[18th July, 1842.]

CRISTOPHER KERR, *Appellant.*

MRS JANET DICKSON, and Others, *Respondents.*

Prescription. — Possession for forty years of lands *de facto* bounded by the sea shore, but described in the titles as bounded by a sea wall, will not avail the possessor so as to work off the effect of the limitation in his boundary, and entitle him to claim a right of making land, beyond the wall, about to be gained from the sea by artificial operations, his own property.

Property. — The proprietor under a bounding charter of land immediately adjoining the sea-shore, has no right in the shore beyond his boundary.

ON 15th September, 1770, James Guthrie, by feu-contract, disponed to James Nicoll, "All and haill that small piece or pen-
" dicle of arable land, including a small angle of Quarryholes on
" the south-east part thereof, being part of the estate of Craigie
" on the south-west part thereof, to the southward of the ferry
" road; and which subjects, hereby disponed, are bounded —
" by the road leading from Dundee to the ferry, and in a
" straight line with the northmost of the march stones after
" mentioned, upon the north; four march stones, running from
" the said ferry road to the River Tay, and the land and Quarry-
" holes feued out by the said James Guthrie, of this date, to
" Thomas Smart, mason in Dundee, upon the east; the River
" Tay on the south; and a march stone and ditch in a direct
" line with the east dyke, or part of the glebe belonging to the
" parson of Dundee, on the west parts." — "Reserving to the
" Magistrates and Town Council of Dundee the privilege and
" use of the beach or shores of the subjects before-mentioned,

" adjoining or opposite to the town's salmon-fishing in the River " Tay, for the purpose of drying their nets, and exercising the " right of the said fishings, conform to use and wont." Nicoll was duly infeft upon this contract.

By feu-disposition, dated 3d September, 1785, James Nicoll sub-feued to John Guthrie a portion of the ground feued to him by James Guthrie, which in the feu-disposition was described as, " All and whole that piece of ground, being part of that pendicle " of arable land, and others, of the lands of Craigie, feued by " me from James Guthrie, Esq. of Craigie; and which piece of " ground hereby feued out, lies upon the south side of the road " leading from Dundee to the North Ferry, and immediately " opposite to the subjects feued by the said John Guthrie from " the said James Guthrie of Craigie, and consists of about three " roods and six falls or thereby; and is bounded — by the said " road leading from the town of Dundee to the North Ferry, " on the north; by a straight line and march stones, running " south from the said Ferry Road, at the distance of three feet " from the east gavel wall of John Yeaman's tenement, on the " west; by a straight line and march stones running south from " the said Ferry Road, which divides the subjects hereby feued " out from the subjects still belonging to me, on the east; and " by the sea-wall which divides the subjects hereby feued out " from the sea-beach, on the south parts; and which sea-wall, so " far as the same extends opposite to the said John Guthrie's " subjects, is to be his absolute property; with the privilege and " use to the said John Guthrie and his foresaids, and their " tenants, of the well at the Horse Craig, and free ish and entry " thereto, — they always being at the joint expense of upholding " the same, according to their interest in the said subjects feued " by me from the said James Guthrie, Esq. — with free ish and " entry to the subjects before disponed, and all right, title, inte- " rest, claim of right, property, and possession, which I, my

" predecessors or authors, had, have, or any ways may have, " claim, or pretend to the same, or any part thereof, in time " coming, lying within the parish of Dundee and shire of Forfar."

The precept in this disposition directed infeftment to be given in the land, with "free ish and entry thereto, and whole other " privileges and pertinents of the said subjects, with and under " the foresaid declarations, reserving always to me, my heirs and " successors, full power and liberty of quarrying in the beach or " shore still belonging to me, betwixt the subjects hereby dis- " poned and the River Tay, within six feet of the foresaid sea- " wall, being the south boundary of the foresaid subjects; and " reserving to the said James Guthrie, Esq." power and liberty to work the coals and other minerals. John Guthrie was infeft upon this disposition.

