divested, it follows that he is the creditor, and the title is on him. Accordingly the curator has a right to make use of the title in the ward and of his name in managing his affairs, and, among other things, in charging for his debts. In theory therefore and principle the objection now made does not appear to me to be a valid objection to the charge, which shows on its face that demanding payment in the name of the ward the curator requires it to be made to himself. The point is a somewhat fine one, but I think the charge is good.

LORD ADAM—With regard to the first point, I agree with your Lordship that it turns on the question whether or not the ward is divested of his estate by the appointment of the *curator bonis*. In this case the ward's estate has not been sequestrated. If that had been done, I do not know, and it is not necessary to consider, what effect it would have had on the present question, but the estate is still vested in the ward. It appears to me that the curator is appointed to supersede the ward in the management of his estate, as it is put in the passage quoted by your Lordship from Mr Bell, and the charge here seems to me to proceed on the authority of the curator, though in form at the instance of the ward. That, I think, is quite clear on the face of the charge from the fact that it demands that payment shall be made to the curator, and I think it is sufficient for the disposal of the case.

LORD M'LAREN—I agree with your Lordships that the authority and right of a *curator bonis* is correctly defined by Mr Bell when he says that a curator is appointed to supersede the ward in the management of his affairs. The appointment of a curator does not imply that the ward is divested of his estate or deprived of his civil rights, except in so far as is inconsistent with the institorial power given to the curator. When therefore an act, such as giving a charge, is done by the ward with the consent of the curator, it does not appear to me that the recognition of a right in the ward to act with the consent of the curator is in any way inconsistent with the view that the curator is the sole administrator of the ward's estate. It must be kept in view that these appointments are made on *prima facie* evidence (usually medical certificates) pointing to permanent or temporary incapacity on the part of the ward. The proceedings are not of a continuous nature, because everything that is done is supposed to be for the benefit of the ward, and he is not to be put under disability except in so far as necessary for the protection of his estate. When it is desired to have a person declared incapable of doing any legal act, *e.g.*, making a testament, a different form of proceeding is necessary. Therefore while I do not doubt that in most cases the more convenient course is for a *curator bonis* to act in his own name, I am not prepared to say that an act done by the ward with his consent is incompetent or invalid.

On the other points in the case I concur.

LORD KINNEAR—I am of the same opinion. The first point is highly technical, but in the execution of diligence technical rules must be strictly observed, and if this objection were well founded we should be bound to give effect to it, however unsubstantial the point may be. But I agree with your Lordship, for the reasons that have been stated, that it is not well founded, because although the ward is superseded in the management of his estate, the estate is not transferred to the curator, and the ward still remains vested in the rights of creditor in the bond. But since he is superseded in the management of his estate a charge in his own name for payment to himself would be bad, not upon any technical, but on this very substantial ground, that the purpose and effect of the appointment of a curator is to disable the ward from determining for himself questions of management, such as whether a bond should be called up or not. That became a question for the curator, who was bound to act, irrespective of the ward's wishes, upon his own responsibility, and could derive no additional authority from the consent or concurrence of his ward. The ward therefore cannot charge for payment, because he has no power to grant a valid discharge. But I think that this charge discloses that it is not a charge at the instance of the ward at all, but at the instance of the curator using the ward's name, that the charge is at the ward's instance in form only, and that the curator is shown to be the real charger by his demanding payment to be made to himself. On all the other points I concur with your Lordships.

The Court adhered.

Counsel for the Complainer — Comrie Thomson — Salvesen. Agent — Thomas M'Naught, S.S.C.

Counsel for the Respondent—M'Kechnie —Dean Leslie. Agents—Webster, Will, & Ritchie, S.S.C.

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*Wednesday, November* 25.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## THE LORD ADVOCATE *v.* THE CLYDE TRUSTEES.

*Crown — Title — Property — Solum of Sea Lochs — Trespass — Deposit of Dredgings.*

*Held* that the Crown possesses a title to the *solum* of sea lochs, like Loch Long, which run up into the country, entitling it, without alleging that the public rights of navigation and fishing are being in any way interfered with, to prevent any person trespassing upon such *solum* by depositing large quantities of solid matter thereon.

*Opinions* expressed that the Crown's title is one of property, and not merely of trust; and *opinions* indicated that the right of the Crown to the *solum* of the ordinary sea coast below low water-mark within the three mile limit is also a right of property.

The Right Hon. J. P. B. Robertson, Her Majesty's Advocate, acting on Her Majesty's behalf and on behalf of the Commissioners of Woods and Forests and of the Board of Trade, brought an action against the Trustees of the Clyde Navigation, incorporated by the Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. 149), to have it found and declared that they were not entitled to deposit or place earth, gravel, stones, mud, soil, or other material, dug, cut, dredged, or otherwise removed from the banks or bed of the river Clyde as defined by said Act, in any part of the narrow seas of the kindgom of Scotland, and in particular in Loch Long, being part thereof, and extending from Arrochar on the north to a straight line drawn from Strone Point in the county of Argyll in the west, to Barons Point in the county of Dumbarton in the east, and to have the defenders interdicted from depositing such dredgings accordingly.

