but for the purpose of obtaining substantial benefit and relief, such as might have been the subject of a distinct and independent suit by the party so setting it up, in the suit commenced against him or her, such a case must be considered as resting precisely on the same ground as if the proceeding had been instituted on the part of the defendant in the one case, and that defendant would be in the same situation as another plaintiff, suing for and obtaining the same relief, would be.

I consider, therefore, that first of all this defence as put in, is pleaded, and is offered, as an entire answer to the case on the part of the pursuer. It does not follow that, in point of law, it will be an answer; but it is pleaded with the intention of contending and of arguing, that it is an entire answer to all claim on the part of the pursuer; and the question before this House now is, not whether the party is correct in supposing that the plea does disclose a full and effectual answer to the pursuer's claim, but the question is simply here, if it is so offered—and if that is his view, can it be considered as falling within the description of a dilatory plea? I own it strikes me that there is no ground for that conclusion.

The learned counsel, with a candour for which I think the House is indebted to him, declined to argue whether this was a dilatory or a peremptory plea, but sought rather to relieve himself and the House from a question on which no reasonable doubt could be entertained, by setting up another ground on which to entitle the party to the benefit of the petition—namely, that the parties have so treated it, and have so dealt with it in the Court in Scotland. But, my Lords, that was not the ground on which the petition was presented. The petition was presented simply and solely, and the reason and ground urged in its support was the character of that plea or defence, that it was what is here called a preliminary or dilatory defence, using the words "preliminary" and "dilatory" as synonymous. I do not think the act of parliament intended that those words should at all be considered as having the same sense.

My Lords, it was suggested before the committee, that by the course of proceeding below, the party might have prejudiced the objection; but the committee did not think it right to trouble the House on that part of the argument, and they desired the case to be argued before your Lordships simply on the character of that defence or plea—whether it was to be considered as a dilatory plea, and whether, therefore, the appeal was taken away without the leave of the Court, under the 5th section of 6 Geo. IV. c. 120. I own it appears to me, that the learned counsel who has appeared at your Lordships' bar, and argued very ably that part of the question to which he was desired to direct his attention, has felt that it could not be with any reason, or any probability of success, argued that this was a dilatory plea, and therefore resorted, as I have before stated, to another and totally different ground from that which seemed to me to have been the subject of the petition—namely, that the party had prejudiced himself by allowing his plea to be treated in a different sense from that which he now insists properly belongs to it. I consider the question before your Lordships to be, whether or not, under the 5th section of the statute, to which I have referred, this is to be considered as a dilatory defence, the decision on which, therefore, could not be the subject of appeal without the leave of the Court. I humbly submit to your Lordships, that this is not a dilatory defence—that it is not within that section—and that it is competent to the party to present his appeal to this House. Upon the hearing of that appeal, of necessity much of what has been urged before your Lordships to-day will have to be considered. On the present occasion, I shall advise your Lordships, that the petition praying that the appeal may be dismissed as incompetent, ought to be dismissed; and I move your Lordships that that petition be dismissed.

Mr. Anderson.—I hope your Lordships will give us the costs of this hearing.

LORD CHANCELLOR.—They must be reserved.

Respondent's petition dismissed—appeal sustained—and costs reserved.

First Division.—Lord Wood, *Ordinary.*—Smedly and Rogers, and Dodds and Greig, *Appellant's Solicitors.*—Grahame, Weems and Grahame, *Respondent's Solicitors.*

MARCH 12, 1852.

THE LORD ADVOCATE, and HER MAJESTY'S COMMISSIONERS OF WOODS AND FORESTS, *Appellants*, *v.* JAMES REDDIE and others, (River Clyde Trustees), and WILLIAM HAMILTON, *Respondents.*

Crown—Crown Property—Navigable Rivers—Agreement—Transaction—Statute 3 and 4 Vict. c. 118—Clause—Construction—*The River Clyde Trustees, appointed by statutes for the improvement of the navigation, were* inter alia *entitled to widen or narrow the channel as they should think fit. At first they narrowed the channel and afterwards they widened it, thereby leaving a strip of ground* ex adverso *the land of H. who claimed it. The trustees disputed his title, but on condition of his waiving opposition to another bill promoted by them in Parlia-*

ment, they agreed to give him half of the value of this strip. The Bill passed, but the rights of the Crown were reserved.

HELD (affirming judgment), 1. *That, in the circumstances, and having regard to the statute* 3 *and* 4 *Vict., the Crown had no claim to the value of the strip of ground as part of the alveus, or to the half price as in lieu of it.* 2. *That the facts and circumstances, as between the trustees and the proprietor, on which the statute* 3 *and* 4 *Vict. proceeded, amounted to a transaction in law between them, by which he was entitled to the half price, although, by a decision of the House of Lords subsequent in date to this statute, it had been found that the right to the strip of ground belonged to the trustees, and not to the adjoining proprietors.*

Opinion—*That in Scotland, as in England, the full right of property in the alveus of navigable rivers where the tide flows and reflows belongs to the Crown* jure privato.[1]

The River Clyde Trustees were empowered, by various statutes, to make all works and operations necessary for improving the navigation of the river, and held compulsory powers for purchasing any adjoining land that might be required for that purpose. Under these statutes, they were entitled to narrow or widen the channel as they thought proper. At first they chose the former course, and a considerable strip of ground was in consequence interjected between the old and the new water line—this interjected ground being part of the old alveus of the river.

