Saturday, July 8.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

COMMISSIONERS FOR HARBOUR AND DOCKS OF LEITH *v.* PROVOST, MAGISTRATES, AND COUNCILLORS OF LEITH.

Burgh—Boundary—"Shore"—Erection of Artificial Structures below Low Water-mark—Extension of Boundary.

The northern boundary of the burgh of L. was fixed by the Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65) to be the "shore," which was defined to mean "low water-mark." In 1909 the Harbour Commissioners of L. brought an action of declarator against the burgh that a portion of the harbour and docks was situated to the seaward side of the line of low water-mark as it existed in 1832, and that the said portion was outwith the burgh. The low water-mark had shifted considerably through natural causes since 1832. Further, between that year and 1909 the pursuers had constructed artificial works, which projected considerably beyond the low water-mark of 1832 and the existing low water-mark.

Held that the boundary of the burgh was fluctuating, and followed the low water-mark as it varied from time to time, whether naturally or by the erection of artificial structures.

Valuation—Land and Heritage—Lands Valuation (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 1—*Dredged Channel in Open Sea—Owners and Occupiers.*

The burgh of L. was bounded on the north by low water-mark. The Harbour Commissioners of L., acting under statutory authority, dredged a channel outside the harbour, whereby vessels of large tonnage could obtain access thereto. The channel was below low water-mark.

Held that the channel was not a heritage of which the Harbour Commissioners were owners and occupiers.

The Commissioners for the Harbour and Docks of Leith, *pursuers*, raised an action against the Provost, Magistrates, and Councillors of Leith, the Parish Council of Leith, the County Council of Midlothian, and others, *defenders*. They concluded, *inter alia*, for declaration that "(*first*) a portion of the pursuers' lands and heritages, known as the Harbour and Docks of Leith, is situated to the seaward side of the line of low water-mark, as such low water-mark existed at the date of the passing of the Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65); (*second*) the said portion of the lands and heritages is situated, for the purposes of the Lands Valuation (Scotland) Act 1854 and the Acts amending the same, outwith the boundaries of the burgh of Leith, and does not fall to be valued by the Assessor of the burgh as lands and heritages situated in the said burgh."

They pleaded—"(1) The northern or seaward boundary of the burgh of Leith being the low water-mark as in 1832, and a portion of the said lands and heritages of which the pursuers are proprietors being situated to the seaward side of and outwith the said boundary, decree of declarator in terms of the first and second conclusions of the summons ought to be pronounced."

On 31st March 1910 the Lord Ordinary (MACKENZIE) dismissed the action, the circumstances of which appear in the following *narrative*, which is taken from the opinion of Lord Salvesen—"The main purpose of this action is to have it declared that a portion of the pursuers' undertaking is situated outwith the boundaries, not merely of the burgh of Leith but of the parish of Leith; and that the pursuers are not liable to be rated or assessed in respect of that portion either for burgh assessments or for poor and school rates.

"The action has had a somewhat chequered history. It was raised as far back as 12th November 1909 before Lord Mackenzie, who on 31st March 1910, having heard parties in the procedure roll, dismissed it. He expressed an opinion in favour of the pursuers on the merits of the controversy, but found himself unable to give effect to it because of the declaratory conclusion containing no definition of the portion of the pursuers' lands which they claim to be situated in the county, and also because the County Council of Midlothian were not parties to the action.

"The case came before us in March last on a reclaiming note for the pursuers. At the conclusion of the opening speech on their behalf it became plain that unless the summons were amended we should have no option but to adhere to the decree of dismissal. It appeared to us that no effective decree could be pronounced in favour of the pursuers in the absence of the County Council of Midlothian, who had a substantial if not the main interest in the settlement of the question whether a part of the pursuers' undertaking is situated within their jurisdiction and falls to be assessed for county rates. As, however, there had been so much procedure already we deemed it desirable to give the pursuers an opportunity of amending their summons so as to avoid technical objections. This has now been done, and a substantially new record has been made up. The pursuers have amended their declaratory conclusion by defining with reference to a plan the alternative boundaries of the burgh of Leith for which they contend, and they have also called as parties to the action the County Council of Midlothian and the Assessor of Railways and Canals in Scotland. The former have lodged a minute in which they support the conclusions of the action, and the latter has not appeared.

"The boundaries of the parliamentary burgh of Leith were fixed by the Representation of the People (Scotland) Act 1832.