The pursuer averred that the narrow seas of that part of Her Majesty's dominions known as the kingdom of Scotland, and the *solum* or bed thereof below low water-mark, belonged to Her Majesty *jure coronæ* subject to the public rights of navigation and fishing, and that the salt water loch or arm of the Firth of Clyde known as Loch Long was part of the narrow seas; the defenders, by virtue of the powers conferred upon them by the 76th section of their Consolidation Act 1858, were entitled to lay their dredgings upon "the most convenient banks" of the river, but that for many years they had desisted from this practice, and they had been in the habit of bringing the whole of their dredgings to Loch Long, and depositing them there; the dredgings were composed of earth, gravel, stones, mud, soil, and other material, largely mixed with the sewage which is poured into the river Clyde from Glasgow and various towns and villages upon its banks and those of its tributary streams; the volume of the dredgings now amounted to several hundred thousand tons per annum, and was yearly being increased.

The defenders, while admitting the substantial accuracy of the pursuer's averments, explained that the mode of disposal of the dredgings in Loch Long which had been openly carried on since 1862, had proved satisfactory in every way, that the discharges from the dredging barges were absolutely innocuous, that their operations had in no way affected the depth of the loch, and that the public rights of navigation were not thereby injured. They stated that the action had not been raised in vindication of any public right or interest, but at the instigation of certain persons residing on the banks of Loch Long, who had undertaken to indemnify the Crown against all expenses. They further added by way of amendment the averment that they had not deposited any material on the *solum* of Loch Long, as the dredgings discharged from the barges did not in fact reach the bottom of the loch.

The pursuer admitted that the proceedings had been instituted under a guarantee as to expenses given by inhabitants on the shores of Loch Long and Loch Goil, and others interested in property there.

It was pleaded for the pursuer—"(1) The narrow seas surrounding the kingdom of Scotland, and the bed and *solum* thereof, belonging to and being invested in the Crown, subject to the public rights of navigation and fishing, and Loch Long as defined in the summons being part of said narrow seas, the pursuer is entitled to decree as concluded for. (2) The defenders having no right, either by statute or at common law, to deposit their dredgings in the narrow seas, and particularly Loch Long, or on the bed or *solum* thereof, their doing so without permission is illegal, and the pursuer is entitled to interdict as concluded for."

It was pleaded for the defenders—"(1) No title to sue. (3) The action is barred by *mora* and acquiescence. (4) In respect that the defenders' operations do not in any way interfere with the rights of the Crown, the defenders are entitled to absolvitor."

Upon 13th June 1891 the Lord Ordinary (KYLLACHY) found and declared that the defenders were not entitled to deposit the dredgings from the river Clyde in Loch Long, reserved the question of interdict, continued the cause, and granted leave to reclaim.

"*Opinion.*—The question in this case is, whether the Commissioners of Woods and Forests, as representing the Crown, are entitled to prevent the Trustees of the Clyde Navigation from depositing in Loch Long the dredgings of the river Clyde, which dredgings consist of earth, gravel, stone, mud, and other materials, and are admitted now to amount to several hundred thousand tons per annum.

"The situation of Loch Long is sufficiently well known. It is a long narrow inlet running up into Argyllshire from the Firth of Clyde, in the vicinity of Dunoon. It is 24 miles long and from half a mile to a mile and a-half broad, and is navigable all the way, or nearly all the way, to the top.

"The action takes the form of a declarator and interdict at the instance of the Lord Advocate as representing the department, and the decree asked extends not merely to Loch Long, but generally to what are termed 'the narrow seas of the kingdom of Scotland.' There is not, however, any allegation of any deposit elsewhere than in Loch Long; and I am not prepared, and indeed have not been asked, to pronounce a judgment applicable to other places. If I were, I should require some further definition of the expression 'the narrow seas.' It is an expression which, in the literature of this subject, is used in different senses—*The Queen* v. *Keyn* (1876),

L.R., 2 Exch. Div. 63, espec. 109-110, 119-174, *et passim*. It is sometimes used to denote the sea within cannon-shot of the shore, together with the estuaries, bays, &c., within the *fauces terræ*. But it is also used in another and wider sense, viz., as comprising the whole seas and channels around Great Britain and other countries on the continent of Europe.

"I propose, therefore, to deal only with the case actually before me, viz., the alleged invasion by the defenders of the Crown's alleged proprietary rights in the land-locked loch, creek, or bay known as Loch Long. Upon that question I have come to the conclusion—and I am bound to say without difficulty—that the Crown is entitled to my judgment.

"It is quite true, as the defenders have anxiously urged, that the action is rested entirely upon the proprietary right of the Crown, or, if the expression is preferred, of the State. There is no averment of injury, actual or anticipated, either to fishing or navigation; nor is there any averment of nuisance or of injury to the foreshore. Whatever may be the fact as to those matters, and whatever may be the motives of the Crown in asserting its alleged rights, the action is based on trespass, and on trespass alone.