The trustees became afterwards satisfied that the proper mode of improving the navigation of the river was, not to narrow but to widen its channel. This change of system made it necessary for them to resume possession of the ground which their former operations had added to the banks.

The river-side proprietors claimed this interjected ground as their own, so far as it lay *ex adverso* of their respective lands; and one of their number, Charles Todd, raised that question in an action of declarator directed against the Trustees. The Court decided against the claim, and held that the Trustees were entitled, without payment of compensation, to resume possession of the interjected ground, as having formed part of the old alveus of the river. (12 Sc. Jur. 284.)

While an appeal against this judgment was in dependence in the House of Lords, an arrangement was entered into between the River Trustees and some of the river-side proprietors, among whom was the respondent Hamilton. The result of this transaction was an agreement, that Hamilton and the other contracting owners should convey the land in question to the Trustees for half its value, giving the disponees warrandice only from fact and deed. The other proprietors did not enter into the transaction, but chose to abide the decision of the House of Lords in Todd's appeal.

The act 3 and 4 Vict. c. 118, was passed for the purpose of conferring additional powers on the trustees. With reference to Todd's appeal, then in dependence, the 18th section of this statute bore—"That nothing herein contained shall affect the said action, or the pleas maintained therein, or the rights of any party in relation to the ground in dispute—all which are hereby saved, and reserved entire."

With regard to those proprietors who had not entered into the above transaction, but had left their rights to depend upon the common law, the 24th section provided—"That nothing herein contained shall be held to affect such rights to compensation as may legally belong to such proprietors."

With regard, again, to the proprietors who had entered into the above transaction, the 20th section provided—"That for the purpose of ascertaining the price to be paid by the said Trustees for the space required to be occupied in widening the said river opposite or adjacent to such grounds as belong to the said land-owners, viz. the said Gavin Hardie, Alexander Johnstone, &c.—(here follow the names of various other parties, including the said William Hamilton)—a certain map made by W. Kyle, in 1800, shall be taken as conclusive."

The statute provided in section 124 that nothing was to abrogate, lessen, defeat, or prejudice the right and title of her Majesty. Notwithstanding the reference to Her Majesty in the clause, the Crown was not a party to the above transaction between the Clyde Trustees and Hamilton.

The above statute was passed in August 1840. In December of that year, the following intimation was made to the Clyde Trustees by the agent for the Commissioners of Woods and Forests:—"That the Commissioners on behalf of the Crown, and in terms of the 12th section of the act above referred to, claimed to be entitled to the purchase-monies to be assessed or fixed as the prices or compensation payable in respect of the different description of lands in or adjoining to the river Clyde, specified in the above-mentioned section. And I am directed to require the Trustees to take care that the prices of such lands be assessed separately and distinctly in each case, in order that the right to such monies may be determined as between the claimants in due course of law."

On 8th June 1841, the House of Lords affirmed the judgment of the Court of Session in Todd's case.

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[1] See previous report 23 Jan. 1849; 11 D. 391; 21 Sc. Jur. 110:—S. C. 1 Macq. Ap. 46; 24 Sc. Jur. 379.

An arbitration was entered into between the Trustees and Hamilton, in pursuance of their agreement, for the purpose of ascertaining the value of the interjected land *ex adverso* of his ground. The arbiter, in February 1847, fixed £775 as half of that value, and decerned the Trustees to pay that sum to Hamilton, and him to convey the land in question with warrandice only from fact and deed.

A disposition in the above terms was executed by Hamilton; but in consequence of a claim made by the Crown to the sum of £775, as coming in place of what was a portion of the old alveus of the river, the Trustees consigned that sum in bank.

This claim was sought to be made effectual on the part of the Crown by a summary petition presented under the 124th section of the statute already referred to.

The Court, on 23rd January 1849, pronounced the following interlocutor:—"The Lords having considered the petition of Her Majesty's advocate for Her Majesty's interest, with the whole record, and heard counsel for the parties, refuse the desire of the said petition, and decern in favour of the respondent, William Hamilton, for payment of the said sum of £775, with the interest due thereon; but find no expenses due."

This judgment was brought under the review of the House of Lords by the appellants, who pleaded in their appeal case that it ought to be reversed, for the following reasons:—"1. The appellants, on behalf of the Crown, are entitled, both at common law and under the act 3 and 4 Vict. c. 118, to obtain decree for the sum of £775, which was fixed to be the half of the value of ground formerly within the alveus of the Clyde, and as such, was the property of the Crown. 2. The arrangement with the landholders, in the 20th section of the statute, cannot operate as a bar to the Crown's right to recover the money, in respect it is qualified and restricted by the clause of reservation in the 124th section, which preserves entire the right of the Crown to the whole alveus, or land reclaimed from the river, and all sums of money or compensation directed to be paid by the Trustees in respect of such land."

