

THE LORD ADVOCATE FOR SCOT-
LAND AND H. M. COMMISSIONERS } APPELLANTS.
OF WOODS AND FORESTS, }

HAMILTON, RESPONDENT (a).

1852.
9th, 11th, and
12th March.

Upon a compromise of doubtful rights, a third party cannot come in and claim the fruits of that compromise by a title paramount.

The *alveus* or bed of a public navigable river is *inter regalia*.

But where the Trustees of a public navigable river had agreed, by way of compromise, to pay an adjacent landowner a sum of money in respect of certain soil, the right to which was in dispute, the Crown was not allowed to claim the money, although the soil in question had formerly been part of the *alveus* or bed of the river, and was, consequently, *inter regalia*.

Whether the Crown *ought* to seek compensation in such a case,—*Quære*.

But, even were this held affirmatively, the Crown should establish its right by a substantive independent proceeding; and not interfere with the compacts of private parties.

In general, a right cannot be raised out of a mere *salvo* or exception in an Act of Parliament.

Refusal of the House to award costs against the Crown.

State of the authorities regarding the rule that the Crown neither pays nor receives costs.

THE Trustees appointed under the authority of Parliament for improving the navigation of the Clyde had in former times proceeded upon the principle of narrowing and deepening the channel; the consequence of which operation was an accumulation of soil at the sides of the river.

By the pleadings, however, it appeared that the Trustees had, “of later years,” seen reason to reverse their policy; for they had “become satisfied, under eminent advice, that the proper course of improving the navigation was not to narrow, but to *widen* the channel.”

In this process of widening, it became necessary to reclaim or resume certain soil, which had previously formed a part of the *alveus* or bed of the river. And here a question arose with the adjacent landowners, one of whom (Mr. Charles Todd) brought an action in the Court of Session, to have it declared that the Trustees were not entitled to take the soil without making compensation for it. Judgment went against Mr. Todd; and, upon his appealing to the House of Lords, the decision of the Court of Session was, on the 8th June, 1841, affirmed (b).

(a) This case is reported in the Court of Session Reports, Second Series, vol. xi. p. 391.

(b) 2 Rob. 333.

In 1840, when the Court of Session had given judgment against Todd, but before the decision on the appeal, the Trustees applied to Parliament for an Act, giving them additional powers as conservators of the navigation. While the bill was in progress, an arrangement was concluded between them and certain landowners—including the above Respondent—whereby, as a compromise of doubtful rights, they agreed to receive and be content with one moiety or half of the sum which might be ascertained to be the value of the soil intended “to be taken for widening the river.”

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.

Accordingly, the 20th section of the Act (*a*) as passed, contained a provision that the soil in question should be valued; that a certain map or plan of the river, prepared in 1800 by a surveyor named Kyle, should determine the extent; and that the adjacent landowners should accept half the amount of the estimated value in full satisfaction of all their demands.

The question of value was determined by an arbitrator, who awarded 775*l.* to the Respondent.

This money was claimed by the Crown; and the question was whether the Crown had any right to it.

To solve this question, the Appellants, under the authority of the Act, presented a petition to the Court of Session, praying a declaration of right to the aforesaid sum of 775*l.*, and more especially praying to have it found, that it “justly and legally belonged to her Majesty, her heirs and successors, or to the Commissioners of Woods and Forests in her Majesty’s right.”

The Court of Session, on the 23rd January, 1849, “refused the desire of the said petition, and decerned in favour of the Respondent, William Hamilton, for payment

(*a*) 3 & 4 Vic. c. 118; a local act, intituled “An Act for farther deepening and improving the River Clyde, and enlarging the Harbour of Glasgow, and for constructing a Wet Dock in connection with the said River and Harbour.”—4th August, 1840.

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.

of the said sum of 775*l.*, with the interest due thereon ; but found no expenses due.”

Against this judgment, the *Lord Advocate*, and other officers, representing her Majesty’s interest, appealed to the House of Lords.

Mr. *Anderson* and Mr. *W. M. James*, for the Appellants, urged that they were entitled to the 775*l.*, because part of the soil, in respect of which it was awarded, formed the *alveus* of the Clyde, a public navigable river, and because the rights of the Crown were expressly saved by the Act. They cited *Craig de Fendis*, 1, 16, 11 ; *Stair*, 2, 1, 5 ; *Erskine*, 2, 6, 17 ; *Bell’s Principles*, 639, 648 ; *Hale de Jure Maris* (Harg. edition), pp. 12, 13, 14 ; *Grant v. Duke of Gordon*, *Morr.* 12, 8, 20 ; *Smith v. Officers of State*, 11th March, 1846 ; 8 *Second Series*, 711 ; 6 *Bell’s App. Ca.* 487.