In 1790, Nicoll and Speid, as mid-superiors, granted a precept of *clare constat* to the son of John Guthrie, which described the lands in the same terms as the feu-disposition of 1785, but without inserting the reservation as to the sea-shore, and directed infeftment to be given in "all and whole the foresaid piece of " ground, consisting of about three roods and six falls, or " thereby, lying bounded and described as aforesaid, with the " privilege and use of the foresaid well, and free ish and entry " thereto, and whole other privileges and pertinents of the said " subjects, with and under the foresaid declarations, to the said " John Guthrie, as heir foresaid to his said father." Infeftment was taken upon this precept, and duly recorded.

In 1835, the property of the land came to be vested in the appellant by purchase, the respondents being his mid-superiors, as in right of James Nicoll, the granter of the disposition of 1785.

Owing to certain operations upon the sea-shore opposite this land, which were intended to be carried into effect by Parliamentary trustees for the improvement of the harbour of Dundee,

it was contemplated that upwards of several hundred feet of land would be gained from the sea.

In these circumstances the appellant, in 1837, brought an action against the respondents, alleging that he "and his prede- "cessors in the said subjects have at all times, and especially "since the date of the foresaid precept of *clare constat* and sasine "thereon in the year 1790, been in the unlimited, unqualified, "and undisturbed possession and enjoyment of the foresaid right "of free access to and from the said river, and of the foresaid "right of embanking and gaining ground from the river, under "and in virtue of the said titles; and in particular, in the year "1793, or year 1794, David Neave, then proprietor of the said "subjects, exercised the said right of embanking and gaining "ground from the river, by removing the sea dyke which then "formed the south boundary of the said subjects, and construct- "ing another about thirty or forty feet farther into the river, "and by filling up and embanking the intermediate space, "whereby he gained a large extent of additional ground *ex* "*adverso* of the said subjects; and the said David Neave and the "other subsequent proprietors, and the pursuer, have had the "unqualified and undisturbed possession of the said subjects, "together with the said additional embanked ground, as their "absolute and undoubted property, ever since." That the respondents "now, for the first time, deny the right of the pur- "suer to free access to and from the river, and his right to em- "bank and gain ground from the said river *ex adverso* of the "said subjects, which rights have been enjoyed and exercised by "him and his predecessors beyond the years of prescription, with- "out any dispute or molestation whatever; and they now pre- "tend that they have themselves the right to embank and gain "ground *ex adverso* of the said subjects, and to hold the ground "so to be embanked and gained by them from the river as their "own absolute and undoubted property, which would thereby

" cut off all access by the pursuer to and from the said river, " and otherwise materially prejudice him in his just and lawful " rights; and they threaten, most wrongfully and unjustly, to " prevent the pursuer from exercising his said rights."

Upon this statement the summons concluded, that it should be declared, " that the said Mrs Janet Jobson or Dickson, and " James Ogilvie," (the respondents) " have no right to embank " or gain ground from the said River Tay, *ex adverso* of the " foresaid subjects belonging to the pursuer, and to hold and " possess the same as their own absolute and undoubted property, " or in any way to appropriate the sea beach or shore, *ex adverso* " of the foresaid subjects, so as at all to come or interpose them- " selves between the pursuer and the river: And it ought and " should be farther found and declared by decree foresaid, that " the pursuer has the undoubted right, at all times, to free access " to and from the said River Tay, *ex adverso* of the foresaid " subjects, and also, that he has the only and exclusive right to " embank and gain ground from the said River Tay, *ex adverso* " of the said subjects, in so far as the said embankments shall " not interfere with, or impede the public navigation of the said " River Tay, and to hold the said ground so gained from the " river as his own absolute property, to the exclusion of all right " thereto on the part of the said Mrs Janet Jobson, or Dickson, " and James Ogilvie: And the said Mrs Janet Jobson, or " Dickson, and the said Dr David Dickson, her husband for his " interest, *jure mariti*, or otherwise, ought and should be " decerned and ordained, by decree foresaid, to desist and cease " from troubling and molesting the pursuer in the enjoyment " and exercise of his said rights."

The pleas in law upon which the appellant rested his action were: —

" 1. The defenders have no right of property or other right in " the sea-beach, *ex adverso* of the pursuer's subjects, nor are they

" entitled to interpose themselves between the pursuer and the " existing line of the river.