The *respondents*, in their *printed case*, supported the judgment upon the following grounds:—1. Because, on the true construction of the statute under which the Clyde Trustees were empowered to take the ground, they became bound to pay half its value absolutely, without regard to the respondent's title, and that in consideration of the absolute surrender by the respondent, in favour of the Trustees, of the other half of its value. 2. Because, by the law of Scotland, the alveus of a navigable river does not belong in property to the Crown, but is vested in the Crown as a trust for the public, and, subject to such trust, is capable of being acquired, by accession, by adjoining proprietors, and the property of the ground in dispute was so acquired by the respondent. 3. Because, even supposing the respondent had not acquired the property of the ground, yet the Crown had no claim to be compensated for the use taken of it by the Clyde Trustees, in respect that if the same formerly formed part of the channel of the river Clyde, it was created by the operations of the Clyde Trustees, under the powers previously conferred on them by former statutes, under which the Trustees had ample power to remove, as well as to create, all such accumulations, for the benefit of the navigation of the river. 4. Because, if, as in a question between the Crown and the Clyde Trustees, the Crown cannot demand compensation for the use of the ground, the Trustees are bound absolutely, by the terms of the statute, to pay the sum in dispute to the respondent. 5. Because it is not proved, and is not the case, that the ground formed part of the channel of the river Clyde, within forty years from the raising of this action, and it is not proved nor admitted that it ever was so.

Anderson Q.C., and *W. M. James*, for appellants.—It is assumed for the purposes of the argument, that the ground in dispute was alveus—and the question is, whether, notwithstanding the Act 3 and 4 Vict. c. 118, the Crown is entitled to receive the £775 instead of the respondent. The fair construction of that statute, taking all its clauses together, is, that the value of the ground in dispute was to be ascertained in a certain way, and *half* was to be paid to whoever established a title to that ground. Accordingly, if the Crown can establish a paramount title, the money belongs to the Crown, and not to the respondent, who has no title at all. It comes then to this, whether the Crown is by law entitled to the alveus of all navigable rivers in Scotland. In the civil law, a navigable river was *juris publici;* but by the feudal law, which prevails in Scotland, it belongs to the Crown *jure privato*, subject only to a servitude in favour of the public—viz. that of free passage and navigation.—Craig, 1, 16, 11. Stair, 2. 1, 5. Ersk. Inst. 2, 6, 17, and 2, 1, 5-6. Bell's Prin. (4th Ed.) §§ 638-9, 648-9-50. The result of these authorities is, that the Crown's patrimonial right is only encumbered with this condition, that the navigation shall be kept free. All the soil of the kingdom belonged originally to the Crown, and is presumed to remain so, unless it can be shewn to have been granted away. Thus the right of fishing, being real property, and capable of being feudalized, was found legally granted to a subject in *Grant* v. *Duke of Gordon*, Mor. 12,820. The question of the Crown's property in the seashore was raised more directly in *Officers of State* v. *Smith*, 8 D. 711, and 6 Bell's App. 487, per Lord Campbell. The same rule prevails in all countries which have adopted the feudal law. In England, the Crown's property in the seashore is clear—Comyn's Digest, see "Navig. B."

and "Prerog. D. 61,"—though it has been latterly denied in *Attorney-Gen.* v. *Corp. of London*, 2 M'N. & G. 247.

[LORD CHANCELLOR.—You need not go into the law of England; the point can scarcely be disputed.]

Such being the general principle, have any statutes taken away this right out of the Crown, and granted it to the River Trustees? All that was vested in the Trustees was the right of deepening the channel and improving the navigation; there is no phrase or word implying a transfer or conveyance of the property in the alveus. Mere general words, such as would bind a subject, do not give away the right of the Crown in such cases, as was settled in *Magdalen College case*, 6 Coke's R. 125, and more lately in *Doe d. R.* v. *Archb. of York*, 19 Law J. Q. B. 242. Hence the right to the minerals beneath the alveus remains still in the Crown—*Hollis* v. *Goldfinch*, 1 B. and Cr. 205. Suppose this piece of alveus had been cultivated, could the Trustees have re-entered upon it, and seized it for the purposes of navigation?

[LORD CHANCELLOR.—Do you hold that a piece of alveus which is found unnecessary at a particular time, or which, from a sudden recession of the waters, has been left dry, and has been cultivated, but which afterwards is required for its original purpose, can be held by the Crown, as against the interests of navigation?]

Yes; the moment a piece of alveus is freed from the superincumbent water, and navigation is no longer possible—which is the only burden on the property—it vests *pleno jure* in the Crown; and whoever takes it again for any purpose, must pay for it.

[LORD CHANCELLOR.—Have you any authority for that?]