"On the other hand, however, it has to be noted that the defenders rest exclusively on the alleged absence of any title on the part of the Crown to interfere with their operations. They do not assert that they themselves have under their statutes or by municipal law any title to turn this inland loch into what is known in Scotland as a 'free toom.' Their statutory powers do not extend below Port-Glasgow; nor does our municipal law recognise the right to deposit rubbish as among the rights which the Queen's subjects possess in the seas and navigable rivers within the realm. The only such public rights known to the law are navigation and fishing. The defenders' case therefore is and must be this—not that they are exercising any right which is a burden on the Crown's right, and which the Crown, as trustee for its subjects, is bound to recognise, but that the Crown's right not only in the seas around the coast, but also in the estuaries, bays, and sea lochs within the territory, is confined to a mere protectorate for the purposes of fishing and navigation; so that, except where the interest of fishing and navigation are concerned, the Crown has no higher or better title to the water and bed of this inland loch than the defenders themselves. In short, the defenders' case is, that apart from fishing and navigation Loch Long is just as free as the centre of the Atlantic, and that therefore not only all British subjects, but also all foreigners, may make such use as they please of its water and of its *solum*, provided only they do no injury, or no injury which can be proved, to the interests of fishing and navigation.

"I am bound to say that, so far as I can discover, this proposition is entirely novel, and is altogether opposed to every authority on the subject. It is true that there has been some controversy—turning, however, largely upon words—as to the exact nature of the Crown's right in what I may call the external sea, and particularly that portion of it which international law recognises as territorial and within the realm—Kent's Comm. i. (ed. of 1884), 27-30; Wheaton's International Law, c. 4, sec. 10, 188-190; Hale, De Jure Mares (as reprinted in Moore on the 'Sea and Seashore'), 353, 377, 381, 384, 399, 401. But there has never, so far as I know, been any suggestion, by any writer or by any judge, that inland lochs, bays, or estuaries within the *fauces terræ*, are in any different positions from navigable rivers. Nor has it ever, so far as I know, been doubted that, subject to such rights of navigation and fishing as the municipal law recognises, the *solum* of such lochs, bays, and estuaries belongs to the Crown. There may have been questions as to the Crown's right to exclude foreigners from the external sea within three miles of the shore, as to the jurisdiction of the Queen's Courts over foreigners within the three mile limit, and generally as to the nature of the Crown's right to the sea and the bed of the sea within that limit; but the most extreme advocates of public or rather international rights have always, I think, distinguished between the external sea and land-locked waters within the *fauces terræ*. In the latter it has, so far as I know, been always recognised that the Crown has not merely a territorial but a proprietary right—a right differing from the Crown's right to the land of the kingdom only in this, that being burdened with certain public uses, viz., navigation and fishing, the rights of property is to a large extent *extra commercium*, or, in other words, within the *regalia majora*.

"I do not think that all this could be better illustrated than by a perusal of the judgments of the English judges in the recent case of the '*Franconia*,' *The Queen* v. *Keyn*, *supra*. The question there was as to the criminal jurisdiction of the English Courts over foreigners sailing in foreign ships within three miles of the English coast; and although the decision went ultimately upon a special ground, the question was largely canvassed whether within the three mile limit the right of the Crown was proprietary, or was a mere protectorate for the purposes of fishing and navigation. I shall have to refer presently to some of the opinions which were there expressed, but in the meantime the important fact is that even those judges who held views opposed to the Crown's claim drew a careful distinction between the external sea to which the question applied, and estuaries, bays, and inland waters, as to which it was common ground that they formed part of the counties into which they ran, and were within the jurisdiction of the courts of common law. I may refer on this subject specially to the judgments of Sir Robert Phillimore and Chief-Justice Cockburn—*The Queen* v. *Keyn*, L.R., 2 Div. 71 and 162.

"I confess, therefore, that it seems to me that the particular case with which I have

to deal is entirely outside the sphere of the controversy to which the defenders appeal. In other words, I can find no authority for the defenders' argument, and, apart from authority, I should think it tolerably clear, in point of principle, that a sea loch, or land-locked bay, running up from the Firth of Clyde into the centre of Argyllshire was for all practical purposes part of that county, subject to the jurisdiction of its Sheriff, and differing from the fresh-water lochs within it only as being navigable, and so subject to the public uses of navigation and fishing.

"It follows that the Crown are entitled to my judgment on the only question which is properly before me; but as the larger question, that, viz., as to the nature of the Crown's right within what has been called the 'narrow seas,' has been made the subject of argument, it may perhaps be right that I should indicate the opinion which I have formed on that subject.

"(1) I hold it to be now acknowledged as matter of international law that the territory of Great Britain does not extend to the narrow seas surrounding the kingdom in the older and wider sense of that expression. That is to say, the ancient claims of the kings of England to the whole seas and channels between England and other countries on the Continent cannot now be maintained. This I do not understand to be in controversy.

"(2) I hold it to be still an open question whether the territory of the kingdom extends, *e.g.*, to those seas and channels along the coast which are outside the *fauces terræ*, and more than three miles from the shore, but which are situated between the mainland and islands forming part of the kingdom, such as, *e.g.*, the island of Arran and the Hebrides. The question may possibly come to be material between the present parties in the event of the defenders seeking another place of deposit, but in the meantime it is hardly a question of practical interest.