" 2. The pursuer is entitled to free access to and from the " river, and to embank and gain ground from the river, in so " far as he does not interfere with the public right of navigation.

" 3. Generally, the pursuer is entitled to decreet, in terms of " the libel."

The respondents in their defences denied the averment as to the change of boundary seaward alleged to have been made in 1793, and pleaded : —

" 1. The property originally feued to Nicoll being described " as bounded by the Tay, it included a right to the shore, *ex* " *adverso* of it, and his right has been acquired by, and is now " vested in, the defenders.

" 2. As the property belonging to the pursuer was described " by precise measurement and boundaries, the investitures do " not convey, and do not import to be a conveyance of the sea- " shore, which lies beyond the boundaries, and is excluded by " the measurement.

" 3. These investitures are strictly bounding charters, and the " pursuer cannot prescribe a right to the shore in the face of his " own titles: and even assuming that he had a prescriptive title, " there has been no prescriptive possession.

" 4. According to the conception of the original feu-disposi- " tion, the shore was intended and declared to belong to the " superior, and there is nothing in the subsequent investitures, " which can in law be held to affect or vary the right now vested " in the defenders."

The Lord Ordinary (Moncrieff,) on the 10th March, 1840, pronounced the following interlocutor, adding the subjoined note: — " The Lord Ordinary having considered the revised " cases for the parties, and resumed consideration of the closed " record and debate, and considered the various writs pro-

" duced; Finds, that the pursuer has not set forth any relevant " grounds for supporting the conclusions of his summons of " declarator: Therefore sustains the defences, assoilzies the " defenders, and decerns; Without prejudice always to any " competent objections which may in due and competent form " be raised by the pursuer to any particular operation to be " performed, or structure to be erected, by the defenders, on " the ground or space in question, as their property reserved by " their authors; and reserving the answers of the said defenders " to any such objection as accords: Finds expenses due, and " remits the account when lodged to the auditor to be taxed."

" *Note.* — The issue raised by the summons is, properly, Whether " the space of ground in question is the property of the pursuer, or " whether it remained with Nicoll, the original superior of the pur- " suer's author, and has been transmitted to the defender, Mrs Dick- " son, as in his right. The Lord Ordinary is of opinion, that in every " view of the case it is not the property of the pursuer; he thinks " that it is the property of the defenders; but that, at any rate, the " pursuer has shewn no relevant grounds, for requiring the Court at " his instance to declare the contrary.

" On the plain construction and meaning of the original feu-dispo- " sition by Nicoll to Guthrie, in 1785, no doubt whatever can, in his " apprehension, be entertained. It is as clear as words could make it. " The ground feued, being part only of that belonging to Nicoll in " virtue of his title from Guthrie of Craigie, is not only defined and " limited by measurement to three roods and six falls or thereby; but " a precise boundary on the south is fixed by the 'sea-wall,' admitted " to be then in existence, — and to exclude the possibility of that " being held to give, either directly or by any implication or legal " inference, any right whatever to the beach beyond it, the wall itself " is described as 'the sea-wall which divides the said subjects from " 'the sea-beach.' These words are not at all ambiguous. But there " is still another clause, which takes away the possibility of any argu- " ment on the subject. The granter Nicoll, having bound himself

" not to quarry within six feet of the eastern boundary of this feu, it " was thought prudent to make it quite clear, that he was to be under " no such restriction with reference to the south boundary; and, " plainly with this view a clause is inserted, reserving 'full power and " 'liberty of quarrying in the beach or shore still belonging to me, " 'betwixt the subjects hereby disponed and the River Tay, within " 'six feet of the foresaid sea-wall, being the south boundary of the " 'foresaid subjects.' It is surely impossible by any argument to make the meaning of this doubtful. That it could not proceed on " the supposition of any right in the sea-beach being given to Guthrie " is apparent, — 1. Because it, in express words, declares the reverse " — that the sea-beach still belongs to me, Nicoll; and 2. Because it " again, in express words, declares that the sea-wall which divides the " subjects feued from the sea-beach, is the 'south boundary' of those " subjects.