It results of necessity from the nature of the Crown property. In case of alluvial accessions, these vest in the riparian proprietor as soon as they are formed, and the Trustees could not seize upon ground thus acquired. In the same way, ground left dry by a revulsion of the waters, belongs at once and immediately to the Crown. The ground here in dispute must have belonged to somebody. The operations of the Trustees, at the time of their narrowing the channel, improved the navigation. This ground was therefore detached from the purposes of navigation by competent legal authority, and at that moment it accrued to the Crown as absolute property, released from its former superincumbent obligation. The Judges below said the Crown held the property of the alveus subject to a perpetual trust; but such a doctrine would lead to a serious inroad on the Crown property, and is unwarranted.

[LORD CHANCELLOR.—Is there any authority against it?]

Hale *de Jure Maris* treats this kind of property as absolute. The confusion arises from the word "public." The Crown's guardianship of navigation in rivers is no doubt a constitutional obligation for the good of the public, but it is not an obligation which Courts of law would recognize as any diminution of the property. Besides, where is the right of preventing the Crown from taking any part of the alveus not needed for navigation? So long as no obstruction, amounting to a nuisance, can be imputed to the Crown, no such check is known to the law. A good test of property is the power of dealing with it. Now 8 and 9 Vict. c. 99 authorized a lease of the Crown's derelict lands to be granted for 99 years: Could the lessee be dispossessed at any moment it suited the River Trustees to say they wanted back the ground? If so, is the discretion in the Trustees unlimited, and how long can it be exercised? Suppose that this ground had been alveus in 800 instead of 1800, could the Trustees still claim it for its original purpose? The statutes incorporating the Trustees, delegated to them nothing but the right which the Crown possessed as guardian of navigation.

[LORD CHANCELLOR.—Is there any provision in the act 3 and 4 Vict. c. 118, to enable the trustees to pay the Crown, as they would any other proprietor?]

No; § 124 is the only one empowering the Trustees to deal with the Crown at all.

Solicitor-General Kelly, and *B. Andrews* Q.C., for respondent.—The case is so clear on the statute 3 and 4 Vict., that it will scarcely be necessary to enter into the abstract question of the Crown's right to the alveus. The position of the parties was such, that the agreement, as disclosed by that statute, was a compromise by which the respondent was to relinquish whatever right he had, and, in return, was to receive absolutely a certain sum, viz. *half* the value. At the time of this bargain, it was undecided whether the respondent, as the adjoining proprietor, was not entitled to the whole property of the piece of alveus,—the case of *Todd* v. *Clyde Trustees*, 2 Rob. 333, then being under appeal to this House. Another question was, what quantity of ground was to be deemed alveus. Nothing, therefore, was more natural than for the Trustees to say, "If you will consent to take Kyle's map as decisive of the quantity of alveus, and to take *half* the ascertained value of that quantity, and give up all litigation, we shall pay you that sum." It was a most reasonable agreement to "split the difference;" and it was not material at all, whether the respondent was in fact entitled to the ground. He was to convey his interest whatever it was,—the very uncertainty of the nature of that interest being part of the consideration. What, then, would be the state of things, if the Crown, who was no party to the bargain, could come between the respondent and the Trustees, and take the benefit of their bargain, without

incurring their obligations. For it cannot be said the Crown would be bound to abide by Kyle's map, which would not even be admissible evidence in any trial between the Crown and the Trustees; nor would the arbitration and award of Lord Robertson be any longer obligatory. A third party, as the respondent would on that supposition be, could never bargain away the rights of the Crown in this manner. Accordingly, we find that §§ 19 and 20 are only reconcileable with the hypothesis, that the money was to be paid absolutely to those land-owners who compromised. Sections 24, 25, and 26, relate to the dissentient proprietors; and § 124, which saves the Crown's rights, controls these sections alone, and leaves §§ 19 and 20 unqualified, and standing by themselves. Even assuming, therefore, that the right to the ground in dispute was in the Crown, still the respondent had to deal with the Trustees, and nobody else. There is no provision in the act for a conveyance of the fee-simple by the Crown to the Trustees, as there is in §§ 19 and 20 for such conveyance being executed by the respondent and the other consentient land-owners. There is also no provision for any pecuniary compensation to be paid to the Crown, either for taking or using the ground, nor is there any machinery for ascertaining the amount of that compensation. Hence, if § 124 be held to give this £775 to the Crown, it will be not merely a saving clause, but an enabling clause, conferring powers which did not exist before. On that hypothesis, the bargain would have been absurd; for what sane person claiming a title to ground—at the worst only doubtful—would bargain to get only half value if that title turned out good, and nothing at all if it turned out bad? The question as to the right of the Crown to the full patrimonial property of the alveus, does not come at all into play in this case. That right is differently expressed by all the leading authorities; but this point clearly appears, that the use of navigable rivers is in the public without any grant. Even allowing that the Crown holds the ground *jure privato* in certain cases, as we do not deny it does, could it be said, that if the Crown here had done what the Trustees did, the former could have claimed pecuniary compensation? The argument must go the length of shewing, that the Crown had such a property in the alveus as to be capable of selling it. It was not a case of *opus operatum;* the works were in progress, and the powers conferred on the Trustees were continuous. Even independently of 3 and 4 Vict. c. 118, they could have gone on and restored the old channel to its original state. But the adjoining proprietors having claimed a part, they thought fit to purchase off these claims for an unconditional price, which therefore must be paid.