The *Solicitor-General* (Sir *Fitzroy Kelly*) and Mr. *B. Andrewes*, for the Respondent : The *alveus* of public navigable rivers is vested in the Crown upon trust for the public ; and the beneficial interest may, in certain cases, be acquired by adjacent landowners (*a*). This is the first instance in which such a claim as the present has ever been advanced. To recognise it would be to upset the first principles of law ; the proposition, on the other side, being neither more nor less than *this*—that they are to take the benefit of an agreement to which they were no parties—and yet that they are to be free from all its counter-stipulations. Assuming that the soil in question was originally part of the *alveus*—that circumstance gives no right to the Appellants to intervene and claim the fruits of a compromise founded upon principles of mutual concession ; which, as against the Crown, can have no operation.

Mr. *Anderson* replied.

(*a*) *Culross v. Lord Dundonald*, *Morr.* 1, 2, 8, 10.

The LORD CHANCELLOR (*a*):

As I think this case admits of no doubt, I am unwilling to advise your Lordships to delay giving judgment upon it.

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.

Lord Chancellor's
opinion.

Under the Act of Parliament, the Trustees 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 their own benefit, and pursuing for their own profit a private speculation: but the public duty, which, to a certain extent, would have fallen upon the Crown, of keeping this navigation in a proper state, has been devolved by the Act upon these Trustees.

With respect to the question which has been mooted as to the right of the Crown to the *alveus* or bed of a river, it really admits of no dispute. Beyond all doubt, the soil and bed of a river (we are speaking now of *navigable* rivers only) belongs to the Crown.

Accordingly, the Act of Parliament expressly saves to the Crown its right to the *alveus*, of which the ground in dispute in this cause originally formed a portion. The Trustees, in the execution of their powers, narrowed the channel by raising certain banks or obstructions, the parts which intervened became silted up, filled with rubbish, stones, sand, and other substances, and at last there was a formation of something like solid land, connecting the adjoining land with the river. Now, I apprehend, in point of law, that *that* portion would belong to the Crown.

When again the Trustees, in order to enlarge the bed of the river to its former dimensions, required *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 their right would exist? The Crown never could have interposed to prevent that property,

(*a*) Lord St. Leonards.

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.
—
*Lord Chancellor's
opinion.*

its own property, from being restored to the old channel. It is very true the collections of sand, stones, earth, and other substances, which had accumulated, and which formed a solid bank, would be removed, because such a bank was an obstruction ; but the soil of the channel, remaining unchanged, would belong to the Crown precisely 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 ; thereby not re-vesting a right 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 ; which, proceeding to give further powers to the Trustees of the navigation, never once refers to the rights of the Crown. It expressly authorises the Trustees to take the banks. The very object of the Act of Parliament was to enable them to do so ; 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 the Act has any provision for that purpose.

The Act of Parliament (putting aside the 124th clause for a moment) is just what one would have expected to find it.

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 said, "I choose to stand upon my right ; I will submit to no compromise." He asserted

his right to the whole of the soil against the Crown, and against everybody else. Before that question was decided, this Act of Parliament passed.

LORD ADVOCATE
FOR SCOTLAND

v.
HAMILTON.

Lord Chancellor's
opinion.

The other class of proprietors (among whom was Mr. Hamilton, the present respondent) 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, or it is in the Crown, or it is in the owners of the adjoining land. Then see what would be the consequences. The Trustees would, of course, rely upon their own right. As regards the other parties, there were two conflicting claimants, the Crown claiming the whole right, and the adjoining proprietor claiming the whole right. The Trustees, therefore, being under the necessity, and having the power, to take the very land in question, whatever disputes might exist with respect to the ownership, having the duty and the obligation imposed upon them to use that land for the purpose of the improvement of the navigation, what, I desire to know, was there to prevent them from buying off either claimant? If you wish 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 such a compromise, you have, in short, one of the contesting parties out of the field. There is nothing irrational or improbable in *that*—nothing, as I apprehend, at all out of the common course of business.

What shape, then, does the Act of Parliament take? It recites that there are two classes of proprietors, and it contains provisions as diametrically opposite to each other as provisions can be. It contains one set of

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.