" It does not therefore admit of the shadow of doubt, that in the mean- " ing and intention of the parties in the contract, the sea-beach was to " remain the property of Nicoll, and Guthrie was to acquire no right " whatever beyond the sea-wall as his south boundary. When the " pursuer now claims to himself, as in the right of Guthrie, the pro- " perty of the sea-beach, admitted to be south of the sea-wall, — the " very space betwixt the subject and the River Tay, — he is unde- " niably claiming what was neither given and paid for, nor intended " to be given, but, on the contrary, was expressly excluded and re- " served to Nicoll by the contract.

" The other feu-disposition granted to Yeaman a few years after- " wards, though the south boundary is there differently constructed, is " equally precise as to the reality of the intention, that the beach or " shore should still remain the property of Nicoll. But the terms of " Guthrie's title are quite sufficient for this cause.

" The nature of the title being thus perfectly clear on the original " contract, the Lord Ordinary is farther of opinion, that there is no " real difference between it and the precept of *clare constat* in 1790, " on which so much is founded by the pursuer. John Guthrie stood " infeft on the disposition of Nicoll, precisely according to all its " terms. His son, John Guthrie, made up his title by precept of

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" *clare constat.* The Lord Ordinary certainly thinks that it would " have been inept and incompetent to include in such a form of title, " which is a mere renewal of the investiture to the heir precisely as " it stood in the ancestor, any subjects not in the ancestor's infeft- " ment; and he may have doubts of the sufficiency of the authority " stated for the position, that additional burdens may be created by " such a title accepted of, — the case of the Magistrates of Edinburgh " referred to in Tait's meagre report of it, appearing to him to be of " very slender authority. But what occasion is there to consider any " such matter? There is no question here about any additional bur- " dens imposed on Guthrie's heir by the investiture of 1790. Neither " is there a single inch added to the subject of the feu: the very " opposite case which the pursuer wishes to reach, but which, if it " existed, would be so essentially different in principle, as to require " very different authority to sanction it. There is no change what- " ever on the boundaries of the subjects, which are *verbatim* the same " in the precept and in the ancestor's sasine. The boundary still is " 'by the sea-wall which divides the said subjects from the sea-beach " 'on the south parts:' — when such is still the express boundary, " how can it be possibly held, that the heir got by such a precept of " *clare constat*, any thing beyond that boundary, which his ancestor by " the same words certainly had not. It seems to the Lord Ordinary " to be a very vain attempt to persuade the Court that there was " either any intention or any act or contract to produce such a diffe- " rence. The only change made on the title was, that from some " unexplained cause, (probably by mere mistake, or to shorten the " deed,) the clause of reservation as to quarrying within six feet " of that south boundary, apparently unnecessary in itself for any " purpose, was omitted, and with it, the words which, incidentally " only, explained in so precise words, that the sea-beach still belonged " to Nicoll. But how could such an omission have the effect of " extending the subject of the feu beyond the boundary, while that " boundary, quite precise in itself, is still continued in *ipsissimis verbis* " of the original title? The Lord Ordinary thinks that it makes no " difference at all. In fact, that clause in Nicoll's disposition had no " connection with the boundaries; it is not in the dispositive clause,

" and is only inserted in the precept of sasine apparently *ob majorem* " *cautelam* ; and it is of no other importance in this question, than as " it incidentally declares the sea-beach, between the sea-wall and the " River Tay, still to belong to Nicoll the disponer. To infer an " alteration of the boundary expressly repeated by such a title, con- " taining, as it does, the express clause, ' saving and reserving always " ' our own right, and that of all others, as accords of the law,' would, " in the Lord Ordinary's judgment, be contrary to every principle of " law.

