clauses excluding assignment and the diligence of creditors has been held insufficient to protect the fund, but that is because in the case supposed there are no trustees interposed who can then withold the fund from the control of the person entitled to the liferent enjoyment of it. But when, as here, there is a continuing trust and the truster has clearly indicated his intention to make a gift of income and of income alone, the direction that the application of the fund shall be for the maintenance and support of the beneficiary supplies all that is necessary. I am therefore of opinion that the second party is not entitled to immediate payment, and that the trustees are charged with the duty of protecting the fund for her maintenance and support.

LORD KINNEAR concurred.

The following was the interlocutor:—

"Answer the first question in the case in the affirmative, and the second question in the negative: Find in answer to the third question that the right of the second party is a protected one; And answer the fourth question in the negative, and decern."

Counsel for the First Parties—D. Anderson. Agents—Macpherson & Mackay, W.S.

Counsel for the Second Party—H. Johnston, K.C.—A. S. D. Thomson. Agent—P. Adair, Solicitor.

Thursday, November 20.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LOCKHART *v.* THE ROYAL NATIONAL LIFEBOAT INSTITUTION.

Property—Burgage—Writs by Progress—Original Grant by Burgh not Produced—Onus—Boundaries—Sea-shore—Sea—Burgh—Royal Burgh—Title to Heritage—Fore-shore.

In an action of suspension and interdict at the instance of a proprietor of subjects within a royal burgh, brought to prevent certain lessees of the magistrates from making certain erections on a piece of ground within that burgh above high-water mark, both the complainer and the magistrates claimed this piece of ground, the complainer maintaining that it was part of the subjects belonging to him, and the magistrates maintaining the contrary. The burgh produced a royal charter dated in 1568, conveying to them certain lands described as bounded "by the sea on the north part." The ground in question was part of the lands so conveyed. The proprietor did not produce the original grant in favour of his author from the burgh, but he produced among other titles (1) an instrument of resignation and sasine dated in 1797 in favour of one of his authors, and (2) an instrument of cognition and sasine by which the burgh cognosced another of his authors as the heir entitled to succeed to said subjects. In both these titles the property was described as bounded "by the sea-shore on the north parts." In the disposition upon which the complainer himelf held the northern boundary was stated to be the sea-shore.

Held (*rev.* judgment of Lord Pearson, Ordinary) (1) that the complainer had sufficiently instructed a title flowing from the burgh; (2) that where a property is described as bounded by the "sea-shore" such a description at least includes the ground at the place in question above the high-water mark for the time being, such a boundary following the sea, and not being fixed by the position of matters as at the date of the grant; (3) that as the complainer's property, if taken to be bounded by the high-water mark at the present time, included the piece of ground in dispute, that piece of ground was consequently embraced within the description in the titles produced by the complainer; (4) that, in the absence of proof by the magistrates that the original grant to the complainer's author was of a more limited character than the writs by progress produced, or that they had had exclusive possession of the piece of ground in question, that piece of ground, being part of the lands described in the complainer's sasine, must be held to be his property; and that therefore (5) he was entitled to interdict the operations complained of.

Opinion (*per* Lord Moncreiff) that a boundary "by the sea-shore" and a boundary "by the sea" mean one and the same thing, and each gives to the grantee property in and down to the sea ebb-mark at ordinary tides, subject to the rights of the public.

William Lockhart, contractor, North Berwick, was the proprietor of a strip of ground within the burgh of North Berwick, situated at the east corner of the West Bay, under a disposition in his favour by the trustee of his deceased father Andrew Carlaw Lockhart, with consents therein mentioned, dated 14th, 17th, 22nd, and 27th February, and recorded in the Burgh Register of Sasines 2nd March 1893. In this disposition the subjects were described as bounded "on the north by the sea-shore."

In December 1900 Mr Lockhart presented a note of suspension and interdict against the Royal National Lifeboat Institution, praying the Court to interdict the respondents from encroaching on his property lying immediately to the south of part of the southmost side parapet of the old lifeboat slip, North Berwick, in making erections or digging foundations, or in any way interfering with his property, and to ordain the respondents to fill up excavations made by them, to level the surface, and to

remove any buildings erected by them on his property.