The northern boundary, with which we are alone concerned, is the shore of the Firth of Forth, and there is a definition clause that 'by the words "sea" and "shore" shall be understood the low water-mark.' The northern boundary of Leith is therefore the low water-mark of the Firth of Forth between the points described in Schedule (M) of the 1832 Act, or it may be, as the pursuers contend, the low water-mark of the shore of the Firth of Forth between these points. On the plan the pursuers have indicated by a blue line what they offer to prove was the low water-mark in 1832; and their first contention is that this blue line constitutes a fixed boundary line which limits the jurisdiction of the burgh of Leith to the area enclosed thereby, whether the sea has since receded or has been displaced by artificial structures. On the same plan they show by means of a red line what they aver to be the low water-mark as existing at the date of the action. Assuming the correctness of these two lines, it would appear that the sea has encroached upon the land during the intervening period of nearly eighty years, and that considerable areas which were in 1832 dry at low water are now always covered by the sea. At some points, however, of inconsiderable area the existing low water-mark as shown on this plan is to the north of the blue line. In other words, the land has at these points gained at the expense of the sea. Further, between 1832 and 1909 the pursuers have constructed certain artificial works, and notably two piers and a jetty which project considerably beyond the low water-mark of 1832 and still more beyond the existing low water-mark. Beyond the ends of the piers there is also an approach channel by means of which vessels of large tonnage can obtain access to the harbour."

With regard to the *approach channel*, the pursuers averred that since 1832 a dredged channel extending below low water-mark had been excavated and maintained by them, and that it was vested in them, and was part of the lands and heritages included in the valuations of their property.

The defenders, the Leith Magistrates, admitted that the dredged channel was outwith the burgh boundary, but maintained that it was not a heritage owned and occupied by the pursuers.

In dismissing the action, on 31st March 1910 (*vide supra*), the Lord Ordinary gave the following opinion:—

Opinion—"The real question between the parties here is whether the harbour and docks of Leith are situated wholly within the burgh of Leith, or whether a part of them is situated in the county of Midlothian. If the latter view be correct, then it was competent for the Harbour Commissioners to invoke section 23 of the Lands Valuation Act of 1854. They would then be a company having 'continuous lands and heritages liable to be assessed in more than one parish, county, or burgh,' and might apply to have their lands and heritages valued by the Assessor of Railways and Canals. If the former view be correct, then the Assessor of Railways and Canals could not act. The valuation would have to be made entirely by the Assessor for the burgh.

"The decision of this question depends upon the view taken of the northern boundary of the burgh of Leith as fixed by the Reform Act of 1832 (2 and 3 Will. IV, cap. 65). Since then there has been no extension of the burgh boundary.

"The 5th section of that Act provides that the boundaries of the enumerated burghs shall be those set forth in Schedule (M). The northern boundary of the burgh of Leith set forth in Schedule (M) of the Act is 'the shore of the Firth of Forth.' The Act says, section 5 (10), that by the words 'sea' and 'shore' shall be understood the low water-mark. In 1832 no part of the harbour and docks were situated below low water-mark. Since 1832 the piers at Newhaven and Leith have been extended below the line of the low water-mark as it existed in 1832. No case is made by the burgh that the general line of the low water-mark has altered since 1832. Their case is that with the extension of the harbour and docks the boundaries of the burgh have extended also. The argument for them was founded on such cases as *Campbell* v. *Brown*, November 18, 1813, F.C., where in dealing with rights of property Lord Glenlee observed that a boundary by the sea is moveable and fluctuating, and that when the sea goes back the shore advances, and the proprietor is entitled to follow the water to the point to which it may naturally retire or be artificially embanked. I am of opinion that this does not apply to the present case. In dealing with administrative areas certain definite procedure has been prescribed by statute. The pier extensions in question are not within low water-mark. They have been built out on the bed of the Forth. If the burgh desires to have its boundaries extended so as to include these parts of the piers they must do so in the ordinary way by petition to the Sheriff. His jurisdiction to do so is undoubted. In the case of the *Dunoon Commissioners* v. *Hunter's Trustees*, 22 R. 379, it was held that under section 11 of the Burgh Police Act 1892, a Sheriff has jurisdiction for the purposes of that Act to extend the boundaries of a burgh so as to include part of a pier within his county erected on ground below low water-mark. The alternative is to proceed by way of bill, which was the course adopted by the burgh in 1907, when they promoted a bill, and proposed a clause, the 34th, in the following terms:—"No portion of the east and west piers (as now existing and as they may hereafter be extended) and the area between the same of the harbour of Leith and the works connected therewith and of the piers (as now existing and as they may hereafter be extended) and harbour of Newhaven and the works connected therewith shall, for the purposes of section 5—Boundaries of Cities, Burghs, and Towns—Rules for the construction of the descriptions contained

in the Schedule [M]—of and of the Schedule (M) therein mentioned to the Act (2 and 3 Will. IV, cap. 65), in so far as such schedule applies to the burgh, be deemed to be below low water-mark.'

"Upon the real question therefore at issue between the parties, I am of opinion that the contention of the Dock Commissioners is right, and that of the burgh is wrong.

