for the pursuers and respondents—The Lord Ordinary's judgment was right, and the reasons for arriving at it set forth in his note were sound. (1) On a construction of the statute it was absurd to argue that the precincts of the harbour did not include the foreshore. Otherwise at high water there would be a strip of water covering the foreshore which would be outside the jurisdiction of the Harbour Commissioners; and a person could not dig for sand in the precincts of the harbour in terms of section 49 if none of the precincts would, as construed by the defenders, ever be free from a covering of water. (2) The terms of the Act prevented the defenders digging for or removing sand from the foreshore in question without the permission of the Harbour Commissioners. (3) It was plain on the authorities quoted by the Lord Ordinary that it had been definitely settled in the law of Scotland that the foreshore extended to the line of the high-water mark of ordinary spring tides. See also opinion of Lord Moncreiff in *Lockhart* v. *The Royal National Lifeboat Institution*, November 20, 1902, 40 S.L.R. 111.

LORD YOUNG—My opinion is very short and simple. It is that the judgment reclaimed against is right. I have read, or have had read to me, every word of the Lord Ordinary's opinion, and I must say I assent to it all, including the last portion, which deals with the most important question, that regarding the shore boundary. I think, and on the grounds stated by the Lord Ordinary, that the law of Scotland with respect to shore boundary is conclusively settled by decision. The Lord Ordinary said he could not adopt any other rule, and I think we should not interfere with it either. I quite see the desirableness of uniformity in the law of England and the law of Scotland in defining the boundaries of the sea-shore. But such uniformity should be obtained by choosing the best definition. I regard the definition arrived at by our own law as the best, and I therefore consider that uniformity should be attained not by the Scottish authorities adopting the rule on this subject which has been determined in the law of England but by the English authorities adopting the rule laid down in our own law.

On the question of what are the precincts of the harbour I entirely agree in the views of the Lord Ordinary.

I am therefore of opinion that the reclaiming-note should be refused.

LORD TRAYNER—I agree. I do not think that I can usefully add anything to what the Lord Ordinary has said, with which I entirely concur.

LORD MONCREIFF and the LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Sandeman. Agent—John Richardson, Solicitor.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.