The complainer pleaded — "(1) The pursuer is entitled to interdict and to the other warrants as prayed for, in respect—(*a*) that he is heritable proprietor of the ground in question; (*b*) that the operations of the respondents are wrongful and illegal, and in violation of the complainer's title and rights of property in the said ground" . . .

The respondents the National Lifeboat Institution, who were proceeding with the extension of the old lifeboat slip under a title of lease from the Provost, Magistrates, and Council of the Royal Burgh of North Berwick, lodged answers, and pleaded — "2. The prayer of the note should be refused, with expenses, in respect that (1) The subjects upon which the operations complained of are being executed are not included within the titles of the complainer, or the ground of which he has had possession under these titles; (2) *Esto*, that they are contained within said titles, the Provost, Magistrates, and Town Council of North Berwick have had full and exclusive possession thereof upon a *habile* title for upwards of the prescriptive period; (3) the said subjects belong in property to the said Provost, Magistrates, and Town Council, and the respondents as their tenants are entitled to the possession of the said subjects."

In June 1901 the complainer moved that the note should be intimated to the Magistrates of the burgh, and they appeared and adopted the answers of the original respondents.

The complainer produced the following titles in favour of his authors—(1) an instrument of resignation and sasine dated 23rd October 1797, and recorded in the Burgh Register of Sasines 1st November 1797, which proceeded upon a disposition of the subjects granted by Robert Vetch in favour of Mrs Catherine Denham or Douglas, and resignation by said Robert Vetch in the hands of one of the bailies of the burgh "as in the hands of His Majesty and royal successors . . . in favour and for new infeftment to be made, given, and granted . . ." to Mrs Douglas, and delivery of sasine, following upon acceptance of said resignation, of the subjects, by the usual symbols, by the bailie to Mrs Douglas; (2) An instrument of cognition and sasine in favour of Robert Douglas Macdougall dated and recorded in the Register of Sasines for the burgh of North Berwick, 26th February 1857, by which one of the bailies of the burgh, within the Council Chambers of the burgh, by virtue of his office of bailie, cognosced and entered M'Dougall as the heir entitled to succeed to the subjects, and gave and delivered to him as heir foresaid "heritable state and sasine, real, actual, and corporal possession" of the subjects, "to be holden of and under the Queen and her royal successors in free burgage for service of burgh;" (3) An excerpt from the instrument of sasine in favour of the complainer's father, recorded in the Register of Sasines for the burgh of North Berwick 28th February 1857. In all these three titles the subjects were described as bounded "by the seashore on the north parts."

The respondents produced a royal charter dated 18th September 1568, in which King James VI., *inter alia*, conveyed to the Provost, Magistrates, and Town Council of the Royal Burgh of North Berwick the right of property in a portion of land within the royalty of the burgh, which included the piece of ground belonging to the pursuer and the adjacent proprietors. In this title the property was described as bounded by "the sea on the north parts."

Proof was allowed and led. The result of the proof on the nature of the proposed operations and the question of possession sufficiently appears from the opinions of the Judges.

On 8th April 1902 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Refuses the prayer of the note, and decerns," &c.

Note.—"The complainer is proprietor of a strip of ground within the burgh of North Berwick, situated at the east corner of the West Bay, and described in his title as bounded "on the north by the seashore." The lifeboat launching slip, which was built in 1871, lies to the north of the complainer's ground, and it was recently found necessary to widen the slip by adding a triangular extension along the south edge of it. The complainer seeks to prevent this, averring that the extension is entirely or almost entirely within his property. As the National Lifeboat Institution, who were proceeding with the work, were doing so under a title of lease from the Provost, Magistrates, and Council of the Royal Burgh, the complainer moved that the note should be intimated to the burgh authorities, and they have appeared and adopted the answers of the original respondents.