"The difficulty is to see how effect can be given to this view in the present proceedings which have been instituted by the Dock Commissioners. The unfortunate position into which they have got themselves is that their lands and heritages have been valued by the Assessor of Railways and Canals, who has valued them at £75,298, of which he has allocated £71,959 to the burgh and £3339 to the county. The Town Clerk of Leith refused to engross this valuation in the valuation roll of the burgh under section 27 of the Lands Valuation Act 1854. The Burgh Assessor valued the Docks Commissioners lands and heritages at £74,246, which includes the whole subjects included in the valuation by the Assessor of Railways and Canals. Therefore the subjects which are situated outside the burgh boundaries have been valued twice over.

"The summons, which is at the instance of the Dock Commissioners, contains first, a declaratory conclusion that 'a portion' of the pursuers' lands and heritages, known as the Harbour and Docks of Leith, is situated to the seaward side of the line of low water-mark, as such low water-mark existed at the date of the passing of The Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65). The second conclusion is 'the said portion of the lands and heritages is situated, for the purposes of The Lands Valuation (Scotland) Act, 1854 and the Acts amending the same, outwith the boundaries of the burgh of Leith, and does not fall to be valued by the defender George Simpson, as assessor foresaid, as lands and heritages situated in the said burgh.' Now there is here no indication of what portion it is that is here referred to. There is no description or delineation on a plan of the extent of the area referred to, which may be great or small. The third and fourth conclusions are for declarator that the Burgh Assessor's valuation of £74,246 includes the said portion, and that the pursuers are not liable to be rated or assessed by the burgh in respect of the said portion. This leaves the area as indeterminate as before, and there is no suggestion as to what is the value of the said portion. The fifth conclusion seeks declarator that the said portion situated outwith the burgh of Leith is also situated outwith the parish of Leith, and that the pursuers are not liable to be assessed in respect thereof by the Parish Council of Leith. Then follows a conclusion for total reduction of the entry in the valuation roll of the burgh of £74,246 as the value of the harbour and docks of Leith, and a conclusion that the Burgh and the Parish Council should be interdicted from levying any assessments on the pursuers in respect of their lands and heritages in Leith upon the said valuation. There is also a conclusion for interdict against the Parish Council levying any assessments on the pursuers in respect of the said portion of their lands and heritages situated outwith the boundaries of the burgh.

"Although, as already indicated, I am in favour of the pursuers on the real question at issue between them and the defenders, I have not been able to see that I can give effect to it through the conclusions of the present action.

"There are two difficulties which might perhaps be overcome by amendment if they were the only obstacles. The first is that no means are provided in the conclusions for defining what portion of the pursuers' lands and heritages is situated to seaward of low water-mark as it existed in 1832; the second is that the County Council of Midlothian, who are the parties interested to maintain what portion, if any, of the pursuers' lands and heritages are in the county, have not been made parties to the action. Even if these were remedied it would still leave the main difficulty. It appears to me that the result of a portion of the pursuers' lands and heritages being outside low water-mark is not necessarily to delete the entry of £74,246 in the valuation roll of the burgh of Leith, and there is no material for deleting part of the entry. The case is quite different from that of *Sharp* v. *Latheron Parochial Board*, 10 R. 1163. There the subjects in question were twice entered in the valuation roll, and interdict was granted against the execution of a distress warrant for poor rates. In *Abercromby and Others* v. *Badenoch and Others*, 1909, 2 S.L.T. 114, it was held that there had been an improper entry of a party in the valuation roll, and interdict was accordingly granted against the recovery of assessments. In the present case, however, the procedure adopted by the Burgh Assessor was the same as had been followed for a number of years. The whole difficulty has been occasioned by the pursuers making application for valuation by the Assessor of Railways and Canals without first ascertaining by admission or action what portion of their lands and heritages, if any, lay outside the burgh. They commenced by putting a part of their lands and heritages into the county, whereas they should have first proceeded to get it taken out of the burgh. The result is that for the current year part of their lands and heritages is liable to double assessment. It appears to me that the pursuers' remedy is by way of suspension *quoad excessum* if the double assessment is sought to be recovered. They must, however, in order to succeed establish (1) the extent of the area that is being double assessed; and (2) the amount of assessment that effeirs to it. This cannot be done in the present action. The first point is, in my opinion, not one appropriate for the determination of the Assessor of Railways and Canals. . . .

"The result is that, in my opinion, the present action should be dismissed. In the

circumstances of the case there will be no expenses found due to or by either party."