Anderson in reply.—It is said that §§ 19 and 20 must be construed by themselves, and that they are not qualified by § 124. We say § 124 overrides and governs every other section, as much as if it had been added to the end of each. Its language is most comprehensive.

[LORD CHANCELLOR.—You say in fact, that the land-owners who entered into the agreement with the Trustees, were in the same position as those who did not agree.]

Yes, as regards the Crown, but not as regards the Trustees. The Crown's right attached to the money, when this came in lieu of the land. By the act, the Trustees were empowered to take the land, and thereby were bound to pay for it. The Crown's only remedy was against the money. It could not raise an action of declarator, and, by a bill of suspension, interdict the Trustees from taking the land. The act gave the Crown no form or machinery for establishing its claim to the alveus, but it gave a machinery for going against the purchase-money, viz. a petition to the Court of Session.

[LORD CHANCELLOR.—Suppose Hamilton, the respondent, had been named by mistake in the act, could he not have got compensation notwithstanding?]

No; it was only in his capacity of land-owner that he had any claim.

[LORD BROUGHAM.—Then you read it—"The compensation is to be paid to Hamilton, or whoever made out a title to it?"

Yes. This case resembles that of an heir and devisee dividing the estate, and taking each a half, which is well enough, until a third party come in with a paramount title. Here, there was an express machinery for getting rid of all claims, viz. a petition to the Court of Session, which was in fact a multiple-poinding; and the Crown's right is paramount.

LORD CHANCELLOR ST. LEONARDS.—My Lords, this case has been very fully argued at the bar, and, as I think, it admits of no doubt, I am unwilling to advise your Lordships to delay giving judgment upon it, particularly under the circumstances in which the respondent has been brought to the bar of this House.

My Lords, the case is a very simple one, although the argument upon it has occupied a long time. It lies in a very narrow compass. The Trustees under the acts of parliament which have been referred to, stand for certain purposes in the place of the Crown. They are public Trustees for the purposes of a public navigation. They are not a company established for its own benefit, and pursuing for its own profit a private speculation; but the public duty, which would to a certain extent have devolved upon the Crown, of keeping this navigation in a proper state, has been devolved by the act of parliament upon a set of Trustees.

The question has been very much mooted as to the right of the Crown to the alveus or bed of a navigable river. It is a question which really admits of no dispute. Nobody has hitherto attempted to deny that the soil and bed of a river—we are speaking now of navigable rivers, as

far as the tide flows—belongs to the Crown. But this argument assumes a very different shape; for, by the act of parliament in question, the very first portion of § 124 expressly saves to the Crown its right to the alveus, or the bed of the river. The ground which, or the price of which, is now in dispute, originally formed a portion of the bed of the river. The Trustees, in the execution of their powers, narrowed the channel, and they did so, as I understand it, by raising certain banks or obstructions—the parts which intervened between them and the adjoining ground became silted up, filled with rubbish, stones, sand, and so on—and at last there was a formation of something like solid land, connecting the adjoining land with the water and the river. There is no dispute, I apprehend, in point of law, that that portion would still belong to the Crown. I am not now speaking of anything which was the result of gradual accretion, but of that which formed the bed of the river, and which never had ceased to be so.

When the Trustees required, in the further prosecution of their works of improvement, in order to enlarge the bed of the river to its former dimensions, that very ground which they had formerly by mistake taken from the bed of the river, where can be the question or the doubt that the right would exist? The Crown never could have interposed to prevent that property, its own property, the bed of the river, being restored to the old channel. Its own rights would be restored. There would be nothing at all disturbing the rights of the Crown. It is very true the collections of sand, stones, and earth, and the various matters which had accumulated and formed a solid bank, would be removed, because such a bank was an obstruction; but the soil of the channel, remaining just as it did before, would belong to the Crown in its own right, precisely in the same manner as it did before.

I should therefore have supposed, that the Crown never would have asked, and never could have been entitled to ask, for any compensation from the Trustees for taking from the bank that which they had before added, or permitted to be added, to the bank, and restoring it to the original channel of the river, thereby not revesting in the Crown,—for the right of the Crown never was disturbed,—but leaving the Crown in possession of the right to the soil, just as it had always enjoyed it.

That would at once account for the shape of this act of parliament; for the act, proceeding to give further powers to the Trustees of this navigation, never once refers to the rights of the Crown. It makes no provision for the rights of the Crown. It expressly authorizes the Trustees to take the banks. The very object of the act of parliament was to enable them to take the banks, but it never supposes that there is any right in the Crown which it could exercise adversely to the Trustees; and therefore no clause in that act has any provision in it for that purpose.