"The burgh produces a Royal Charter, dated in 1568, conveying the right of property in certain subjects, described by east and west boundaries, which are still recognisable, and between which the ground in question lies, and the subjects are described as bounded by 'the sea on the north part.'

"The complainer holds no title from the burgh. The immediate title he founds upon is a disposition in his favour by the trustee under his father's will. That disposition is dated 27th February, and recorded in the burgh register of sasines 2nd March 1893.

"So far, therefore, as the disputed ground lies between high and low water-mark, the position is, that the burgh has an express title from the Crown, with a 'sea' boundary, while the complainer, without connecting himself with either the Crown or the burgh, has a title which bears that his subjects are bounded by the sea-shore.

"Assuming for the moment that these two boundaries mean the same thing, it seems clear in a question with the burgh that while the complainer's title will afford a basis for prescription, he cannot prevail except on condition of proving prescriptive

possession of the disputed subjects by himself and his authors in virtue of their titles. He accordingly avers that they have had such possession, and that is the first point to be considered.

"At the place in question the east and west bays nearly meet, and on the neck of land between them Victoria Road runs northward in the direction of the harbour. The lifeboat house is on the east side, and the boat is launched by being drawn across the road and down the slip on the west side. The south-east corner of the West Bay, into which the slip runs, is a place where drift sand tends to accumulate. This has been so for many years, and it appears from the evidence that about the summer of 1868, a year or two before the original lifeboat slip was built, the burgh authorities erected a wind fence or sand fence of railway sleepers across the north frontage of the complainer's property in order to prevent Victoria Road from being overblown with sand. The effect of this fence and of the boat slip was to direct the drift of sand in that part into a comparatively small angle, where it gathered into a bing. But before as well as since these operations the drift sand seems to have been extensively used for various purposes, mainly for ballasting ships (though this use has latterly fallen off), for building purposes, and for railway locomotives. Sand was taken also from other parts of the shore, but for various reasons the locality in question was the most convenient and (so far as appears) the most frequented.

"The complainer's father, who died in 1892, acquired his property in 1857 from one Robert Macdougal. At that time there was a rubble wall on the sea front of the subjects adjoining to the west, but the Lockharts' property lay open to the shore. When the sleeper fence was put up in 1868 the complainer says his father told him that his permission was asked and obtained, but the circumstances as to this do not further appear, and there is no record of it. Again, when the original lifeboat slip was built in 1871 the complainer says his father told him that he consented to its being put up, as being for a charitable institution, and that 'he gave them the piece of ground.' But it does not appear to whom the consent was given, nor that any writing passed on the subject. These verbal consents depend on the evidence of the complainer, and also (in one case) of Mr Stewart, as to what Mr Lockhart senior said. Assuming this to be sufficient evidence, it appears to me that such consent goes a very little way towards making out a case of possession, if no writing passes and no title is given. It would be difficult to maintain that the possession of the original slip by the Lifeboat Institution has really been the complainer's possession, as if he had granted a lease of it.

"The complainer's case of actual possession rests almost entirely upon the taking and carting away of sand from the ground between the sleeper fence and the slip. It may be taken that he and his predecessors have done this for many years, by themselves and those having their authority, and that this is the main use, if not practically the only use, to which the subject can be put. But in my opinion the proof of possession fails of its object, because it was not exclusive possession. Here again we are met by the assertion that Mr Lockhart senior was in the habit of giving his consent to the taking of sand, besides taking it himself. And there is no doubt that such consent was given by Mr Lockhart, notably to the witness Councillor Stewart. I do not doubt that the Lockhart family all shared the desire that their permission should be asked, and that in some instances it was asked, and from this they drew the generalisation that their consent was required. But nothing could better illustrate the inadequacy of this as inferring possession by the Lockharts through licences than the petition of Mr John Bell. Mrs Henderson, the complainer's sister, states that she is sure she heard her father give Mr Bell leave to take sand, and, if Mr Bell had been dead, this would have counted as an instance of Mr Lockhart exercising the licensing power. But Mr Bell himself (a witness for the complainer) negatives the idea altogether, and says that he took sand from that part for ballasting vessels without Mr Lockhart's leave being asked or given, and that Mr Lockhart must have seen him taking it. And Mrs Henderson, being pressed, takes refuge in the generality 'that the public got permission, and Mr Bell would be one of them as well as the rest.'