"(3) The more practical question, and that on which alone I heard argument, was with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, viz., the strip or area of sea within cannon-shot or three miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land, or is it only a protectorate for certain purposes, and particularly navigation and fishing?

"I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore in tidal and navigable rivers and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent *extra commercium*, but none the less is it in my opinion a proprietary right —a right which may be the subject of trespass, and which may be vindicated like other rights of property.

"Such I consider is the result of all the best authorities — Scotch, English, and foreign.

"It is the doctrine of Craig, Stair, Erskine, and Bell. It is the doctrine of Selden, and Hale, of Grotius and Vattel, and it has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, *inter alia*, to minerals under the sea, mussel-beds and oyster beds, *maritima incrementa*, and flotsam and jetsam — Craig, i. 13, 140; Stair, ii. 1, 2; ii. 1, 5; Ersk. ii. 1, 6; ii. 6, 13; Bell's Prin., secs. 639 and 640; Grotius, ii. 2, 13; Vattel, 1, 23; Puttendorf, iv. 2, 6. See also authorities cited by Lindley, J., L.R., 2 Exch. Div., p. 90-91; Hale, De Jure Maris, 358, 367 (Moore); Hall's Essay, 667, 671 (Moore); *Smith* v. *Officers of State*, March 11, 1846, 8 D. 711, espec. 722; *Gammell* v. *Lord Advocate*, March 6, 1851, 13 D. 854, and 3 Macq. 419; *Duchess of Sutherland* v. *Watson*, January 10, 1868, 6 Macph. 199; *Gann* v. *Whitstable Fishers*, 11 C.B., N.S. 337, 13 C.B., N.S. 353, 11 (H.L.) 192; *The Queen* v. *Duke of Cornwall*, L.R., 2 Exch. Div. 156; and Act 21 and 22 Vict. c. 109 (1858).

"Altogether, it is, I think, too late to dispute a proposition so long recognised and so well established, and in saying so I hope I am not treating with disrespect certain *dicta* of eminent judges to which the defenders referred. For I think it will be found that for the purposes of the present action the distinctions which these *dicta* involve are hardly material. It may be, for example, that the Crown's right in the sea within the three mile limit is not merely burdened with certain public uses, but that altogether it is a right which is properly described as a trust for the British public. It may therefore be not merely to certain effects, but altogether *extra commercium*, and so not properly to be described as 'patrimonial.' But whether held in trust or not, it is none the less, so far as I can see, a proprietary right—that is to say, it is a right of property, and not a mere protectorate for the limited purpose of fishing and navigation. And if the right is a right of property either in the Crown or in the State, of which the Crown is the Executive, I do not think that any of the learned judges referred to will be found to dispute that it includes a right to prevent acts of trespass like those of the defenders—acts which, as I have said, are not in pursuance of any private or public right, and of which the only justification alleged is that the Crown is not prepared to take the burden of proving that they are injurious.

"I have not noticed the defenders' plea of *mora* and acquiescence, because it was not supported in argument and is obviously untenable. Neither do I think it necessary to do more than notice the defenders' averment introduced by way of amendment at the close of the discussion, to the effect that 'the defenders have not deposited any material on the *solum* of Loch Long. The dredgings which are discharged from their barges do not, in fact, reach the bottom of

the loch.' I am, I suppose, bound to assume that this statement is made seriously, and that the defenders are serious in their demand to be allowed a proof of it. If therefore I thought it relevant I should have felt bound to have allowed such proof, but I do not think it relevant. For, assuming that in some unexplained manner the law of gravitation is suspended or counteracted in this part of the Firth of Clyde, I do not for my part see that it makes any difference whether the defenders' deposits reach the bottom of Loch Long or are carried out to the Firth of Clyde or are carried out to sea. The Crown, if proprietor of the *solum*, must also in my opinion be proprietor of the water above it, and, at all events, must have a sufficient proprietary interest in the water to have a good title to prevent acts of trespass like those in question. It certainly does not appear to me that the Crown is bound, in a question with persons who have no title of any kind, to enter into a proof as to whether the unauthorised deposits in question appreciably or injuriously affect the *solum*. It must be assumed that the Crown advisers have good reasons for their interference, and they are not in my opinion bound to discuss those reasons in a Court of law.

"I shall therefore grant the declarator concluded for, except with respect to the narrow seas, but I shall reserve in the meantime the question of interdict. I shall also find the pursuer entitled to expenses, and grant leave to reclaim."

The defenders reclaimed, and argued—There was no distinction between the *solum* within the three mile limit and the *solum* below low water-mark in estuaries so far as proprietary rights were concerned, although there might be so far as administration was concerned. In neither had the Crown any right of property. The Crown's right was one of trust merely for the purpose of protecting navigation or fishing. In *Keyn's* case the Crown's jurisdiction was not sustained, and although there was a strong minority, it was the question of jurisdiction and not of property which was there discussed. The Scots law authorities cited by the Lord Ordinary did not support his Lordship's view. The cases of *Smith* (cited) and of *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309, related to Crown's property in the foreshore. The Crown must make out that the *solum* belonged to it, but no reported case put its right so high—see *Lord Advocate* v. *Clyde Trustees*, January 23, 1849, 11 D. 391, espec. pp. 401, 403—or that navigation or fishing rights were being interfered with, and this it had failed to do. The *onus* of finding proof lay with the Crown, and had not been discharged.

