

[8th June 1841.]

CHARLES TODD, Merchant in Glasgow, Appellant.<sup>1</sup> (No. 13.)

[*Lord Advocate (Rutherford).*]

HENRY DUNLOP, Lord Provost of the City of Glasgow,  
and others, Trustees for improving the Navigation  
of the River Clyde and enlarging the Harbour of  
Glasgow, Respondents.

[*Attorney General (Campbell).*]

*Property — River.* — Held (affirming the judgment of the Court of Session), that a party whose predecessor obtained from a corporation a feu right to land adjacent to, and described in his feu contract as bounded on the north by, a public river, has no right of property in ground afterwards gained from the channel of the river by the operations of the corporation, as trustees in improving the navigation of said river.

Observed, per Lord Chancellor: The case is ruled by that of *Smart v. Magistrates of Dundee*, affirmed by the House of Lords, 22d November 1797 (8 Brown's Cases in Parliament, p. 119), where it was held that “where  
“ the sea flood is stated as the boundary of premises  
“ granted on the shore of a sea-port, being an incor-  
“ porated burgh, this does not give the grantee a right to  
“ follow the sea, or to land acquired from it, or left by  
“ it where it has receded, in prejudice to the corporation  
“ having a right vested in them to the whole territory of  
“ the burgh.”

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<sup>1</sup> Fac. Coll., 23d Jan. 1840; 2 D., B., & M.

2D DIVISION.  
 Lord Ordinary  
 Jeffrey.  
 Statement.

BY statutes 32 Geo. 2. c. 62., 10 Geo. 3. c. 104., and 49 Geo. 3. c. 74., the lord provost, magistrates, and town council of Glasgow were appointed trustees for improving the navigation of the river Clyde, and were authorized to cleanse, enlarge, and improve the said river, to make and keep it more passable for shipping, to erect all necessary walls and other works, and “to alter, direct, and make, or cause to be altered, directed, and made, the channel of the said river through any land, soil, or ground,” part of the then bed of the river.

By the 6 Geo. 4. c. 117. certain other trustees were added to the magistrates and council; and besides the authority in the former statutes, they were authorized to make new and additional walls. In section 2. of that statute there was this reservation:—“reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the said river, or other rights competent to them at common law.” By sect. 5. of the same act it is declared, “that where, by the formation of any jetties, connecting dykes, or other works under or by virtue of the said recited acts or of this act, the access to the river, previously enjoyed by the owner and occupiers of the lands adjacent thereto, is or shall be impeded or obstructed, the said trustees shall leave or form such openings in the said jetties or connecting dykes, and also shall form such roads upon or along such jetties or dykes, at suitable and convenient distances, for such owners and occupiers, as may afford them equally free and easy communication at all times with the river, for the watering of cattle, and for the landing, embarking, and carting manure, farm produce, and other

“ articles; which openings and roads shall be kept  
 “ clear, and in good and sufficient repair, by the said  
 “ trustees, at their expense in all time coming.”

In 1792 John and David Todd acquired, under a feu-contract from the city of Glasgow, a piece of ground on the south side of the Clyde, and below the Broomielaw. It was described as “ consisting of one acre one  
 “ rood and thirty falls of ground, or thereabout, in  
 “ which measure both parties acquiesce, be the same  
 “ more or less;” and as “ bounded on the east by the  
 “ said continued road or passage, on the north by the  
 “ river Clyde, on the west by Sheilsburn, and on the  
 “ south partly by the property of the said John and  
 “ David Todd.”

The ground conveyed to David and John Todd by the feu-contract of 1792 afterwards came by progress into the person of the appellant, and continued to belong to him, with the exception of certain portions thereof, which he sold, in 1833 and 1837, to Thomas Wingate.