Argued for the pursuers—The boundary of Leith was fixed in 1832 as the low water-mark existing at that date, and it did not fluctuate. A boundary could only be altered *vi naturæ* or *vi statuti*. It was true that in the case of an ordinary estate a boundary by the sea was fluctuating and that the proprietor was entitled to follow the water to the point to which it might naturally retire or be artificially embanked —*Campbell* v. *Brown*, November 18, 1813, F.C. But that well-established law did not apply to administrative areas. Parliament had provided means whereby a burgh might obtain extension — Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 11; Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96; Burghs Extension (Scotland) Act 1857 (20 and 21 Vict. cap. 70). See *Midlothian County Council* v. *Magistrates of Musselburgh*, 1911 S.C. 463, 48 S.L.R. 335. Moreover, the analogy of an estate bounded by the sea did not help the defenders, because it was only in a question with the Crown, and not with a subject superior, that a boundary was fluctuating—*Young* v. *North British Railway Company*, August 1, 1887, 14 R. (H.L.) 53, 24 S.L.R. 763. *Smart & Co.* v. *The Town Board of Suva*, [1893] A.C. 301, differed from the present case in that there was there no competing administrative area adjoining. (2) *Esto* that the boundary was fluctuating, it only varied from natural causes and was not affected by the erection of artificial structures. These were outwith the burgh when erected below low water-mark, and were in the county—*Dunoon Commissioners* v. *Hunter's Trustees*, February 16, 1895, 22 R. 379, 32 S.L.R. 285. Moreover, piers under which the tide ebbed and flowed were different from embankments. If a burgh could extend its boundaries by pushing out erections into the sea, grave injustice might be done, as it could thereby at its own hand acquire right to a valuable bed of minerals. (3) In any event, the dredged channel which was admittedly below low water-mark was a part of the pursuer's lands and heritages outwith the burgh boundary. The pursuers were clearly owners and occupiers of the channel in the sense of the Valuation Acts—See *Clyde Navigation Trustees* v. *Adamson*, June 22, 1865, 3 Macph. (H.L.) 100, and the *Mersey Dock and Harbour Board* v. *Jones*, &c., which was reported as a note to the above case at 3 Macph. (H.L.) 102. Channels were enumerated as among the undertaking of the Mersey Docks, and the whole undertaking was held to be assessable by the House of Lords. Water pipes had been held separate assessable subjects—*Edinburgh Water Company* v. *Hay*, 1854, 1 Macq. 682; *Corporation of Glasgow* v. *M'Ewan*, November 23, 1899, 2 F. (H.L.) 25, 37 S.L.R. 620, and February 3, 1899, 1 F. 523, 36 S.L.R. 437. Moreover, it had been decided that the expenses of dredging a channel below low water-mark were a proper deduction from the rateable value of a harbour—*Burghead Harbour Company Limited* v. *George*, June 28, 1896, 8 F. 982, 43 S.L.R. 754. The dredged channel was *res corporalis* — Lord Kinnear in *Burghead Harbour Company, Limited* v. *George* (*sup. cit.*) at 8 F. 996. *Lord Advocate* v. *Clyde Navigation Trustees*, November 25, 1891, 19 R. 174 (Lord Young at 183), 29 S.L.R. 153, was also referred to.

Argued for defenders—When a burgh was bounded by the sea the boundary was necessarily fluctuating, as was the boundary of an estate in the same circumstances—*Campbell* v. *Brown* (*sup. cit.*); *Boucher and Others* v. *Mrs Crawford*, F.C., November 30, 1814; *Blyth's Trustees* v. *Shaw Stewart*, November 13, 1883, 11 R. 99, 21 S.L.R. 83; *Young* v. *North British Railway Company* (*sup. cit.*) *per* Lord Watson at 14 R. (H.L.) 53. An *opus manufactum* altered the boundary just as did natural change. The burgh boundary was where low water-mark was *de facto* at the present time. *Smart & Company* v. *Town Board of Suva* (*sup. cit.*) was precisely in point and conclusive in the defenders' favour. (2) The dredged channel was not a land or heritage within the meaning of the Lands Valuation Acts and was not an assessable subject. It was outwith the harbour altogether. The pursuers had merely got licence by Act of Parliament to interfere with the *solum* belonging to the Crown and to take out mud. They were not owners nor occupiers of the open sea. The channel could be freely sailed over by all. The test of ownership was the right of exclusive occupation — *Adamson* v. *Clyde Navigation Trustees*, June 26, 1863, 1 Macph. 974 (L. J.-C. Inglis at 987); *Clyde Navigation Trustees*, July 25, 1866, 4 Macph. 1143. (It appeared at p. 1147 that waterways were not considered assessable). *Burghead Harbour Company, Limited* v. *George* (*sup. cit.*) was an altogether different case. There the dredging operations were within the harbour boundaries. It was, in any event, vain for the pursuers to contend that *Adamson* v. *Clyde Navigation Trustees* (*sup. cit.*) was overruled by *Burghead Harbour Company, Limited* (*sup. cit.*), for in a recent case the authority of *Adamson* was left absolutely untouched—*Assessor for Lanarkshire* v. *Clyde Navigation Trustees*, 1908 S.C. 620, 45 S.L.R. 501. *Clyde Navigation Trustees* v. *Assessor for Lanarkshire*, 1910 S.C. 840, 47 S.L.R. 384, had very recently decided that the expense of dredging inside docks—but not outside them—was a proper deduction in arriving at the valuation of a harbour undertaking.