Argued for respondents—The reclaimers asserted no title of property or even of trust, for Loch Long was beyond the limits of their statutory powers, and they had really no title to defend the action. The Crown's right to the *solum* was not a mere trust right, but a right of property although qualified in certain respects in the interests of the public. *Dicta* in the case of *Keyn*, and in other cases cited by the Lord Ordinary, seemed to support the Crown's proprietary right to the *solum* within the three mile limit, but it was not necessary to determine that, for the Crown certainly had a right of property in the *solum* of Argyllshire and Dumbartonshire below low water-mark within the *fauces terræ*. It was absurd to say that the part of Scotland so situated did not belong to the kingdom of Scotland, and that anyone, even a foreigner — because everyone had as good a title as the Clyde Trustees—could empty what they chose into Loch Long.

At advising—

LORD JUSTICE-CLERK—The pursuer of this case is the Sovereign, acting through the properly appointed department, and the purpose of the action is to interdict the defenders, who are the statutory commissioners in charge of the Clyde Navigation, from throwing large quantities of solid matter into the water of Loch Long. The basis of the case for the Crown is that the place at which it is alleged that these masses of matter are thrown into the sea forms part of the realm, and that the department which is authorised to act for the Crown in matters relating to such part of the realm is entitled to prevent any person who has not received lawful authority for doing so from depositing anything upon the *solum*. The contention of the Crown is that it is not necessary to aver that any damage is being done by the acts of the defenders, but that the Crown holding Loch Long as part of the realm, has a title to prevent any interference with it if no legal right can be shown to justify such interference, and to exclude the original right in the Crown to the loch. The defenders, on the other hand, state no defence of the nature of a claim of right to do what they are doing based upon any grant, express or implied, in their favour, by which they have obtained, either by such grant given by the Crown or conferred by Parliamentary authority, any right to Loch Long such as will supply them with an answer as on the ground of right conferred to the contention of the Crown. Their only plea upon the merits of the case is that as their operations do not in any way interfere with the rights of the Crown, they are entitled to absolvitor. Claiming no special right in themselves, their defence is that the Crown has no right which they are infringing.

It would appear from the Lord Ordinary's opinion that there was an elaborate discussion before him upon the rights of the realm to the *solum* of the sea below low water-mark upon the open sea coast, and there was a considerable amount of argument and a citation of numerous authorities upon the same subject before us.

In the view I take of this case, it is quite unnecessary for us to consider any such matter as the Crown's right to the *solum* of the sea within the three mile limit from the coast where that coast faces the open

sea. The considerations of law applicable to the three mile limit could only be of consequence in this case if the *solum* of Loch Long could be held to be in the same position as the *solum* of the sea below low water-mark. I understand that the defenders maintain that there is no difference. Their argument is that as the sea comes up Loch Long the *solum* of the loch is in exactly the same position as regards the rights of the Sovereign to the property as the *solum* below the sea on the coast within the three mile limit, and they maintained that if they can show that the realm has no right of property within that three mile limit, then it can have no right of property in the *solum* of Loch Long. Whether the Crown has or has not a right of property *ex adverso* of the coast does not, in my opinion, affect the question which is before us. It is of course clear that if the *solum* on the coast is the property of the Crown, *a fortiori* the *solum* of a narrow land-locked arm of the sea, not two miles broad at any point, must be in the Crown also. But the converse would by no means necessarily hold, that if the *solum* on the coast is not in the Crown, then the *solum* of a narrow estuary is not part of the realm, but is a "No-Man's Land," like the bed of the Atlantic Ocean. On the contrary, it appears to me that the considerations which might apply to the *solum* opposite to the sea coast would not apply to the other at all. Let it be assumed to be the settled law that there is no right of property below low water-mark on the sea coast—an assumption which, in my opinion, is not sound—the question whether the *solum* of a strip of land-locked water such as Loch Long belonged to the realm would by no means be closed by such settlement of the law in relation to the coast. I therefore prefer to consider the case, in the first instance, quite apart from questions regarding the *solum* within the three mile limit. If it be plain that Loch Long is part of the realm, without its being necessary to rely upon any law relating to the three mile limit, then all considerations in regard to the three mile limit are unnecessary to the case.

The first question is this, Is Loch Long part of the realm? This is a question the answer to which can be given without any proof. There is no more need for proof on that question than there would be in a case relating to the city of Edinburgh to establish that that city is part of the British realm. Its geographical position is known. It is a narrow estuary running inland from the Firth of Clyde, enclosed by Scottish land except at its narrow outlet to the firth.