Subsequent to the date of the feu-right in 1792, the channel of the river Clyde was contracted, as the trustees averred, solely in consequence of artificial embankments and other operations performed by them and their predecessors, who, with the view of improving the navigable channel, erected embankments and built retaining walls on each side, by which the transverse section of the river was greatly lessened or contracted, and afterwards filled up the space between the wall on the south side of the river and the appellant's ground, so as to form a new tract of land; these operations, by which ground was taken from the bed of the river opposite his northern boundary, having been carried on

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within a recent period, and all performed by the trustees for the purposes connected with the navigation of the river. The appellant admitted that the last operation, whereby a large pool opposite his property was filled up, took place about the year 1826; but he alleged that the new ground was acquired partly by alluvial deposits, and partly by his own operations, as the proprietor of the adjacent land, as well as by those of the trustees.

The river trustees (respondents) having resolved to restore the channel of the Clyde to its former width, by cutting away the ground so gained on Mr. Todd's (the appellant's) northern boundary, the appellant, with a view to compensation, brought an action of declarator against the respondents, in the Court of Session, concluding, " And it ought and should be found and  
" declared, that the river Clyde forms the northern  
" boundary of the said subjects belonging to the pur-  
" suer as aforesaid; and that, under the servitudes or  
" burdens foresaid, the pursuer possesses and is entitled  
" to the full and absolute property of the subjects  
" down to the said river, and of the whole ground  
" extending to the said river, without distinction as to  
" whether the said ground formed part of the subjects  
" at the date of their original acquisition, or has since  
" been gained in consequence of the river having  
" receded, or its channel having been contracted or  
" narrowed, or of any operations employed for the  
" purpose of so contracting or narrowing the said  
" channel, or in connection therewith; and that, subject  
" to the servitudes or burdens foresaid, the pursuer is  
" entitled to exercise the whole rights of absolute pro-  
" prietor over the whole of the said ground, and to

“ sell, dispoſe, alienate, and convey the ſame, as full  
 “ and abſolute proprietor thereof.”

The reſpondents, in defence, pleaded inter alia that the ground in diſpute having been recently taken from the channel of the river by artificial means and operations, with a view to the improvement of the navigation, did not accreſce or belong to the purſuer (appellant).

A record having been made up and closed, the Lord Ordinary ordered caſes, with which avizandum was (11th July 1839) made to the Court, his Lordſhip ſtating his views of the whole cauſe in a note in the terms ſubjoined.<sup>1</sup>

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<sup>1</sup> “ *Note.*—This caſe, like all others which turn upon principles and  
 “ intereſts ſo large, and (if the epithet may be allowed) expaſible, is  
 “ not unattended with difficulty; but the Lord Ordinary is of opinion,  
 “ that the weight both of principle and of authority is with the truſ-  
 “ tees for the navigation.

“ It is a long and by no means an eaſy ſtep, from the caſe of gradual  
 “ and imperceptible acceſſion, by the action of natural cauſes, to great  
 “ and ſudden acquiſitions of additional land, by artificial operations of  
 “ the acquirer himſelf; but it is a ſtill greater and far more difficult  
 “ ſtep, from this laſt, to the allowance of ſuch acquiſitions to an inactive  
 “ proprietor, when theſe have been obtained by the artificial operations  
 “ of a third party, and moſt of all by the operations of a public ſtatute-  
 “ tory board, performing them (tentatively or permanently) for the  
 “ improvement of a local navigation, and met, when afterwards pro-  
 “ ceeding to remove them, in the diſcharge of the ſame duty, by a claim  
 “ on the part of the alleged (gratuitous) acquirer.