" The meaning and legal import of the titles being thus clear, the " Lord Ordinary is of opinion, that the case, independent of the plea " of prescription, is not at all doubtful, and that the argument in the " pursuer's revised case is altogether fallacious. It appears to him, " in the first place, that the sea-beach is not *inter regalia* in the sense " necessary to the pursuer's argument. It is, no doubt, *publici juris* " in regard to navigation, and some other uses of it. But the Lord " Ordinary adopts the opinion of President Campbell, in the case of " Innes *v.* Downie, 27th May, 1807, as reported by Baron Hume, " which, besides being of high authority in itself, appears to be in " perfect agreement with all the other authorities, — that the sea- " beach or rocks within flood-mark are not *inter jura regalia*, but " subjects of private property for all purposes not inconsistent with the " public uses. He is farther of opinion, however, that it is really " unnecessary to discuss any such question, and incompetent for the " pursuer to raise it. The pursuer grants, and must grant, that there " was a full right in Nicoll to this ground in dispute, as in connection " with the adjoining property. Nicoll gives a certain part of the " subject in feu to Guthrie, with an express boundary, the nature of " which is precisely ascertained. Guthrie takes the right as it is, " and with all its qualifications. Except by Nicoll's conveyance to " Guthrie, the pursuer has no title. How, then, can he dispute " Nicoll's right, as the previous proprietor of the whole subject, — if " this part of it, or this right attached to it, is not given to Guthrie, " or expressly reserved to Nicoll? The pursuer says, and must say, " that it is validly given by Nicoll to Guthrie; for he cannot have " got it by any other title. But how can this be, if it is expressly

" reserved or positively excluded by the terms of the special boun-
" dary? Nicoll, as the original proprietor, and still superior of the
" whole subject, remained proprietor of it with all its adjuncts, except
" in so far as he was divested of it by the deed in favour of Guthrie.
" How, then, can the pursuer, as deriving right from Nicoll, dispute
" Nicoll's right in whatever remained of the original title not con-
" veyed to Guthrie, but distinctly retained by Nicoll? It seems to
" be the most extraordinary fallacy for the pursuer to think, that in
" such a declarator, he can have any title to found on any supposed
" right in the Crown against the assignee of his own author, Nicoll.
" The idea seems to be, that it was impossible, by any form of title,
" to separate the right in the beach from the subject of the feu; and
" that it must necessarily be held to have been conveyed to the feuar,
" though not paid for by him, and contrary to the express terms of
" his own tenure. But what title can the pursuer, as vassal, have, to
" maintain such a plea against his own superior, in violation of the
" express stipulations of the contract? In this point the case would
" be the same, if the feu-contract had only been made two years ago,
" and had expressly borne that the granter should have the full benefit
" of the sea-beach south of the wall, in regard to all the statutory
" regulations of the Harbour Commissioners. Could the pursuer have
" claimed that benefit, or insisted in a declarator, to have it found that
" the superior had not the right to it, contrary to his own contract?
" Such a plea could never be stated, and yet the whole of the pur-
" suer's argument, in the first part of his case, seems to the Lord
" Ordinary to be exactly to this effect.

" There is, however, a plea of prescription, founded on the precept
" of *clare constat* in 1790, with the infeftment on it, and subsequent
" infeftments, and an allegation of possession.

" There is no doubt that, by the statute 1617, prescription may be
" established by infeftments standing together for forty years, though
" proceeding on the entry by an heir by *clare constat*. But there must
" first be a title which admits of prescription in the particular thing
" claimed; and then there must be clear possession of that thing. No
" man can prescribe any right in the face of the very title on which
" he founds. Hence, the rule of law is quite clear, that no man can

" prescribe on a bounding charter, so as to acquire a right to property " which is beyond the boundary to which his right is limited, by the " express terms of his charter itself. Without going into authorities, " the Lord Ordinary holds this to be an absolutely clear proposition. " It cannot be otherwise in the nature of the thing. As the positive " prescription requires a title to found it, there must be a title, suffi- " cient by its terms, to cover the right claimed, although, before pre- " scription has run, the claim might be excluded by anterior or " collateral titles. But if the title itself bears that the grantee's right " shall be bounded by a definite line, known and admitted, there can " be no prescription of ground beyond that line; because there is no " title to which the possession can be applied.

" Now, in the present case, the Lord Ordinary could understand, " that, if the boundary given in the precept of *clare constat* were " different from that in the original feu-disposition, prescriptive " possession might enable the pursuer to say, that that precept must " rule as the title, and that it could not be explained by the clauses " in the original grant. But there is no such case in fact. The " boundary is still the same as it was at first. The precept, as well " as the feu-disposition, is a bounding charter, if there ever was one, " in its words, in its meaning, and in its legal effect. And this being " the nature of the title, the Lord Ordinary is of opinion, that no " prescription to the effect now maintained could possibly run upon it.