The act of parliament, putting aside § 124 for a moment, is just what one would have expected to find it. There happened to be two classes of proprietors. All the proprietors to whose land the banks had become an accretion, had used those banks, I suppose, without interruption. Upon that ground, they had set up a title to the soil itself. They divided themselves into two classes, one of those classes being represented by Mr. Todd, who says, "I choose to stand upon my right—I will submit to no compromise," and who was at that time coming to this House upon the question of right. He asserted his right to the whole of the soil which had been added in the way I have pointed out to his adjoining property. He asserted his right to it against the Crown, and against everybody else. Before that question was decided, this act of parliament passed.

There was also another class of proprietors, among whom was the respondent, who took another course, and they said this:—"There is a question raised as to our right,—if you give us half the value of our interest, we will withdraw from the contest." Supposing for a moment the case had stood simply thus:—The property is in somebody; it is either in the Trustees, who have the right to revert to it, and to re-acquire that which they have allowed to be annexed to the adjoining land,—or it is in the Crown, as still forming part of the alveus,—or it is in the owners of the adjoining land. Then see what would be the consequences. The Trustees, if they had the right, would of course rely upon their own right, as far as they thought they could. As regards the other parties, there were two conflicting claimants—I will suppose the Crown and the landlords—each claiming the whole right of property—the Crown claiming the whole right, and the adjoining proprietor claiming the whole right. The Trustees, therefore, having the right—being under the necessity, and having the power to take the very land in question—whatever disputes might exist with respect to the ownership of that land, having the duty and the obligation imposed upon them to use it for the purpose of the improvement of the navigation,—what I desire to know is this, What is there to prevent the Trustees, who are to take this land, from buying off either claimant? If you desire to acquire a piece of land, and there are two claimants, and the right of neither is settled, what is to prevent your fairly buying up the right of one of them, making a fair compromise with him, and then trying to deal with the other? Having come to a fair compromise with one of them, you have, in short, one of the contesting parties out of the field. There is nothing irrational nor improbable in that—nothing, as I apprehend, at all out of the common course of business.

What shape, then, does this act of parliament take? It recites the two classes, and it contains provisions as diametrically opposite to each other as provisions can be. It contains one class of

provisions, applying to those landlords who have agreed to what I call a compromise; and the other class of provisions applying to those land-owners who stood upon their rights, and had declined to compromise. As regards those who had compromised, not only is the language perfectly explicit, but what is more than the language, look at the essence—look at the substance—look at the meaning of this act of parliament, and see whether any man who reads it, can doubt what the true construction of it is. It says that a certain line shall be the boundary between the lands and the alveus, after a certain time; that a certain map, which had been made by Mr. Kyle many years before, shall be the map which shall decide which is or is not alveus. Then it says, as regards those persons on the part of whom that transaction is taking place, and what appears to be the alveus adjoining their lands, that without having recourse to any other authority, or any other mode of ascertaining whether it is alveus or not, that particular map shall bind both parties as to what is or is not alveus,—that it shall be valued, and that one-half the value shall be paid by the Trustees, and accepted by Mr. Hamilton and the others as the full value of their rights. How can there be any question about it? Where is the ground of the dispute? You shall bind yourself to admit the alveus to be just as it appears upon that plan: It shall be valued: We are at once to pay you for it—not the full value, but only half: Is not that of itself in the nature of a compromise? And what follows? There is no clause directing that sum of money to be paid and consigned, and appropriated to abide future decision. There is no such clause, nor anything approaching to it. But there is a clause which gives, as against those very land-owners, other rights to the Crown, as against their general property, wanted for the navigation, which would not bind other parties. There were incidents, therefore, in this mode of dealing, which make it a compromise, which prove it to be a compromise, and which could only be attained by a compromise. It was only by concession that the parties ever could have arrived at the resuit to which they came.

What takes place as to the other class of proprietors? As to the others, we have not a compromise. The act of parliament says expressly, that their rights shall in no manner be affected or injured by the act of parliament. Then, what is to take place? There is to be a jury. What is the jury to do with the question? Mr. Kyle's map is no longer to be binding. Why? not because it does not shew the alveus correctly, but because there was no compromise—no agreement. There was therefore to be a map made for the purpose of ascertaining what portion of that ground is alveus. And what then took place? Why, there was to be a division of the purchase-money—that portion of the purchase-money which belonged to the adjoining owner, in right of his property beyond the alveus, was to be paid to him without dispute. What was to be done with the other portion? That was not to be paid by the Trustees, and accepted by those parties, but it was to be paid in the way of deposit, to abide the decision, for those who should be entitled to it under the provisions of that act. Therefore the question is so plain, that I cannot represent it to your Lordships as a matter which is open to the slightest doubt. It appears to me one of the plainest cases I ever saw in my life. It admits of no doubt that this was a compromise, and that, by that compromise, that particular portion of the value was to be paid to Mr. Hamilton, altogether irrespective of the rights of the Crown, as well as of the Trustees, as the mere purchase of his interest, and buying him off, if you like so to express it, in order to put an end to the claims of parties standing in his particular position.