At advising—

LORD SALVESEN—[*After the narrative given above*]—If the pursuers' leading contention be sound certain curious results would follow, *e.g.*, the Magistrates of Leith would have jurisdiction over certain portions of the Firth which are now covered with water at all stages of the tide; on the other hand, other parts which are dry at low water would be beyond their jurisdiction, and so far as they have any value would fall to be assessed in the county of Midlothian; while the artificial works—

which are of course far above the reach of the tide and form part of the undertaking vested in the pursuers—would also fall to be assessed in the county of Midlothian and would be outwith the jurisdiction of the Magistrates of Leith for all purposes, including sanitation, police, &c. The anomaly is even better illustrated by a reference to the harbour at Newhaven. Taking the blue line as accurately showing the low water-mark in 1832, the harbour works at Newhaven are, with the exception of the extreme north quay walls, situated to the south of that line and therefore within the undoubted jurisdiction of the Magistrates of Leith. If the present low water-mark, however, be taken as the boundary, it practically cuts through the middle of the Fish Market — the northern portion of which would, on the assumption that this line is now the boundary of Leith, be within the county, while the southern portion would remain within Leith.

The case for the defenders is that a boundary by the sea is moveable and fluctuating, and that a burgh which is so bounded is in the same position as a proprietor, who is entitled to follow the water to the point to which it may recede or from which it has been artificially excluded. In the case of an ordinary proprietor this was settled in *Campbell* v. *Brown*, November 18, 1813, F.C., the judgment in which was expressly approved by the House of Lords in *The Lord Advocate* v. *Young*, 14 R. (H.L.) 53. In quoting the well-known dictum of Lord Glenlee in *Campbell* v. *Brown*, Lord Watson spoke of it as expressing the settled rule of the law of Scotland, and it is noteworthy that no distinction was drawn by him between the case of an accretion to the land due to the sea receding and an exclusion of the sea by the land being artificially embanked. The only test seems to be whether the sea has in fact ceased to submerge the land at low water of ordinary spring tides. If and to the extent that it has the land or structures upon it go to increase the area of the estate which is bounded by the sea.

I shall afterwards deal with the main contention of the pursuers that the blue line forms the fixed boundary of the burgh of Leith. I would merely point out at this stage that the alternative suggestion that the boundary should follow the natural movement of the sea irrespective of any artificial structures by which encroachments that might otherwise have taken place have been prevented seems to me to be utterly untenable. It would involve this result, that if the burgh had erected a sea-wall on the shore within its jurisdiction at the time when it was formed and so prevented the sea from overflowing part of this area, that part which would have been overflowed but for the artificial structures would cease to be within the burgh. It is obvious that it could never be certainly ascertained to what extent the land in question would have been overflowed, and it would be a strange result of the citizens' expenditure in protecting their town, if, nevertheless, they should lose their jurisdiction over the part which was thus saved from destruction by the sea. This is illustrated in the present case by the claim which the pursuers make with regard to the harbour works at Newhaven, which although they have prevented an encroachment of the sea that would apparently otherwise have taken place, must yet, according to this view, be held to have preserved the protected area for the benefit not of the citizens of Leith but of the county of Midlothian.

The Lord Ordinary in his opinion, while recognising the law applicable to proprietors with a sea boundary, says that it does not apply to administrative areas. I can see no reason for the distinction. I apprehend that if an administrative area has a boundary by the sea it is just as fluctuating and moveable a boundary as the boundary of an estate. It would indeed be odd if it were not so. One can easily figure a case of part of a burgh being defined as comprising an estate with a seaward boundary. In such a case, according to the pursuers' argument, while the owners of the estate would follow the sea as it receded, the burgh boundary would continue to be the low water-mark as it happened to be when its area was defined —a line which might be incapable of ascertainment after the lapse of time and after changes had been made on the surface. Further, if the sea receded all along the shore of a seaport town, it would, in his view, cease to be a seaport at all, the intervening strip of land forming part of the county. Fortunately the very point arose in a case which apparently was not cited to the Lord Ordinary—*Smart & Company* v. *The Town Board of Suva*, 1893, A.C. 301. There the western boundary of a town in Fiji was fixed by an Ordinance to be the sea coast at high water-mark, and it was held that this boundary varied from time to time with the high water-mark as it shifted. The case is instructive, because appellants had been rated in respect of lands reclaimed by them beyond high water-mark as it existed at the date of the proclamation but within the mark as it existed when the rates were imposed. They unsuccessfully maintained the same argument as the pursuers here. It was suggested that the case might be distinguishable from the present on the ground that there was no competing local jurisdiction within which the appellants in that case might have been assessed. I cannot find any trace of that in the argument submitted or in the judgment of the Court, nor do I see that it would have made any difference except that the appellants' interest to escape town taxation if they were to escape taxation altogether would be all the greater; and the injustice to them if they were improperly assessed within the town area when they were not liable to be assessed at all correspondingly increased. It appears to me that this decision is practically conclusive against the pursuers on both the alternative proposals in their summons. It decides that a town boundary by the sea is a shifting