" But in the next place, if it were possible for the pursuer to get " over this difficulty, it appears to the Lord Ordinary that there is " no sufficient averment of possession. There is nothing specific " except only the statement, that in the year 1793 or 1794, the sea- " wall having been in disrepair, the feuar then in possession, in " repairing or rebuilding it, changed its position by encroaching a few " feet on the beach. Every thing else that is said resolves into " nothing more than such use of the beach, by passing over it, as the " public may at any time make of it, when it is open and unoccupied. " Such possession could never establish any right, if the ground other- " wise remained the property of Nicoll and his assignees. The aver- " ment as to the change of the position of the wall is denied; and if " it were relevant, it would require proof. But the Lord Ordinary

" thinks it evidently not relevant. It would not be relevant, even " if this action were different from what it is; because, by the pur- " suer's own statement, it was a possession taken in violation of the " express boundary of his own title. But even this consideration " is not necessary to the point of irrelevancy. For the averment " is irrelevant, besides, because the defenders are not disturbing the " pursuer in the possession of the wall as it stands; and the rule of " law is clear, *tantum prescriptum, quantum possessum.* The pur- " suer might keep his wall where it is; but that could not constitute " a prescriptive possession of any thing else beyond it.

" On the whole, the Lord Ordinary thinks that the case is in favour " of the defenders, in respect of the property of the ground; and " that they will be entitled, under the Harbour Statutes, to make the " beneficial use of it contemplated. But as questions of a different " kind might arise in the actual application of it to such uses, he has " inserted a reservation to leave every such question open."

The appellant presented a reclaiming note against this interlocutor, on advising which the Court (Second Division,) pronounced the following interlocutor: — " The Lords having " considered this reclaiming note, with the whole process, and " heard counsel thereon, adhere to the interlocutor complained " of; refuse the desire of the note; of new find expenses due, " allow the account to be given in, and remit to the auditor to " tax and report."

The appeal was against these interlocutors.

Mr Tinney and Mr Anderson for the appellant. — The property of land between the high and low water mark is in the crown.

[*Lord Campbell.* — Your summons concludes that you may hold it as your own absolute property. To succeed, you must shew this.]

Although the property is in the crown, it is only for the public purposes of trade and navigation. The proprietor of the land whose boundary is the high water mark, has a right of free access to his lands from the sea-shore, and to enjoy the shore like any other subject in all the ways mentioned by *Skene, Verb. Sign. voce Wave.* If the sea recede, however, from natural or artificial causes, so as to produce what is called sea green, *i. e.* land washed by the sea only at high spring tides, the land so acquired from the sea does not belong in property to the crown, but becomes the property of the owner of the land whose boundary is the sea-shore. *Ersh.* II. 6. 17; Bruce, *Mor.* 9342; Campbell *v.* Brown, 17 *F. C.* 444. Nay, such owner may embank, and gain land from the sea so long as he does not interfere with the public uses of the sea-shore. Culross *v.* Geddes, *Hume*, p. 554; Leven *v.* Burntisland, *Hume* 555; Boucher *v.* Crawford, 18 *F. C.* 64. This right of occupancy, if it may be so called, arises not from any substantive right of property, *ab ante*, in the *solum* of the shore, but is a privilege incident to his proprietorship of lands bounded by the sea; and it has been recognized in a proprietor whose lands, *de facto*, adjoined, or were bounded by the sea, although his titles did not, *per expressum*, bear that the sea was the boundary. M'Alister *v.* Campbell, 15 *D. B.* and *M.* 490.

The case of Smart *v.* Mags. of Dundee, 8 *Bro. Par. Ca.* 119, did not alter the law in this respect, for the special ground of decision there was, that the burgh had a grant of the shore, and that every thing which was not expressly granted away from the burgh to its feuars was reserved to the burgh; and the parties expressly admitted the correctness of the general doctrine for which the appellants are contending. So in Todd *v.* Dunlop, 2 *Rob.* 333, the *alveus* and *littus* of the Clyde were specially vested by statute in the defenders for certain purposes, and upon this the case was decided.