That such a place should not belong to the country which practically encloses it and shuts it off from the ocean except at its outlet, but should be as free to all the world to do anything with it as might be done with a part of the open sea, is, in my opinion, not only not in accordance with law, but contrary to all accepted ideas as to the occupation and ownership of a country by the chief power of the nation which actually possesses it. I hold it to be quite settled law that such an estuary as Loch Long is as much a part of the property of the realm as the counties within the embrace of which it may lie, that the chief courts of the country have the same jurisdiction over it as they have over the country itself, and the local courts the same jurisdiction as they have over the immediately neighbouring locality, and no other courts than those of this country have any jurisdiction over it whatever. In short, I hold it to be part and parcel of the country. The common consent of nations recognises the sole right of each nation in its own estuaries such as that of Loch Long to the exclusion of all intrusion on the part of other nations unless obtained by treaty following on conquest or pacific international agreement for mutual benefit.

In opposition to this view it is maintained for the defenders that whatever may be the territorial right of the State in such an estuary, it is not a proprietary right, and that therefore the Crown cannot exercise the same rights to prevent trespass which can be exercised by an ordinary proprietor of part of the *solum* of the country. Their case is that the right of the State is one of mere protectorate for the purposes of navigation, fishing, and the like, but that in all other respects the State has no right to interfere with anything done in Loch Long, whether by a British subject or by a Frenchman, German, American, or any other foreigner, unless in the execution of its duty of protectorate of public uses such as I have stated.

I can find no authority for any such proposition, which is certainly startling as well as novel. It appears to amount to this, that the Crown is limited as regards localities such as Loch Long to a duty of police, while all the world can use the loch at pleasure as long as it cannot be shown that damage is actually being done to those interests for which the protectorate exists. The defenders practically maintain that unless the Crown in its police capacity undertake to prove that what is being done is in fact injurious to the uses to which the community have right, independent of property, it cannot succeed in preventing what would be a palpable act of trespass if done on any property above high water-mark, and this even although the person or body committing the act have no right whatever greater than that possessed by any individual citizen or even by a foreigner.

It seems strange that if such a view of the law were sound, it should not long ere this have been so established as to be found formulated in our authoritative law treatises and confirmed by decisions. But I can find no trace of any such law. On the contrary, whatever questions may be raised as regards the *solum* within the three mile limit, all the authorities concur in giving the proprietary right in estuaries to the Crown. It is true of course that the powers of proprietary right are modified by certain public uses which the community

are entitled to enjoy, but these are restrictive solely in the interest of the whole public, and in no way infringe upon the rights of the Crown to deal with members of the public who go outside the public uses which are admitted to be a restriction on the full exercise of proprietary rights, and commit trespasses which have no connection with these public uses, unless indeed it be to infringe upon and endanger them. I hold, on the authorities, that the right of the Crown in Loch Long and its *solum* is a right of property, and that the Crown is entitled to stop any intruder from coming to Loch Long and there throwing large quantities of solid matter into the loch. Having that right, I further hold that it is not a relevant defence on the part of those admitted, by so casting solid matter into the loch, to aver that they are doing no harm. They are doing that which they have no right by statutory or customary law or by contract to do, and I am unable to see how the Crown can be prevented from interdicting the trespass. This is on the view of property, which I hold to be very clear. But I should hold the same as regards the Crown's right even if that right was merely one of trust for the recognised public uses of such a place. Even in that view the Crown would in this matter be in no different position from that of many public bodies who hold property expressly for the public use, the conditions of their trust preventing the sale or alienation of the property, but who nevertheless are entitled to exercise all the rights of proprietors to prevent those having no title from interfering with it in any other way than in the reasonable exercise of such admitted public rights of use. It is certain that what the Clyde Trustees have been doing does not fall within any of the public uses subject to which the Crown holds Loch Long. I can see nothing to prevent the proper authority acting for the Crown from interfering to stop any persons from doing in Loch Long acts which they can show no title to do, and which on any other property would amount to a trespass if done without title.

I am therefore very clearly of opinion that the title of the Crown to ask for declarator and interdict against these proceedings is beyond all question, and that accordingly the Court should adhere to the interlocutor of the Lord Ordinary, and if it prove to be necessary, grant interdict against the defenders.

LORD YOUNG—I greatly regret, we must all regret, I think everybody must regret, that this question should have arisen, and I cannot help thinking that it might have been avoided. The defenders the Clyde Trustees have a public duty to perform in the interests not merely of the harbour of Glasgow, but through that to the whole community. They must, until some useful employment of the dredgings which they in the course of their duty take out of the limits of the harbour is found, have some place to put them or cease to take them out. It appears, no doubt, to be contemplated in the statute that they should place them upon the banks of the river, but it is quite intelligible to those who know the state of things in these days that that is too expensive a proceeding to be encountered if it can by any possibility be avoided. And I cannot doubt that there must be some place within measurable distance where these dredgings may be thrown into the sea without any detriment to the public, and therefore with the consent of those who are charged with the public interest. And I cannot help thinking that upon reasonable conference between those who represent the public interest, of which the Clyde Trustees have charge, and the Crown authorities, who are charged with other public interests, some place for depositing these dredgings could be ascertained and resorted to without raising any legal questions. But unfortunately the legal question has arisen by the Clyde Trustees asserting a legal right to deposit the dredgings in Loch Long, and the Crown authorities, acting in the public interest, maintaining that they have no such right.