The Crown is desirous to have the benefit of this compromise,—but was there ever such a contention? How can the Crown stand in Mr. Hamilton's place? You may say that Mr. Hamilton has no right; but if Mr. Hamilton has a right, he has accepted for that right half the purchase-money. The Crown, which asserts a right to the whole of the purchase-money or nothing, comes here to get the half. The Crown comes to your Lordships' House, and asks you to give to it that half which is to be paid to Mr. Hamilton as a consideration for the whole. Is the Crown to come here to assert its right against that individual, when it is not relinquishing its right to the whole? Why did not the Crown, as I must take the liberty of saying it should have done upon this occasion, pursue the Trustees, and try its right, in a question of so much importance, to the whole *solum* of this river, and to every part of it? If it had brought the Trustees here properly, as it should have done, the question would have been agitated, and would have been decided as a solemn point of law. That would have been much better than escaping from the real question of right, and attempting to get from Mr. Hamilton that which was clearly agreed to be paid to him for his particular right upon the relinquishment of the property. It is said at the bar, that the right of the Crown is still reserved to the other half. Are we to have another suit, and another hearing in this House, with regard to another £775, the value of the other half of this property? I hope no such results may follow.

LORD BROUGHAM.—The prayer of the petition concludes by reserving to the Crown all its rights.

LORD CHANCELLOR.—The absurd consequence, if your Lordships will pardon my so calling it, will be this,—as, indeed, was put by one of the learned Judges very properly in the Court below. Mr. Hamilton, and those other parties, insisting very properly upon their rights or their views of them, though they were wrong in point of law, the Trustees were advised to give way

to them; and the proposition is this—If you will make this compromise with us, we will join you in it: If you are entitled, you shall have half; and if you are not entitled, you shall have nothing. It is the drollest compromise, as your Lordships will probably think, that was ever made. I can understand a contested right being compromised, as this was, for half its full amount; but I cannot understand a compromise in which, if I have a right, I am only to have half; and if I have not a right, I am to have nothing. I do not call that a compromise. I call that a relinquishment of half my property, without the slightest benefit in return.

This much being clear, the only other question is about the reservation of the rights of the Crown in § 124. That is an absolute reservation as regards the soil. The right of the soil is reserved, and that right of the soil would belong to the Crown when this contention is over precisely as it did before. The soil is still in the Crown,—the right of navigation is still in the subject,—the power is still in the Trustees to carry on the improvement of the navigation,—and all parties are left in their original position. The question upon this clause is first of all upon its grammatical construction, and next upon its meaning as regards this particular money.

Upon the grammatical construction of the clause, it is certainly difficult to read it in such a way as perfectly to comprehend it. It is as laboriously and ingeniously contrived to puzzle the reader, as any clause which I have seen for some time. It might refer, I admit, to the subject in contention, but it would naturally and properly refer to those clauses which are altogether distinct, and in which the money is stopped *in medio*,—in which it is placed in safe hands in order to abide the result of the contest. But even if it extended to the other alternative, it gives no right,—it saves the title, but it confers no right. There cannot be a greater mistake in law than to insist that the reservation of the rights of the Crown confers a right upon the Crown. This clause, indeed, did confer a right upon the Crown, but it was a right only as regards its procedure, and not a right as regards property or interest. The rights of the Crown remain just as they were; and unless the Crown can maintain its right irrespective of that clause, except so far as it may be supposed to have saved its right, I submit it must be perfectly clear that no new right is vested in the Crown by force of that clause. In my apprehension, this clause does not in any manner give to the Crown the right contended for.

I ought to apologize to your Lordships for having occupied so much time upon so very plain a case. I very much regret that the forms of this House do not permit your Lordships to give the costs to the defendant of having been brought to the Court below, and to your Lordships' bar, upon this point; but I shall recommend to your Lordships that the interlocutor in the Court below be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, that the judgment below is right, and that it ought to be affirmed. We generally speak of the soil of a navigable river as being in the Crown, not only in Scotland, but in England. We have it laid down by Mr. Justice Buller, in *The King* v. *Smith* (2 Doug. 441),[1] that generally speaking, and unless in peculiar circumstances, the soil of a navigable river is *primâ facie* in the Crown. This case does not require that we should dispose of that question either way, but it is fit, as it has been urged, that we should state our opinion upon it.

My Lords, this is a case of compromise. It is not the less a case of compromise or of contract between the parties, that that compromise or contract is set forth in the provisions of a local act of parliament. The compromise, as the preamble to the 18th and 19th sections of the act sets forth, was for the purpose of preventing disputes. For that purpose, before the case of Mr. Todd had been decided, and while the case was pending. these parties agreed to take one-half of what they might have been held entitled to in the alveus of the river, or in the soil which the river had covered upon a certain plan. Upon the valuation, they agreed to take one-half: and it was agreed, on the other hand, that that half was to be taken and accepted by them in lieu of all their rights.