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[*Lord Cottenham.* — The general proposition is one that cannot be disputed, but how do you bring your case within it?]

When the authors of the respondents granted the feu-right of 1785, they parted with the land which, by their own titles, was described as bounded by the Tay, *i. e.* the sea; they reserved no land between the sea-shore and the land feued; nothing, therefore, remained in them in respect of which they could thereafter enjoy or assert the right of occupancy suggested. No doubt the reservation in the deed of 1785 asserts a right of property in the shore, but *ex concessis* the right was in the crown; the reservation, therefore, was simply a nullity.

[*Lord Brougham.* — It could not give a title as against the crown, but could it not give one as against the party to whom the feu was granted?]

We apprehend not, nothing remained in the granter to reserve a title to. The reservation is an interference in truth not between Nicoll and his grantee, but between the grantee and the crown; it was simply nugatory.

[*Lord Campbell.* — Is it impossible that Nicoll may have had a grant of the sea-shore?]

It is for the purposes of this suit, as he has not set up any such grant. After the feu of 1785, Nicoll, like any other subject, might resort to the shore for the purposes of pleasure, but any connection with it in respect of land adjoining, so as to give him or his successors a right to embank, or claim any ground gained by natural or other causes, had altogether ceased.

[*Lord Brougham.* — Could you bring a declarator that Nicoll, and those claiming under him, could not quarry between you and the sea?]

Perhaps not; but we could that he should not build or enclose, because the estoppel must be strictly interpreted.

[*Lord Cottenham.* — Are you not estopped from saying that it is not Nicoll's land?]

There is nothing in the reservation that says so; but however that may be, we do not claim under the charter of 1785; our claim is under the precept of *clare constat* of 1795, in which the reservation is not repeated, and which is with privileges and pertinents.

[*Lord Brougham.* — The boundary is the same as in the disposition of 1785.]

But the reservation is not contained in the precept, and we have had prescriptive possession under the precept. The effect of the reservation, therefore, whatever it may be, is done away with.

[*Lord Brougham.* — That depends on the possession; shew us the possession of the *locus in quo.*]

There could not be such possession, as the *locus* had no existence. We do not claim right of possession of the *locus in quo*, but such rights as we may acquire in respect of our possession of the land in the grant.

[*Lord Brougham.* — Does not the description in the precept exclude you from any right to the shore? it takes a distinction between the wall and the shore.]

Not a distinction which can affect this question; there was nothing beyond the wall that was previously the property of Nicoll, so as to be reserved to him by the terms of the description, and there is no ambiguity in the terms of the description which makes necessary, or can justify, a reference to the previous titles to ascertain what is included within the description, and thus to revive the reservation against the appellants, who have possessed upwards of forty years under a title in which it is not contained.

[*Lord Cottenham.* — Assuming that your grant excludes the shore, it is very difficult to see how your possession, under the precept, of the land contained in it, can give you any prescriptive title to the land excluded from it.

Lord Brougham. — How can time differ the question from

what it would have been if the charter had been dated yesterday, you not having exercised any right over the ground gained?

Lord Campbell. — You have had no visible possession of any thing beyond what is contained in your grant.]

If the reservation was immaterial, then the two grants are the same; and if it is material, then our claim is under the precept in which it is not contained; and possession for forty years, not to be sure of the *locus in quo*, but of the land, in respect of the possession of which a right of the particular nature claimed can be acquired, is sufficient to give that right. We were therefore entitled to a decree in terms of the second alternative conclusion of our summons, or, at all events, we were entitled to declarator in terms of the first alternative conclusion; for whatever may be the right of the appellants, the respondents cannot have any right of property in the land acquired; but the interlocutor of the Court below, by sustaining the defences in which such a right is expressly set up, has in effect recognized such a right to be in the respondents.

[*Lord Brougham.* — Sustaining the defences does not affirm the pleas of the defender.]

In ordinary cases it is immaterial, but here, where a right is asserted in the defences, it appears to be most material.

[*Lord Campbell.* — Without there be an express finding of the Court, it is immaterial what the pleas of the defender are. The Lord Ordinary finds that you have not set forth relevant grounds for supporting your action, and *therefore* he sustains the defences.