boundary which follows the sea as it recedes, and also that it will follow the line of any artificial structures by means of which the sea is excluded from part of the area which it formerly submerged.

As against the obvious convenience of the boundary of a seaport being defined from time to time by the actual low water-mark, it was argued that it might operate serious injustice especially in cases where there were valuable beds of minerals below the town area. It was conceded that where the operation of natural causes only produces an enlargement of the burgh the injustice would not be so marked, and indeed I do not see how there would be any. The bed of the sea from low water-mark and three miles outwards belongs to the Crown, and the minerals underlying the sea within the three mile limit will presumably remain unchanged in quantity as the surface of the land remains undiminished in area. It was said the burgh might by a deliberate act, as by embanking a considerable portion of the foreshore, include within its boundary a considerable area of the minerals below corresponding to the amount of land from which the sea was excluded. The suggestion appears to me to be fanciful. It is difficult to see how a burgh could perform such an operation involving an encroachment on the rights of the Crown without statutory authority, but even if it could the result does not cause me any alarm. If a proprietor by similar operations can transfer the property in the coal beneath an area that he reclaims from the sea from the Crown in whom it is vested to himself, there does not seem to be any reason why a town should not by similar operations secure the benefit of assessing the coal below the reclaimed land for burgh purposes. No transference of the rights of property can be effected by such an operation, but merely a transference of the rateability from the county to the town. The argument does not appear to me therefore to have much cogency.

Lastly, it was attempted to distinguish between the case of artificial embankments and the piers which are here in question; and reference was made to the *Dunoon* case, 22 R. 379, where it was held that under the Burgh Police Act 1892 a Sheriff has jurisdiction to extend the boundaries of a burgh within his county so as to include part of a pier erected on ground below low water-mark. That case no doubt shows that in circumstances not dissimilar from those now before us the existing law provides a means by which the anomaly of a pier being situated in two different jurisdictions may be removed; and the pursuers indicated that they would not oppose such an application being granted. If so, their interest in the present dispute becomes somewhat academic; but it is plain that the defenders could not apply to the Sheriff for an extension of boundaries without admitting that parts of the piers were outside the burgh. In the *Dunoon* case such an admission was made; and the point which has been so elaborately argued here could not have been raised. As regards the form of the piers which differentiates such structures from the embankments ordinarily employed in reclaiming land from the foreshore, no point appears to me to arise. The piers are just elongated embankments which throughout their length raise the level of the land above the sea and so enable it to be used for harbour purposes. I am therefore of opinion that the boundaries of the burgh of Leith extend to low water-mark, and include all artificial structures round which the tide ebbs and flows.

The next question in the case relates to the dredged channel extending in a north-west direction from the end of the piers. The defenders admit that this dredged channel is outwith the burgh boundary. If it is to be treated as land and heritage within the meaning of the Lands Valuation Act 1854 it would follow that the pursuers' undertaking of which the dredged channel forms a part would be situated in two jurisdictions, and would therefore fall to be assessed by the Assessor of Railways and Canals.

In view of the argument submitted, the averments on record as to this dredged channel are meagre. There is a statement that it has been made since 1832; that it forms part of the pursuers' undertaking, and that the cost of forming it is taken into account by the Assessor of Railways and Canals in allocating the valuation of the whole undertaking between the burgh of Leith and the county. There are, however, no averments at all as to the pursuers having a right of port or harbour to the middle of the Forth, with regard to which an elaborate argument was submitted. It is not necessary to advert to this argument, which was based upon charters which are not in process and are not narrated in the pursuers' condescendence; for the non-rateability of a similar dredged channel in the river Clyde was decided in the case of *Adamson*, 1 Macph. 987. One of the grounds of judgment—and it appears to me to be enough for the present case—is thus expressed by the Lord Justice-Clerk (Inglis)—"To say that the trustees are in any sense of the term owners and occupants of the river Clyde—a public navigable river—appears to me to be preposterous, and to propose to assess them upon dues which are levied merely for the privilege of navigating a public river is a proposal to which your Lordships, I presume, never could listen under the clauses of the Poor Law Act, which direct that these assessments shall be laid upon owners and occupiers in respect of the annual value of the lands and heritages owned and occupied by them." These words seem to me equally applicable to the present case, for the public possess rights of navigation over every part of the sea, including that part in which the pursuers have dredged a channel. The pursuers cannot be regarded as owners of the channel, for the *solum* belongs to the Crown, and they have no proprietary rights in the water which fills it, nor are they in any sense occupants of the channel, although