“ Whatever other difficulties may be in the caſe, the Lord Ordinary  
 “ has no idea that the purſuer can ever make good, againſt ſuch  
 “ defenders, the broad and ſweeping right he aſſerts ‘to follow the  
 “ ‘river’ to whatever diſtance it may be carried, becauſe his property is  
 “ deſcribed in his titles (though they limit him to a precise meaſure-  
 “ ment by roods and yards) as bounded by that river. To ſhow the  
 “ fallacy of this propoſition, it is only neceſſary to conſider to what  
 “ conſequences it would lead. By the ſtatutes the truſtees have power  
 “ not only to deepen, widen, or contract the channel of the river, but  
 “ alſo to ‘ſtraighten, direct, or alter its courſe.’ But ſuppoſe that in the  
 “ exerciſe of this power (and to avoid a long bend like thoſe on the  
 “ Forth) they had thought fit to carry the channel of the river quite  
 “ away from its former bed oppoſite to the purſuer’s ground, and to  
 “ lead it through a new cut three or four hundred yards further off,

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The Lords of the Second Division afterwards heard the cause argued in their own presence by one counsel

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“ thus interposing between him and the actual stream a large tract of  
“ land (twenty or thirty acres, it might be, in extent), would the pursuer  
“ be entitled to take to himself the whole of this interjected territory, in  
“ virtue of his alleged right to have the river, at all events, for his boun-  
“ dary, and consequently to follow it wherever it went? The notion is  
“ evidently extravagant; but the pretension might lead to still greater  
“ absurdity. His titles, he says, gave him an inalienable right to have  
“ the river for his boundary ‘on the north.’ But suppose the trustees  
“ had found it necessary to divert its course in an opposite direction, and  
“ to carry its channel some three or four hundred yards to the south of  
“ the pursuer’s acre and half of ground, what would become of his north  
“ river boundary then? Or how would he proceed with his claim to all  
“ the land between him and the river on the south?

“ The propositions in law at the bottom of page 15. of the defenders  
“ case, and the illustrations beginning at the middle of page 19, seem  
“ to the Lord Ordinary to admit of no answer. Some others, however,  
“ to the same effect, have occurred to him. Suppose that, instead of  
“ closing in their retaining wall up to the land at each end, the trustees  
“ had left it open, and, for the sake of quickening the action of the  
“ water, had constructed it in the form of a breakwater running along  
“ the shore, at a distance of but a few yards, but completely insulated,  
“ and leaving a narrow run of water between it and the old original  
“ bank, could it be doubted that, in such a case, the pursuer, though  
“ losing all the benefit of his open frontage to the river, and cut off from  
“ any useful access to its navigable channel, must yet have been con-  
“ tented with his original boundary, and could have had no pretensions  
“ to the property of the unsightly bulwark by which he was excluded?  
“ But suppose, again, that this insulated breakwater had been faced up  
“ as a quay on the side next to the channel, and levelled on the top  
“ accordingly, and that, in order to make it accessible for the purposes  
“ of trade and navigation, the trustees had connected it with the shore  
“ by two or three bridges across the interposed narrow water-run, would  
“ the property of it have been in this way transferred by what he calls  
“ ‘legal accession’ to the pursuer? But if open-arched bridges would  
“ not have this effect, would the substitution of a solid mound or two, as  
“ the means of communication, if placed towards its centre, have any  
“ other? It would be strange if they could; and yet, if two such mounds  
“ were placed, one at each of the two extremities of such a breakwater,  
“ they would bring it precisely into the condition of the original front  
“ wall or quay of the trustees, which the pursuer confidently maintains  
“ did convert all the space behind it into his private property. It is  
“ inconceivable, however, that such a trifling change in the plan of the  
“ connecting passages should have so extraordinary an effect; and, if  
“ the trustees could certainly have removed their breakwater, if, after a

of a side, and on the 23d January 1840 pronounced the following interlocutor:—“ The Lords, having

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“ certain trial, it was found not to be serviceable, without raising any  
“ right in the pursuer to compensation in any of the former cases, the  
“ Lord Ordinary cannot understand how he should have such a right in  
“ the last, which, however, is substantially identical with that which has  
“ occurred. It appears to him, in short, that the trustees must always  
“ have a right to remove any embankment they may have erected in the  
“ river, when they find it does not answer their purpose, and that this  
“ right cannot be affected by the mere form or plan of such embankment,  
“ but must be the same whether it is constructed as a detached break-  
“ water or an advanced dyke, touching the shore only at its upper or at  
“ both its extremities, or an open wooden quay resting on a low embank-  
“ ment overflowed at every flood tide.