Lord Cottenham. — Is not this the ordinary form of interlocutors?

Solicitor-General for respondents. — It is exactly the form which was used in Tod *v.* Dunlop.]

But there the property was claimed by the defenders, and the claim was assented to by the Court, which was not done here;

but perhaps what has fallen from your Lordships may do away any injurious effect of the interlocutor as establishing a right in the defendants.

[*Lord Cottenham.* — The Lord Ordinary in his note expressly says he has reserved the question as to the right of the defenders.

Lord Campbell. — It would have been *ultra vires* for him to have decided more than he has done.]

It is difficult in that view to understand the qualification in the interlocutor.

[*Lord Cottenham.* — The meaning is, he finds that you have not the property, but that you are not to be injured by what the defenders may do.]

That is a species of negative pregnant. It is to say we may complain of what is injurious, but not of an innocent use. The Lord Ordinary should not have sustained the defences, but simply have dismissed the action on our own shewing.

[*Lord Brougham.* — Can any one say that your not having made up your pleas, is to affirm those set up by the defenders? The Court could never mean any thing so unreasonable, and their words don't bear such a meaning.]

LORD BROUGHAM. — My Lords, in this case there can be no doubt whatever. It is unnecessary to dispose of many of the questions which have been raised here, because we are confined to the question on the charter, the bounding charter. Taking it either on both, or even the latter of the two, or the *clare constat* alone, the land within the boundaries laid down there, forms the subject matter conveyed to the present appellant, or those under whom he claims. It is perhaps a little more clear under the charter of 1785, in consequence of the words of reservation; but the boundary is substantially the same in both, and the possession which is alleged to have been had under the second, was perfectly consistent with the first, and might have been with the

exception of one single act of ownership about the year 1793 or 1794, which appears to be in the nature of an encroachment; with that single exception, the possession under the one is the same as the possession under the other. I think your Lordships can have no doubt upon the case.

Lord Cottenham. — I do not think there is the least doubt upon the case. The first feu-contract in the year 1770, described the land as "bounded on the south by the River Tay." In the year 1785, that boundary was changed, and in the grant of that date the boundary was made "the sea wall," with a reservation of interest in the land beyond the sea wall, clearly shewing, that the parties understood, that whatever interest there was in the lands beyond the sea wall, was to remain in the granter, and that the grantee was to take only that which was bounded by the sea wall, including the sea wall itself. The grant in 1790, recites the same boundary as preserved, and there is not the least semblance of an intention in the parties to grant, or an idea that the grantee was to receive more than that which his father, who had previously occupied under the grant of 1785, had taken under that grant, namely, that which was bounded by the sea wall, including however the property in the sea wall itself, leaving all the rest entirely open.

Now, this grantee calls upon the Court to declare a right, which he supposes himself to have not only in that which he did take, but in that which he did not take, and which was expressly excluded from the grant of 1785, and equally excluded from the grant of 1790; he not only asks the Court to declare, contrary to the terms of the grant, that he is entitled to that which he never purchased, and never intended to purchase, and which it was never intended by the other party to grant, but that the other party, whose interest was reserved, may be restricted from the exercise of such rights in that property as he may be entitled to; he prays, that the party who claims the right to that land beyond

the sea wall, may not be permitted to use it in any way to the prejudice of the owner of the enclosed land. It appears to me that he has shewn no ground whatever upon which he can ask for the interposition of the Court. It does not appear to me that the interlocutor does any damage or injury to the pursuer, from the terms in which it is drawn up, inasmuch as it only dismisses him from the suit, and sustains the defences so far as they are necessary for the purpose of shewing, that the pursuer has no right to that which he seeks, cautiously reserving any future ground of complaint which may arise. I see no ground whatever for disturbing the judgment of the Court below.

Lord Campbell. — As between the granter and grantee, this is a claim expressly in the very teeth of the terms of the grant. Then, as to a title by prescription, there are only two objections to it; first, that there is no title; and second, that there is no possession. On these grounds, I am of opinion that the judgment of the Court below ought to be affirmed.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of, be affirmed with costs.

RICHARDSON and CONNELL — GRAHAM, MONCRIEFF, and WEEMS, Agents.