they have made it under statutory authority with a view to improving the access to their harbour. It is no doubt mainly used by vessels which frequent the burgh of Leith, and to the extent to which it is used by vessels which but for the greater depth of water would not be able to enter the port the pursuers derive the benefit from the increased dues which they collect. The case of *Adamson* appears to me to be *a fortiori* of the present, because under the Clyde Acts the river was divided into three sections, and specific dues were exigible from vessels which traversed any of these, so that the exact amount of the dues collected in respect of the navigation of the river outside the burgh of Glasgow could readily be ascertained. In the case of Leith there is no corresponding provision, and nothing can be charged for the use of the dredged channel outside the pier-heads.

It was stoutly maintained that the case of *Adamson* has been overruled by subsequent decisions. This matter was considered by the Lands Valuation Judges on a similar argument so late as the year 1908, and was rejected by Lords Low and Dundas. Lord Kinnear's opinion in the *Burghead* case, 8 F. 782, was referred to as throwing doubt on this part of *Adamson's* case. I do not so read it. The matter decided in the case was that the Collector of Poor Rates was bound to make a deduction from the rateable value of the harbour in respect of the amount spent by the harbour trustees in dredging channels within the harbour works—a decision which I take to be unquestionably sound, but which has no bearing on whether a dredged channel outside a harbour is to be regarded as a heritage of which the Harbour Trustees are owners and occupiers. I am accordingly of opinion that on this ground also the pursuers' argument fails.

If I am right so far, the defenders must be assoilzied from the declaratory conclusions to which the other conclusions are ancillary. In this view it is not necessary to consider the separate case presented for the parish of Leith.

[*His Lordship then dealt with a point which is not reported.*]

On the whole matter, I am for recalling the Lord Ordinary's interlocutor, and assoilzieing the compearing defenders from the conclusions of the action.

LORD DUNDAS—I do not dissent from the opinion just delivered by my brother Lord Salvesen. It appears to me to dispose in a most reasonable fashion of the subject-matter of the present case, the facts of which as averred on record seem to lend themselves strongly to the proposed judgment, and I find myself in complete accord with the greater part of what has been said. The pursuers' contention that the seaward boundary of the burgh of Leith must for all time remain fixed by the line of low water as it existed in 1832 is to my mind quite untenable, and the *Suva* case (*Smart & Company*, 1893 A.C. 301) is a strong authority against it. I also agree entirely with Lord Salvesen's opinion as to the pursuers' argument to the effect that the dredged channel seaward of the piers is a land and heritage in the county of Midlothian within the meaning and application of the Lands Valuation Acts, so as to admit their claim to invoke the jurisdiction of the Assessor of Railways and Canals. I do not desire to add anything to what has been said on that topic, unless to remind your Lordships that this very matter of dredging was recently before the Valuation Appeal Court, and the Judges decided that the expense of dredging inside the docks, but not in the sea outside them, formed a proper deduction in arriving at the hypothetical rent of the Harbour Commissioners' undertaking—*Leith Harbour and Dock Commissioners* v. *Assessor for Leith*, 1907 S.C. 751.

It seems right, however, for me to say that I was at first much impressed by the apparent soundness of the distinction drawn in the Lord Ordinary's opinion between the law which undoubtedly obtains in regard to rights of property where a sea boundary is concerned, and that which may be applicable in a question between adjoining administrative areas. As regards the latter case, certain definite procedure has, as his Lordship points out, been created by statute for the extension of burgh boundaries, having regard to the whole circumstances involved, and with machinery for the adjustment of property and liabilities. There is no doubt that this procedure is applicable to the extension of a burgh into the sea or into a navigable river, *e.g.*, *Dunoon Commissioners*, 1895, 22 R. 379; and cases might be figured where consequent questions of a substantial nature regarding public policy or pecuniary interest might arise as between the competing authorities. I readily admit that in the present case no such questions arise; and indeed upon the facts before us the suggestion of invoking the statutory procedure for a formal extension of the burgh of Leith seems to approach the ridiculous. But the decision in this case does (as was conceded by counsel for the burgh) involve as a principle of universal application that the extension of a burgh seawards by artificial means carries with it *ipso facto* the right to invade *pro tanto* the area of an adjoining administrative authority without any regard to considerations of policy or of pecuniary compensation or the like. I think one could imagine cases of artificial extension such as ought not to be permitted except under the authority of a formal application to the Sheriff or to Parliament; and I cannot help fearing there is a risk that in some future case where the circumstances are widely different from the present a degree of embarrassment may arise from the principle necessarily sanctioned by this judgmen. I should add that this aspect of the case is not to my mind governed or even touched by the decision of the Privy Council in *Smart & Company* v. *Town Board of Suva*. I know nothing except what may be gathered from the report of that case about the law and practice obtaining in