“ The pursuer dwells much on the long possession he has been allowed  
“ to hold of the added ground, and of the plain finality (as he contends)  
“ of the operations by which it was added. But upon both points there  
“ is great and palpable exaggeration. The Lord Ordinary doubts  
“ whether the trustees could, consistently with their duty, have announced  
“ any of their operations as final, while their engineers told them there  
“ was room for improvement; and certainly there never has been any  
“ such announcement. The whole of their operations in fact have been  
“ tentative; and their general character has varied, and even been in  
“ some degree reversed, after years of experience had pointed out the  
“ errors of the first conception. The two first acts, for example, con-  
“ template improvements, chiefly by the construction of artificial chan-  
“ nels, with locks, dams, and sluices, and all the later ones, by scouring  
“ and cleaning the natural bed of the stream; and while the act of  
“ 1809 points mostly to gaining additional depth, by narrowing the  
“ water-way, that of 1825 provides most anxiously for bringing up a  
“ larger mass of tide-water, and securing sufficient width for the pur-  
“ poses of navigation. It is not disputed, accordingly, that from the  
“ very first the plan and principles of the operation have undergone  
“ material changes; and that, though the work has been going on ever  
“ since 1758, it was not till 1826 that the experiment of an advanced or  
“ contracting bulwark in front of the pursuer's ground was completed.

“ Since that time there cannot well have been any thing like a settled  
“ state of possession; and, considering the nature of the subject, that  
“ possession could scarcely be attended with many indications of owner-  
“ ship. The pursuer accordingly has admitted that the added ground  
“ has been chiefly used for the purposes of navigation, as a towing-path  
“ or landing-place, &c.; and that, except in carrying his drains through  
“ it, and occupying a small part as a tank or basin, he has had no bene-  
“ ficial use of it. But, in truth, he admits enough to show that the  
“ occupancy (or right to occupy) as proprietor has been mostly with the  
“ trustees, or those for whose benefit they were acting. He admits that

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“ heard the counsel for the parties, and advised the  
“ cause, sustain the defences, assoilzie the defenders,

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“ they were fully entitled to use it for all purposes connected with the  
“ navigation and trade of the river; and consequently, not only to have  
“ a towing-path and landing-stairs there, but to have occupied it with  
“ cranes and windlasses for unloading vessels, and posts or pauls, and  
“ ground rings for mooring or making them fast, and all the other  
“ apparatus of a landing-place within the city’s grant of free harbour;  
“ in short, that they were entitled to take the same use of it as they  
“ might have taken of any other quay or wharf which they had erected  
“ on ground belonging to themselves, or had constructed as a detached  
“ bulwark in the bed of the river, connected with the shore only by  
“ mounds or bridges. The first question to be asked, therefore, is,  
“ whether, if, instead of building this quay in the bed of the river,  
“ beyond the pursuer’s original property, they had cut off an equal  
“ breadth—say twenty-five or thirty yards—from what was included  
“ in his measurement, and then in his occupancy, and built up a pier or  
“ quay for such purposes on the space so laid open, the pursuer would  
“ not have been entitled to have been paid for it, as ground actually  
“ taken from him by the trustees for the use of the navigation? But if  
“ his admitted property would have been justly considered as taken from  
“ him, by being appropriated to such uses, it would certainly be rather  
“ extraordinary if a quay, built on what never was his property, should  
“ yet become so by being so appropriated. The present claim of the  
“ pursuer goes down, it will be observed, to the very water edge, and  
“ includes the whole space occupied by the advanced dyke or quay of the  
“ trustees; not, however, to the effect of excluding them from the actual  
“ use of it, which he admits to be preferable to his own, but to the far  
“ more extraordinary effect of preventing them from taking it away when  
“ they find that it does not promote, but obstruct, the uses for which it  
“ was erected.