"There are two lines of evidence, the combined effect of which leads me to the conclusion that the complainer's proof of exclusive possession has failed. The one is, that for a long series of years, at all events from 1834, the burgh included among the customs, which it let yearly to a tacksman, a certain charge for each cartload of sand taken from the shore within the burgh. The only change has been that since 1894 the burgh authorities have levied the rates themselves through a collector. It is, of course, impossible to identify now from what part of the shore the particular loads were taken, but it is certain that the tacksman's title to levy customs was not in any way restricted, and that it extended over the ground now in dispute. The other class of evidence is that of persons who have in fact taken sand from this place without Mr Lockhart's leave, and that not surreptitiously but in ordinary course. I have already referred to Mr John Bell's case. There is sufficient additional evidence to the same effect, and on the other hand there is no evidence of the complainer ever having stopped anyone from taking sand from this particular ground.

"I have assumed down to this point that the complainer's 'sea-shore' boundary means the same as the burgh 'sea' boundary, and would have been as effectual in a title flowing from the burgh. The respondents do not concede this. They maintain that although this point of construction was apparently so decided in the case of

the *Magistrates of Culross* v. *Geddes* (Hume, 554), that case was not decided upon a general rule, but upon a comparison of various grants by the same magistrates. A similar comparison of the grants by the respondents here shows that they are described as bounded by 'the sea sands' on the north. The case thus is not quite the same as the *Culross* case, where the expressions 'sea' and 'sea-shore' had been used indiscriminately by the burgh, the inference being that they meant the same thing. If, however, my view of the evidence is well founded, it is unnecessary to decide this point.

"Then it is said by the complainer that his right at all events goes down as far as the high-water mark of ordinary spring tides, and that in any view a part (however small) of the boat-slip extension is above that mark and within his property. It appears, however, from the evidence that the sea has been receding at this part for a long period of years, and while I have taken the case on the footing that the complainer's title enables him to follow the sea, provided he can show prescriptive possession, the question how much is carried to him by his title, as being above high-water mark, must be determined, not according to the present high-water mark, but as at the date when the grant was made. For anything that appears, the high-water mark may at that time have come as far as the line where the sleeper fence now stands, being practically a continuation round the bay of the old rubble wall which forms the north boundary of the adjoining properties. I think it was for the complainer to show that it extended to seaward of the sleeper fence, down to which his possession has been clear and exclusive."

The complainer reclaimed, and argued—The Lord Ordinary was in error in saying that the complainer held no title from the burgh, or had not connected himself with the burgh. He and his authors held the subjects as burgage and were infeft in them. Further, in the titles of 1797 and 1857 produced, the burgh had expressly recognised his authors as the owners of the subjects. The complainer having thus a title which expressly included the ground in dispute, it was for the respondents to show that they had ousted him by possessing it exclusively for the prescriptive period. This they had failed to show. Indeed, the evidence showed that the complainer had made such use of the ground in dispute as he required, and if the public had at times taken sand from this part of the shore, they did so through toleration on his part. His property was bounded by the sea-shore, and this gave him right to at least all the ground above high-water mark—*Hunter* v. *Lord Advocate*, June 25, 1869, 7 Macph. 899; Opinion of Lord Kinloch, pp. 912 and 913. A proprietor whose land was bounded by the "sea-shore" was entitled to gain ground if the sea receded in the course of time further from the land. In other words, the boundary was not fixed by the line of the shore at the date of the original grant, it varied according as the shore line changed from time to time—*Magistrates of Culross* v. *Geddes*, November 24, 1809, Hume 554; *Boucher* v. *Crawford*, November 30, 1814, F.C.; *Magistrates of Montrose* v. *Commercial Bank of Scotland, Limited*, June 11, 1886, 13 R. 947, 23 S.L.R. 682; Bell's Prin., secs. 642 and 643.