There is a statement here that the action taken by the Crown authorities is inimical to the great and important public interests committed to the defenders, and that its sole purpose is by the use of the Crown's alleged title to aid the attainment, otherwise impossible, of purely private aims. It is stated somewhere that their expenses are guaranteed, and that is admitted. Now, I very much sympathise with those who have property or who dwell on the banks of Loch Long objecting to this refuse being thrown in there, and that altogether apart from the interests of navigation or fishing. It is bringing Glasgow down to their doors when they have gone down the water for fresh air. But I confess it occasioned very great surprise to me that the Crown authorities, making their own inquiries in the matter and exercising their own judgment, as it was their duty to do, and being convinced as the result that it was their duty in the public interest to stop this proceeding, that they should have asked or condescended to take any guarantee from private individuals for the expenses incurred by them in the discharge of this plain and important public duty. But the question we have to consider and determine is, whether the legal title of property in Loch Long is in the Crown? I am of opinion that it is, and, I confess, without any doubt or hesitation.

Loch Long is part of the territory of Scotland, and it is all situated within the counties of Argyll and Dumbarton. I have no doubt whatever that it is the property of the Crown if it be, as it certainly is in my opinion, part of the territory of Scotland. Of course, like all properties its use is subject to such limitations as nature puts upon it. It can only be used as property in so far as is consistent with the fact of its being covered by salt water to a great depth, and the tide flowing and ebbing through, which is a great limitation upon the proprietors' rights. But that it is the property of the Crown

*jure coronæ*, I have no doubt whatever; that the Crown—that is to say, the Government of the day—and the duties of the Government are all transacted by departments—the Crown must use this property as all other property of the like kind, whether covered by water or not, in the public interest. But that is not a matter for us to consider. If the department of the Government charged with the administration of the Crown duties in this matter shall use it in a manner inconsistent with or detrimental to the public interest, or shall fail to use it in the manner in which the public interest demands, there is a remedy, but it is not in this Court. The Government as a whole and in all its departments may be called to account most efficiently and effectually elsewhere, but that is not a matter for this Court. I must assume that the Crown is, in the opinion of its own advisers and of the legislative assemblies of the nation, using this Crown property in a manner which is consistent with the public interest, and forbidding every use which in their opinion is at variance with the public interest. I think it is the absolute legal right of the Crown which we must support to prevent any use of which the Crown authorities disapprove of the *solum* of Loch Long. That is conclusive of the present case.

We had a great deal of argument and some reference to English authorities upon a *solum* permanently covered with water within what is called the three mile limit. That reference to the three mile limit and to these authorities is pertinent to this case if in point of fact the property and the title within the three mile limit is in the same position as within Loch Long, and otherwise not. If it is in the same position as within Loch Long, then I am of opinion it is within the territory of Scotland and the property of the Crown, except in so far as it may be well and lawfully alienated. If it is not in the same position, then the reference is not pertinent to the present case.

But I have no objection whatever to indicate my own view — this is quite individual — that within the three mile limit the Crown has the right of property. Of course every part of the three mile limit must be in the same position with respect to title and right of property, and so on. A foot, a yard below low water-mark is just part of the territory within the three-mile limit. But what about building piers, jetties, lighthouses, anything you please as far out as it is convenient to take them, and some piers are taken a long way out? Take the pier at Aberdeen. The coast there is on the open sea. There is a large bay no doubt—the coast is partly indented—but the pier of Aberdeen extends a long way out, and if the interests of Aberdeen Harbour required it to be extended out for a mile, is it doubtful that the pier so built would be built upon Scottish land, the property of the Crown, vested in the Crown *jure coronæ*, and applicable to any use which could be made of it, whether running out a pier or building a lighthouse, or anything else? That is a use of the *solum* which is possible notwithstanding its being permanently covered with water, and which may be taken. There are many such piers. There is a very long pier, if I remember aright, at Brighton. There are very long piers in the Isle of Man, but I do not know if that is, on the other hand, the narrow seas, and I should think there the Crown has the property and the right to exclude all that it thinks proper to exclude, and that it is permitted by Parliament with its supervising authority to exclude. But although it is not at all necessary to the decision of the present case, I agree with your Lordship in thinking that by the law of Scotland all within the three mile limit is the property of the Crown, and I cannot distinguish between that part of the three mile breadth which is immediately adjacent to low water-mark and that part which is furthest from it. I have no hesitation whatever in agreeing with the judgment of the Lord Ordinary, although I repeat my expression of regret that this matter, in which no other interest is involved except the public interest, in the charge of representatives of the public on the one side and the other—that it could not have been arranged without raising this litigation.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I think it unnecessary to express any opinion in this case on the question which was argued before us as to the extent and character of the Crown's right to the *solum* underlying external seas within what is known as the three mile limit. That question does not and cannot arise in reference to the *solum* of Loch Long, which forms no part of the external seas surrounding the United Kingdom, but is an inland arm of the sea or Firth of Clyde, entirely within the United Kingdom. Being within the territory of the United Kingdom, the *solum* of Loch Long must either be vested in the Crown or in a subject-proprietor deriving right from the Crown. It is not suggested, however, that the *solum* of Loch Long is or has ever been vested in any subject of the Crown, and therefore it follows that it is still vested in the Crown.