“ He does not (or at least he cannot well) deny, that if, within a  
“ year or two of its erection, they had found it necessary to remove this  
“ their dyke from the bed of the river, they might have done so with-  
“ out making him any compensation. But he seems to think that,  
“ because it was allowed to stand for twelve or fourteen years, they can  
“ now deal with it only as his property. The Lord Ordinary does not  
“ understand this. On the contrary, he is very much inclined to go  
“ along with what is said by the trustees, as to the insufficiency even  
“ of a prescriptive possession, to sanction obstructions in navigable  
“ waters. He is indeed pretty clearly of opinion, that if the opera-  
“ tions had been wholly performed by the pursuer himself, and for the  
“ sole purpose of gaining ground from the river, it would have been  
“ competent for the trustees to have removed them, even after forty  
“ years possession, if it had then been clearly made out that they ope-  
“ rated as such obstructions. That the fact is so, he thinks, is sufficiently



“ and decern, but find no expenses due to either  
 “ party.”

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“ proved by the reports of their engineers, upon the faith of which they  
 “ are now about to remove them, and farther to enlarge the channel, at  
 “ very great expense; and he does not see that it should make any  
 “ difference, in the pursuer's favour at least, that they were originally  
 “ made, not at his expense but theirs; and not with the most remote  
 “ view to his benefit, but under an erroneous expectation of improving  
 “ the navigation.

“ The Lord Ordinary will not go into the authorities referred to on  
 “ either side, no one of which he thinks bears materially on the hinging  
 “ points of the present case, which are in the peculiar powers and  
 “ privileges of the defenders, as parliamentary trustees. But even upon  
 “ the more general questions involved in former cases, it appears to him  
 “ that the pursuer has little to found on beyond certain obiter dicta  
 “ reported (more or less correctly) as having fallen from judges, no  
 “ doubt of great authority, when deciding cases which did not call for  
 “ the announcement of any such large principles; and he must add,  
 “ that the account given (at page 28. of the defenders case) of the pro-  
 “ ceedings in the House of Lords, as to the most recent of these cases,  
 “ goes very far to shake the authority, not only of its decision in this  
 “ Court, but of the previous decision in that of Campbell and Brown.  
 “ But the true ground of the Lord Ordinary's opinion here was not, as  
 “ he conceives, involved in any of those cases.

“ Before concluding, however, he thinks it right to say, that the only  
 “ thing that has occasioned any hesitation in his mind is that express  
 “ provision in the act of 1825, by which, while giving ample powers to  
 “ widen the channel, if necessary, there is ‘ reserved to the proprietors  
 “ ‘ of adjacent lands all rights to soil acquired from the said river, or  
 “ ‘ other rights competent to them at common law.’ There is some-  
 “ thing perplexing, no doubt, in this distinct reservation; and it is not  
 “ easy to adopt the trustees explanation, that it was a mere redundancy,  
 “ and gave no benefit or security that would not have been enjoyed  
 “ without it. The Lord Ordinary holds, that it gave something more  
 “ than this, but thinks that what it gave was security rather than any  
 “ new right; and while he cannot construe it, therefore, as excluding  
 “ any right which would otherwise have been clearly in the trustees, he  
 “ conceives that its insertion will be sufficiently explained and its object  
 “ satisfied, by holding that it was meant only to secure to the adjacent  
 “ proprietors such acquisitions of soil as might have come to them by  
 “ natural imperceptible accession, and to exclude what might have been  
 “ a plausible claim on the part of the trustees to interfere, without pay-  
 “ ment, with such acquisitions.

“ He has reported the case to save a little time and expense to the  
 “ parties, and not, as will be seen, on account of any difficulty he should  
 “ have felt in deciding it.”

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Statement.The pursuer appealed.<sup>1</sup>

In the course of the Lord Advocate's address, in opening the case of the appellant, the attention of the House and of the bar was directed by Lord Brougham to the case of *Smart v. Magistrates of Dundee*.<sup>2</sup>

Ld. Brougham's  
Speech.