Argued for the respondents—The complainer had failed to connect himself by grant with the burgh. A mere renewal of the investiture was not to be treated as a recognition of the original grant. Before such a grant could be inferred exclusive possession on the part of the complainer and his authors must be instructed—*Ayton* v. *Magistrates of Kirkcaldy*, June 4, 1833, 11 S. 676; *Jameson* v. *Police Commissioners of Dundee*, December 10, 1884, 12 R. 300, 22 S.L.R. 202; *Young* v. *North British Railway Company*, August 1, 1887, 14 R. (H.L.) 53, 24 S.L.R. 763. Boundary by the sea-shore and boundary by the sea were not synonymous expressions, and it had never been unequivocally decided that they were the same in effect as boundaries. Lord Kinloch in assimilating these boundaries in *Hunter* v. *Lord Advocate*, *supra*, had gone too far. In *Magistrates of Culross* v. *Geddes*, *supra*, the boundary in the adjacent feus was the sea, and this fact probably influenced the Court in their decision. Then *Boucher* v. *Crawford*, *supra*, was of no authority, as it would have been reversed by the House of Lords if one of the parties had not died—Opinion of Lord Wood in *Paterson* v. *Marquis of Ailsa*, March 11, 1846, 8 D. p. 760. A boundary by the sea-shore did not include the fore-shore and was equivalent to a boundary by high-water mark—*Magistrates of Culross* v. *Earl of Dundonald*, June 15, 1769, M. 12,810; *Berry* v. *Holden*, December 10, 1840, 3 D. 205. High-water mark must be taken as a boundary fixed at the time when the grant was given out. The magistrates by erecting a fence to the north of the complainer's property in 1853 had shown that they considered that fence the northern boundary of the complainer's property. The magistrates ever since had exclusive possession of the ground north of that fence, and the public as representing the burgh had made use of the ground and taken sand from it. The magistrates were therefore entitled to give the Lifeboat Institution power to build upon what was really fore-shore, and the complainer had no right to prevent them.

At advising—

LORD JUSTICE-CLERK—The complainer is proprietor of a piece of ground on the west of Victoria Street in North Berwick, and he asks interdict against encroachment on his property on its north boundary. A good many years ago a lifeboat launching-slip was laid down in a westerly direction from the line of Victoria Street, and past the complainer's property on the north. It is matter of dispute whether this existing slip is or is not partly on the complainer's property, the respondents maintaining that it is not, and the complainer

maintaining that it was by permission of his father that the slip was laid down where it is, he having given his consent as being proprietor of at least part of the ground on which it stands. The present dispute relates to the ground immediately to the south of the present slip, the respondents the Lifeboat Institution desiring to have the slip widened, and the Town Council maintaining that they are in right of this ground, and intend to give it to the Institution for the extension of the slip.

The deeds on which the complainer founds in order to establish his title do not go further back than 1797. The deed of that year is an instrument of resignation and sasine, by which a certain John Vetch, who had granted a disposition for a price to a Mrs Douglas, by his procurator resigned and surrendered the property in the hands of one of the bailies of North Berwick for a new infeftment to be granted to Mrs Douglas, and the bailie, having accepted the resignation, gave sasine to Mrs Douglas by the usual symbols.

This resignation upon the face of it indicates that there had been a title given out by the burgh to these lands. The property is resigned in the hands of the burgh, and given out by the burgh. Accordingly, it was frankly admitted by Mr M'Lennan at the debate that there must have been a grant by the burgh, on which this instrument proceeded, and in virtue of which the new sasine was given at the request of the last proprietor who had sold the subject, and which thus gave possession of the lands to one through whom the complainer obtained his right. His right is therefore a right by sasine.