Fiji as regards the methods or incidence of assessment for taxation. It appears that legislative machinery by way of proclamation exists for extending the boundaries of any town in Fiji, and it may be assumed that the rates leviable in the towns are higher than those in the landward areas, if indeed the latter are rated at all. But I find nothing to suggest that there is in Fiji any system corresponding to that which we know in this country of separating assessing bodies for burghal and landward areas respectively. The question in the *Suva* case arose purely between the Town Board, on the one hand, and an individual proprietor on the other—the latter objecting to his property being included in the town and rated accordingly. There was no question, and probably could have been none, as between a burghal assessing authority and a landward assessing authority; and it seems to me therefore that the distinction to which the Lord Ordinary adverts did not arise in that case. I have thought it right to express these views for what they are worth, because the doubts I felt as regards the general principle involved have not been entirely dispelled. But I recognise that the facts of the present case afford little, if any, basis for the broad argument which might on a different state of facts have arisen for application; and, as already said, I do not propose to dissent from the judgment of your Lordships.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived, and I have done so without feeling any serious difficulty other than that caused by the number of public bodies and officials whose position has to be considered being so great and in some ways so overlapping. But when the case is looked at broadly upon the question, What is the boundary of the subjects in question where the subjects are skirted by the sea, I find no serious difficulty. When the case is looked at from that point of view it is, as it appears to me, not possible to come to any other result than that which your Lordships' opinions have expressed.

The Lord Ordinary proceeds upon the view that the law generally applicable may not apply to an administrative area. I am not able to concur in his view of that matter. I cannot see any ground in this case for such a distinction, whatever may be the probabilities as regards other cases that might arise, and if that view cannot be held sound in the present case, then I can see nothing that can stand in the way of a judgment such as your Lordships consider ought to be pronounced; and having had the opportunity of studying more than once the opinion prepared by Lord Salvesen, I content myself by expressing my concurrence.

I may add that my concurrence includes the view expressed as to the dredged channel outside the piers in the open waters of the Forth.

LORD ARDWALL was absent.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the compearing defenders.

Counsel for the Pursuers (Reclaimers)—Fleming, K.C.—Cooper, K.C.—J. H. Millar. Agent—V. A. Noel Paton, W.S.

Counsel for Defenders the Magistrates of Leith—M'Clure, K.C.—Lippe. Agents—R. H. Miller & Company, S.S.C.

Counsel for Defenders the Parish Council of Leith—W. J. Robertson—Armit. Agents—Snody & Asher, S.S.C.

Counsel for Defenders the County Council of Midlothian—Pitman. Agent—A. G. G. Asher, W.S.

Saturday, July 8.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

KIRKINTILLOCH KIRK-SESSION *v.* KIRKINTILLOCH SCHOOL BOARD.

School—Board School—Transfer of Parochial School by Kirk-Session to School Board—Reservation of Right to Use School Buildings when not Required for Educational Purposes—Power of School Board to Sell School Buildings—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 36 *and* 38.

A kirk-session in 1873 transferred a parochial school to a school board, under sec. 38 of the Education (Scotland) Act, 1872 for use as a public school, reserving in the disposition the right to use the schoolrooms "at such times and for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education." In 1910 the school board, having obtained the consent of the Scotch Education Department, arranged to sell the whole subjects to a third party. The kirk-session thereupon brought an action to interdict them from selling the subjects without first obtaining the consent of the pursuers and arranging for their obtaining equivalent accommodation.

Held that the school board were not entitled to sell the school buildings without arranging to give the kirk-session an equivalent for their right of partial occupation.

Dicta of the Lord President in *School Board of Glasgow* v. *Kirk-Session of Anderston*, 1910 S.C. 195 (at 204), 47 S.L.R. 278, *approved.*

Property—Real Burden—Disposition of School to School Board under Condition as to Use—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 38.

A kirk-session transferred a parochial school to a school board, under section 38 of the Education (Scotland) Act 1872, by disposition which bore to be granted "under the real lien and burden of the