LORD BROUGHAM.—I find that the case of *Smart* is not in the Faculty Collection, but there is a full report of it, taken from the appeal cases, in 8 *Brown's Cases in Parliament*. I have looked into that case, and it appears to me to bear closely on the present, in so far as the general question of law raised in both cases is the same, and the pleas maintained for the parties respectively exactly similar. There Lord Monboddo, as Ordinary, decided in favour of the pursuer, and found, “that as the pursuer's property is bounded on the south by the sea-flood, he has a right to whatsoever land the sea leaves adjoining to his property, or that he shall acquire by any *opus manufactum*, not prejudicial to the navigation of the river;” but the Court altered, and sustained the defences; the defence in substance being, that the ground in question was not in the pursuer, but in the town of Dundee; which last judgment was affirmed.

Ld. Chancellor's  
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LORD CHANCELLOR.—That case shows that the ground so acquired was in the grantor, and not in the grantee. How then can the grantee here claim ground, acquired by the operations of the trustees, upon the

<sup>1</sup> The appellant having died before the hearing, the appeal was revived in the names of his executors.

<sup>2</sup> Affirmed, 22d Nov. 1797; 8 *Brown's Cases in Parliament*, 119.

solum which belonged to the grantors? The case of Smart rules the present, and it also appears to be consistent with the doctrine in Erskine, as quoted in the papers.

*Lord Advocate.* — If your Lordships be of opinion that the two cases are not distinguishable in their circumstances, I shall not press the argument on the general point. But the terms of the statutes, particularly the reservation in the act of 1825, deserve consideration.

*Mr. Attorney General.*—That merely reserves to proprietors what was in them; it does not confer any new right. The respondents case below was, in truth, overloaded with matter from these statutes.

LORD CHANCELLOR.—The clause referred to leaves the law as it stood before. I propose, that your Lordships do affirm the judgment of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, therein complained of, be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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*Appellant's Authorities.* — Marquess of Tweeddale v. Kerr, 14th May 1822; Campbell v. Brown, 18th Nov. 1813; Boucher v. Crawford, 30th Nov. 1814; Ersk. 2. 1. 5; Fisher v. Duke of Atholl's Trustees, 3d June 1836; Ersk. 2. 1. 6; Ibid. 2. 6. 17; Innes v. Downie, 27th May 1807, Baron Hume's Dec. p. 552; Magistrates of Culross v. Geddes, 24th Nov. 1809, Ibid. 554; Leven v. Magistrates of Burntisland, 27th May 1812, Ibid. 557.

*Respondents Authorities.* — Duke of Atholl v. Maule, 7th March 1812, affirmed, 5 Dow, 282; Ersk. 2. 1. 5; Craig, 1. 16. 5; Stair, 2. 1. 5; see Smart, 22d Nov. 1796, affirmed 22d Nov. 1797, 8 Brown's Parl. Cases, 119; Duke of Atholl v. Maule, 4th Feb. 1817; 2 Bell's Illust. 2; Ersk. 2. 6. 3; Dig. b. 43. tit. 12 & 13; Colquhoun, 21st Dec. 1793, Mor. 12,827; Grant, 9th March 1781, Mor. 12,820; Forbes, 19th Feb. 1824, affirmed, 1 W. & S. 583; Menzies, 4th July 1826, reversed, 3 W. & S. 235; see Attorney General v. Richards, Trin. Term, 1794, 2 Anst. 603; Rex v. Smith, Trin. Term, 1780, 2 Doug. 441; Rex v. Lord Grosvenor and others, Trin. Term, 1819, 2 Stark. 511; and Vought v. Winch, Trin. Term, 1819, 2 B. & A. 662, 663; Melville, 29th May 1830; Campbell, 19th May 1836.

ARCHIBALD GRAHAME — RICHARDSON and CONNELL,  
 Solicitors.