Now, in this and the subsequent deeds, the boundary on the north is invariably given in the same terms, viz., "by the sea-shore." If then the complainer can establish that the line of the sea-shore is further north than the ground on which the respondents propose to place the addition to the slip, he would be entitled to interdict, unless the respondents can show that they have established a title which can compete with the complainer's title successfully. The respondents the Town Council of North Berwick found upon their charter of 1568, by which their boundary is "the sea on the north parts." They maintain that this is a more comprehensive title than the complainer's, and that it includes a right to the fore-shore, in other words, that "sea-shore" and "sea" do not mean the same thing in titles to land next the sea, but that the latter carries the right further down. I am not satisfied that there is any foundation for such a contention. The cases seem to point the other way. But, however, that may be, I hold that a subject bounded by the "sea-shore" goes down to high-water mark, a line which of course may vary according to natural changes in the levels of the shore. Now, the complainer is not maintaining any right to the fore-shore; he is only insisting that being bounded by the sea-shore, his right goes down to high-water mark, and that if he can show that the operations proposed are above high-water mark, they constitute an encroachment upon his property of which he is entitled to complain. That is I think a sound contention.

But it is said that there has been adverse possession of the ground in question, and that the burgh has had full and exclusive possession upon a *habile* title for the prescriptive period, and are therefore in right of property to the exclusion of the complainer. They found on the fact that they put up a sleeper fence many years ago across the ground, and thereby shut off the ground from the land to the southward. I am satisfied upon the evidence that that fence was put up not as a division fence or boundary, but solely in the interests of the town as the proprietors of Victoria Street and of the complainer's predecessor as proprietor of the ground above the sandy shore, the purpose being to keep out the sand, which in stormy weather was blown up in large quantities, to the injury of the street and ground. That it was not put up to shut out the proprietor from access to the shore is shown by the fact that when he and his tenant desired to do so, access was opened through the fence to the ground in question without objection on the part of the Town Council.

It is also maintained that there was adverse possession by the town allowing sand to be carted away from this part of the shore for payment. I am not satisfied that this is made out. I think there is evidence to show that the complainer's father and the complainer were applied to by persons desiring to take sand from this place, and that they gave permission to do so, and that people came to this place for sand in order to escape the dues which were charged by the burgh for the taking of sand from other parts of the shore. I cannot find any evidence of exclusive possession adverse to the complainer. In the case of sea-shore sand, it would require, in my opinion, a very strong and clear case before adverse possession, as in the exercise of an exclusive right, could be held to oust a proprietor whose titles were good and include the disputed area.

I hold, therefore, that if the title of the complainer carries his boundary over the piece of ground in question, nothing has been proved to invalidate it. If it were necessary for him to prove actual possession, I think he has had the possession which that part of his subject is capable of while it remains unenclosed.

It only remains to consider whether in fact his sea-shore boundary on the north is so far north as to include the disputed piece of ground. On the proof I have no doubt that it is—that the sea-shore has never been set back by any change of levels so as to be on a line lying southwards of the disputed area or any part of it.

On these grounds I am unable to agree with the decision of the Lord Ordinary, and am of opinion that the complainer is entitled to the interdict which he craves.

LORD YOUNG—I concur in the whole result of your Lordship's judgment.

LORD TRAYNER—The complainer is the vested proprietor of lands in the burgh of North Berwick. He complains that the respondents have invaded or threatened to invade his subjects, and asks interdict against them doing so. The Lord Ordinary has refused interdict on the ground that the respondents have produced a Crown charter conferring on them certain lands, which include the lands in question, while the complainer has produced no title connecting himself either with the Crown or the burgh. I cannot concur in this view. The lands in question are undoubtedly part of the burgh lands; they are held on burgage tenure. But the complainer and his authors have held and possessed these lands on infeftment for more than twenty years—I say possessed, for infeftment is possession. The complainer needs no higher or better title than that. Nor is it in the least degree necessary that he should produce the original grant or conveyance of those lands from the burgh. His title would be equally good and equally unchallengeable if it were shown that the title proceeded originally *a non habente*, for infeftment proceeding on an *ex facie* valid warrant for infeftment excludes all inquiry into the regularity or sufficiency of the earlier steps in the progress of titles. But if it were necessary for the complainer to connect himself by title with the burgh he has done so. There is produced an instrument of resignation and sasine dated in 1797, whereby the lands in question were resigned into the hands of the burgh 'as in the hands of His Majesty and his royal successors . . . in favour and for new infeftment thereof, to be made, given, and granted" to one of the complainer's authors. How could the complainer more directly connect himself with the burgh? Again, in 1857 there was expede in favour of another of the complainer's authors a cognition and sasine by which the burgh recognised the person in whose favour that instrument was granted as the heir entitled to succeed to these very lands, and in respect thereof the burgh, by the hands of one of its bailies, "cognosced and entered" the heir, and gave and delivered to him as heir aforesaid "heritable state and sasine, real, actual, and corporal possession" of the lands in question. In this state of the titles it appears to me impossible to say that the complainer has failed to connect himself by title with the burgh—even had that been necessary to his success in this action, which, as I have said, I do not think it was.