But can it be said, because Mr. Hamilton was a party to the compromise, and has a right to the money in virtue of that compromise, therefore the Crown has a right to come in in the place of Mr. Hamilton, to be substituted for him, and to claim it? I see nothing in this act of parliament which gives that right to the Crown; and I do not understand how it is possible to contend that the Crown can so come in, any more than I think it could have been contended for suppose the compromise had turned, not upon giving one-half of the lands required to be taken by the Trustees for improving the navigation of the river, but a certain sum might have been paid to these parties without any reference to the land at all—without any reference to the number of acres or the number of perches taken for the improvement of the river. If a certain sum had been agreed to be given, in consideration of which they were to abandon all possible claims against the Trustees, could it have been said that the Crown would have had the right to come

[1] A navigable river, as used in the older English authorities and in the sense of this rule, means a river where the tide flows and reflows. There are several rivers navigable for some miles above the flow of the tide, and as to these, the rule referred to in this case does not apply. See *Murphy* v. *Ryan*, 2 Ir. Rep. C. L. 143.

in and say—"If we, the Crown, had been a party to this proceeding, we should have required that a sum of money should have been given to us, in lieu of any claim which we might have set up to any part of the land now covered by the river, which might have been laid by for the purpose of improving this navigation"? I do not think, in that case, there would have been a pretence for the Crown claiming to be so entitled. I think there is no more pretence for that claim now. My Lords, it is impossible to get over the words of § 20—"one-half the gross value, after such reduction, shall be paid by the said Trustees, and shall be accepted by the said owners of the adjacent lands as the full price of the ground or soil so required."

With respect to the saving clause, I entirely agree with what my noble and learned friend has said, that you cannot out of this saving clause construe any right to be given to the Crown. The right which the Crown had independently of it and previously to it, is saved, and nothing more. The Crown is not to have its right lessened nor diminished; but nothing whatever is given to the Crown by the saving clause, except the mode of ascertaining its rights by petition to the Court of Session. As, generally speaking, you cannot raise out of a proviso in a statute, nor out of an exception in a statute, any affirmative enactment, so you cannot, generally speaking, raise out of a saving clause any affirmative or positive right whatever.

I am therefore of opinion, that the Court below has well decided this case. I agree, generally speaking, in the reasons upon which their Lordships have proceeded. Perhaps some remarks might have arisen upon one or two of the statements in one of the learned Judge's reasons, with which I do not quite agree; but, generally speaking, those reasons appear to me to be perfectly satisfactory.

I am exceedingly sorry that, according to the inflexible rule in these cases, we cannot here give costs as against the Crown; but the hardship is not inconsiderable, of the party having been obliged to come here by this appeal, and thereby to expend pretty nearly the whole of the money to which, as the fruit of our judgment, he would be entitled.

Interlocutor affirmed.

First Division.—Pemberton. Crawley and Gardiner, *Appellants' Solicitors.*—G. & T. W. Webster, *Respondents' Solicitors.*

MARCH 22, 1852.

THE TRUSTEES of the HARBOUR of DUNDEE, *Appellants, v.* WILLIAM STARK DOUGALL, *Respondent.*

Free Port and Harbour—Regalia—Negative Prescription—Statute—Clause—Construction—*The Dundee Harbour Trustees acquired under statute from the town of Dundee, their right of free port, constituted by ancient charters, which set out the limits as including several miles on each side of a wide estuary, but the statutes spoke only of "the harbour of Dundee and the precincts thereof," not stating the precise limits. The trustees raised an action of declarator, concluding to have the sole and exclusive right of levying dues at Ferry-port-on-Craig, a harbour on the opposite side of the firth, which belonged to the defender Dougall, and was within the limits of the old charters. Dougall shewed no grant of "free port," but of "portus" only, but alleged and proved, that vessels had from time immemorial loaded and unloaded at Ferry-port-on-Craig, without paying dues to the Dundee Harbour Trustees.*

HELD (affirming judgment), *that this was a good defence to the action, and that the statute transferring the harbour did not take away any existing exemption.*

Public Bodies—Negative Prescription—*Public trustees appointed by statute to discharge public duties, may have their rights cut off by the negative prescription running on* a primâ facie *title, though no positive prescription is proved.*

Process—Expenses—*If the result of an appeal is only such a variation of the interlocutor appealed against, as might have been obtained by application to the Court below, the appellant must pay costs.*[1]

The Trustees of Dundee Harbour appealed against the interlocutors of 26th May 1847, 5th July 1848, and 20th July 1849, and maintained in their case, that they ought to be reversed for the following reasons: 1. Because the statute 6 and 7 Vict. c. 83, empowered the appellants to levy the dues contained in the schedule appended to the act, within the port and harbour of Dundee or the precincts thereof, and Ferry-port-on-Craig is within these precincts.—6 and 7 Vict. c. 83, §§ 56, 58; Lord Medwyn's obs. in *Campbelton case*, 7 D. 223; Hale *de Portibus Maris*, c. 2; Statute 1606, c. 33, Thomson's Acts; *Moncrieffe* v. *Navigation Commissioners of Perth*, Feb. 15, 1834, noticed in 12 Sh. p. 459. 2. Because the omission to levy dues at one

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[1] See previous reports 11 D. 6, 181, 1464; 20 Sc. Jur. 542; 21 Sc. Jur. 35, 551. S. C. 1 Macq. Ap. 317: 24 Sc. Jur. 385.