Lord Chancellor's
opinion.

provisions applying to those landlords who have agreed to what I call a compromise, and another set of provisions applying to those who had stood upon their rights and had declined to compromise. As regards those who had compromised, the language of this Act of Parliament is perfectly explicit; and its sense and substance are so plain, that no man can doubt what the true construction is. It says that a certain line shall be the boundary between the lands and the *alveus*, and that Mr. Kyle's map shall decide what is, and what is not *alveus*. Then as regards those persons on the part of whom that transaction had taken place, it declares that, without having recourse to any other authority, that particular map shall bind both parties. It then enacts that the land shall be valued, and that one-half of 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 consigned and appropriated to abide future decision. There is no such clause nor anything approaching it. There are incidents therefore in this mode of dealing with the subject which prove a compromise, and which could only be attained by concession.

But what takes place with respect to the *other* class of proprietors? As to them we have not a compromise. The Act of Parliament says expressly that *their* rights shall in no manner be injured or affected by it. 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 show the *alveus*

correctly, but because there was no compromise, no concession, no agreement. There was therefore to be a map made, for the purpose of ascertaining what portion of that ground was *alveus*;—and 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? It was not to be paid by the Trustees and accepted by those parties; but it was to be consigned by way of deposit and to abide decision.

LORD ADVOCATE
FOR SCOTLAND

v.
HAMILTON.

Lord Chancellor's
opinion.

But to return to the *compromising* proprietors, the Crown desires to have the benefit of the agreement come to with them, and of the concession made by them. But how can this be? How can the Crown stand in Mr. Hamilton's place? Mr. Hamilton has accepted for his right half the purchase money. The Crown, which asserts a right to the whole, comes here to get the half; not, however, relinquishing its right to the whole. Was there ever such a contention? 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 to the whole soil of this river, and to every part of it? If it had brought the Trustees here properly, the question would have been agitated and would have been decided as a solemn point of law. Such a course 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 upon his 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 then to have another suit and another hearing in this House with regard to another 775*l.*, the value of the other half of this property?

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.
—
*Lord Chancellor's
opinion.*

My Lords, the only question remaining is about the reservation of the rights of the Crown in section 124;—which is an absolute reservation as regards the soil. The soil, therefore, will 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 river; and all parties are left in their original position. The section is certainly difficult to read in such a way as perfectly to comprehend it; for it is as laboriously and ingeniously contrived to puzzle, as any clause which I have seen for some time. But though it saves the title, it confers no new right, except as regards procedure (*a*). It does not give any right as regards property or interest.

My Lords, I very much regret that the House cannot award the costs to the Respondent of having been brought first to the Court below, and then to your Lordships' bar, upon so very plain a case; but I shall recommend to your Lordships that the interlocutor in the Court below be affirmed.

*Lord Brougham's
opinion.*

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. This case does not require that we should dispose of that question either way; but it is fit, as it has been argued, that we should state our opinion.

My Lords, this 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

(*a*) A right to proceed by way of summary petition instead of suit.

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, these parties agreed to take one-half of what they might have been held entitled to in the *alveus*, or in the soil which the river had covered according to 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 accepted by them in lieu of all their rights.

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON
—
*Lord Brougham's
opinion.*

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 claim it? I see nothing in this Act of Parliament which gives that right to the Crown.

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 or 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 or 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. And I am exceedingly sorry that, according to an inflexible rule, we cannot give costs as against the Crown (*a*); for the hardship

(*a*) "As it is the king's prerogative not to *pay* costs, so it is beneath his royal dignity to *receive* them." This is Blackstone's

LORD ADVOCATE
FOR SCOTLAND
v.
HAMILTON.
—
*Lord Brougham's
opinion.*

is not inconsiderable to the party having been obliged to come here, and thereby expend pretty nearly the whole of the money to which, as the fruit of our judgment, he will now be entitled.

Interlocutor affirmed.

plausible theory, 3 Comm. 400. And it governs the English courts of *Common Law*; but there is "no such general principle in Courts of Equity," 1 Sim. and St. 394. In *Attorney-General v. Corporation of London*, 12 Beav. 171, costs were awarded to the Crown, Lord Langdale observing, that "because at law there must be a certain rigid rule with respect to costs, it by no means follows that it should be a strict rule in *this* court. It is not so." This decision was affirmed by Lord Cottenham, 2 M'N. & Gord. 240; 2 Hall & Tw. 29. But what is, or ought to be, the rule in Scotland, where Law and Equity are administered by the same tribunal? That question seems to have been first considered in the House of Lords upon the appeal of the *Lord Advocate v. Lord Douglas*, 9 Cl. & Fin. 173, where it was determined that "an officer of the Crown suing on behalf of the Crown is not liable to pay costs, even although the suit may have been improperly instituted;" from which it follows, as a consequence, that the usual recognisance for costs exacted from all other appellants is dispensed with when the Lord Advocate, representing the Crown, is complainant.

PEMBERTON, CRAWLEY, & GARDNER.—G. & T. W.
WEBSTER.