The Lord Ordinary further thinks that the complainer's right is defective because he has not proved exclusive possession for the prescriptive period. I suppose this idea must have been suggested by the manner in which the case was presented to the Lord Ordinary. But with deference to the Lord Ordinary I think his view is erroneous. The complainer is not setting up a title to the lands in question by prescription. His right is based on conveyance and sasine, and his sasine *per se* gave him as of right exclusive possession to the lands therein described. If the burgh seeks to oust him from the lands by reason of an exclusive possession adverse to the complainer's possession, it lies on the burgh to establish such adverse possession for the prescriptive period. But no such thing has been done here. I think the complainer's title is not questionable, and that he and he alone has right to the lands described in his infeftment. Does the piece of ground in question fall within that description? Here the only question that arises is with regard to the complainer's northern boundary, which is said to be "the sea-shore." I need not go over the cases which decide what is meant and included by a boundary so expressed. There is ample authority for holding that such a boundary extends at least to high-water mark, and I dissent from the view that that mark is to be taken as at the date of the original grant. In my opinion the boundary follows the sea. If the sea gains on the land the proprietor bounded by the sea or sea-shore is so much the loser. If the sea recedes he is so much the gainer. But the high-water mark for the time being is his boundary. It is not disputed that the ground in question is within high-water mark, and therefore it follows in my opinion it is the property of the complainer, with which the respondents have no right to interfere. I am therefore for recalling the interlocutor reclaimed against and granting interdict as craved.

LORD MONCREIFF—The Lord Ordinary has decided against the complainer on the ground that the complainer has not connected himself with the burgh, and that in order to succeed he required to show that he and his predecessors have had exclusive prescriptive possession, and that he has failed to do so.

But I think that the Lord Ordinary is mistaken in regard to the state of the complainer's title. He says—"The complainer holds no title from the burgh." No doubt the complainer does not produce an original grant from the burgh, but he produces what is quite sufficient for his purpose—an instrument of cognition and sasine in favour of his predecessor Robert Douglas M'Dougall, dated 26th February 1857. Now, this deed *prima facie* establishes that the burgh recognised the right of the vassal Robert M'Dougall to the subjects which now belong to the complainer, and which are described in the same terms as in the disposition of 1893.

The complainer also produces an instrument of resignation and sasine in favour of Mrs Catherine Denholm or Douglas, dated 23rd October 1797, in which the same lands are described in the same terms. Now, according to the peculiarities of burgage tenure this instrument of resignation and sasine combines the effects of an instrument of resignation *in favorem* and a charter of resignation and sasine according to the rules of ordinary conveyancing.

Therefore the respondents cannot successfully maintain that the complainer has not sufficiently connected himself with the burgh, nor dispute that the complainer is in possession of the lands so described in virtue of a prior grant by the burgh.

This of itself is not conclusive. The writs to which I have referred being writs by progress could not add to or diminish the conditions of the original grant. The respondents therefore might, if they could, have shown that the original grant was of a more limited character.

Again, if the respondents could have shown that they have had exclusive possession of the fore-shore in question for the years of prescription upon a *habile* title they would have prevailed, notwithstanding their grant to the complainer's authors.