To what extent and effect it is vested in the Crown is a different question. It was maintained for the defenders that the right of the Crown in the *solum* of such a loch (as in the foreshore or the *solum* of a tidal navigable river) is not proprietary, but merely a right in trust for the public for certain public uses. On this question there is a considerable difference of opinion. For my own part I agree with those who think that the right of the Crown is a proprietary right—burdened with rights in favour of the public no doubt—but still a proprietary right. But it is not necessary to maintain that view for the decision of the present case. Assume that the only right which the Crown has is a trust right for public benefit. The title of the Crown to the *solum* of Loch Long is the only title to that *solum* which exists, and in respect of

that title the Crown is in a position to resist any attempt to invade the rights which the trust title confers. A trustee vested in lands for trust purposes has a good and sufficient title to prevent any stranger from squatting thereon, or from interfering in any way with the lands to which he has no title whatever. Now, this appears to me to be the position of parties in the present case. The Crown has—and alone has—a title to the *solum* of Loch Long; the defenders have no title to it whatever. The defenders have therefore no right to use the *solum* of Loch Long, and the Crown has the right and title to prevent them using it if they try to do so. The defenders, however, maintain that the Crown cannot interfere with the proceedings complained of except it shows that these proceedings are injurious to the special public uses in trust for which the Crown holds. I think this argument cannot be sustained. It is the duty of a trustee to prevent any unwarranted invasion of the trust subjects, and he is, in my opinion, entitled to interdict any such invasion, on the ground, admitted or proved, that he is the vested holder of the subjects, and that the invader has no title to them whatever. He is under no necessity to state or to prove that the invasion of his right, threatened or actual, is or will be injurious. I agree substantially with the views expressed by the Lord Ordinary, and am of opinion that his interlocutor should be affirmed.

The Court adhered, and thereafter, upon the motion of the defenders and reclaimers, granted leave to appeal to the House of Lords.

Counsel for the Pursuer and Respondent—Lord Adv. Sir Charles Pearson, Q.C.—Sol.-Gen. Graham Murray, Q.C.—H. Johnston—C. S. Dickson. Agent—Donald Beith, W.S.

Counsel for the Defenders and Reclaimers—D.-F. Balfour, Q.C.—Asher, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

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*Thursday, November* 26.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## IMRIE (POOR) *v.* IMRIE.

*Husband and Wife—Constitution of Marriage—Proof—De præsenti Acknowledgment.*

A declarator of marriage was raised by a woman founded upon *de præsenti* acknowledgments exchanged between her and her alleged husband.

The acquaintance began in October 1888. A courtship ensued, and the parties became engaged. On 8th May 1889 they signed and exchanged writings in which they acknowledged each other as husband and wife. No witness was present when this was done, though the writings bore to be attested by witnesses. The parties had connection with each other both before and after 8th May, and the intercourse between them resulted in the birth of a child on March 2nd 1890. The pursuer deponed that the documents had been exchanged with the intention of constituting a marriage. The defender said that the object of the exchange was to give the pursuer, in the event of his death, a claim to an insurance on his life. He admitted, however, that at the time he was perfectly willing to marry the pursuer before the registrar, and had proposed that course to her. The correspondence showed that after 8th May 1889 the parties, with the exception of one letter written after a quarrel, always wrote to one another as husband and wife, but, on the other hand, it was proved that on New Year's Day 1889 the pursuer had from the defender a card addressed to "my dear husband." It was also proved that on an occasion in July 1889 the pursuer introduced the defender to a friend as her husband, and the defender allowed the description to pass without comment, and that in the same month the defender gave her a wedding-ring, which she sometimes wore. The writings founded on were not produced, and the defender deponed that the pursuer, in the course of a quarrel with him, had torn the one given to her, saying "that that finished it for good and all," and that he had afterwards burned his. The pursuer denied that she had destroyed the writing given her by the defender, and there was some ground for the belief that it might have fallen into the hands of the defender's mother, who was hostile to the pursuer. There were passages in some of the pursuer's letters which suggested that in the beginning of August 1889 she had attempted to procure abortion, and there was also evidence that she had about the same time carried on a flirtation with a former admirer.

The Court *granted* declarator of marriage, holding that the result of the whole evidence was to show that the writings in which the parties acknowledged one another as husband and wife had been signed and exchanged with the intention of constituting a marriage.

This was an action at the instance of Caroline Jane Williamson or Imrie against James William Imrie, concluding, *inter alia*, for declarator that the pursuer and defender had been lawfully married to each other in May 1889, and for decree of adherence.

The pursuer averred (Cond. 3) that in May 1889, in accordance with a proposal made by the defender, documents in the following terms, duly signed and witnessed, had been exchanged between her and the defender:—"I acknowledge Caroline Jane Williamson as my lawful wife. (Sd.) JAMES