Lastly, it was open to the respondents, and is still open to them, to maintain that on a sound construction of the complainer's title he has no right to the fore-shore in question.

In regard to the first point, the respondents do not plead and have not maintained or proved that the boundaries in the original grant were different from those in the instrument of cognition and sasine and in the disposition in favour of the complainer. Secondly, they have not proved exclusive possession of the ground in question. It is true that in 1871 a lifeboat slip was built across part of the fore-shore *ex adverso* of the complainer's feu. But there is evidence that this was done with consent of the defender's predecessor Mr A. Carlaw Lockhart, and the complainer does not now disturb that erection. Again, it is proved that a fence of sleepers was put up above high-water mark at the end of the complainer's feu. But I think it is proved that this also was done with the consent of Mr Lockhart, and as much for his own protection as for the convenience of the town and the public.

There is also evidence to the effect that when sand was taken from the piece of the fore-shore in dispute Mr Lockhart's permission was asked, or at least that no dues were charged by the town or their tacksman when sand was taken from that part of the shore by members of the public.

The only question which remains is whether the true construction of the complainer's title is that for which he contends. On this point, in my opinion, the complainer is right. According to the best authorities a boundary "by the sea-shore" and a boundary "by the sea" mean one and the same thing, and gives to the vassal property in and down to the sea-ebb mark at ordinary tides, subject to the rights of the public. This is very well explained in Lord Kinloch's opinion in *Hunter* v. *Lord Advocate*, 7 Macph. 912. He examines the whole of the authorities, and says—"I consider the words 'sea,' 'sea-flood,' and 'sea-shore,' to express all of them in this respect one and the same thing. It has been contended with some plausibility that the term 'sea-shore' cannot indicate a grant of the shore, because that by which a subject is bounded cannot be viewed as within the subject. But this argument ignores what I think is the true object in using this and all the other phrases, which was not to draw a boundary line in the strict sense of the expression, but simply to make it clear and indisputable that the property was dealt with as a property on the shore of the sea, implying thereby that the shore was given by the conveyance to the fullest extent to which the flood of the sea-shore runs out."

It is sufficient for the present case that the complainer is entitled to go down to the existing high-water mark.

I am therefore of opinion that the complainer is entitled to succeed. The form of our judgment may require consideration, and it may be better to hear parties as to whether arrangements cannot be made by which the addition to the slip may be allowed to remain.

The Court recalled the interlocutor reclaimed against, and found the complainer entitled to interdict.

Counsel for the Complainer—Solicitor-General (Dickson, K.C.)—Hunter. Agents—Hutton & Jack, Solicitors.

Counsel for the Respondents—Jameson, K.C.—M'Lennan. Agent—T. S. Paterson, W.S.

Saturday, November 22.

FIRST DIVISION.

ROSS'S TRUSTEES.

Liferent and Fee—Rights of Liferenters and Fiars—Free Income — Casualty—Duplications of Feu-Duty.

In his daughter's antenuptial marriage-contract a father conveyed certain subjects to the marriage-contract trustees, with directions to pay the "free income" to his daughter during her life, and to hold the trust estate for behoof of the children of the marriage.

The subjects conveyed consisted of the *dominium directum* of certain property which was feued, and from which duplicands of feu-duty payable at regular intervals were exigible.

In a special case presented by (1) the trustees, (2) the daughter, and (3) her children,—*held* that these duplicands of feu-duty fell to be considered as income and not as capital.

Montgomerie-Fleming's Trustees v. *Montgomerie-Fleming*, February 28, 1901, 3 F. 591, 38 S.L.R. 417, *approved* and *followed*.

By antenuptial contract of marriage, dated 23rd March 1874, between William Ross, C.A., Edinburgh, and Ellen Percival Gibson, Miss Gibson's father William Walker Gibson disponed, assigned, and conveyed to the trustees therein mentioned, and for the uses and purposes hereinafter mentioned, certain lands, subjects, and others therein described, but that only as