[HEARD 11*th*—JUDGMENT 13*th July*, 1849.]

ALEXANDER SMITH, W.S., Edinburgh, *Appellant*.

THE RIGHT HON. JOHN HAMILTON DALRYMPLE, EARL OF STAIR, and others, Her Majesty's Officers of State for Scotland, for Her Majesty's interest, *Respondents*.

Title to Sue—Crown.—The Crown has a title to prevent, by application for interdict, any encroachment by the proprietors of ground adjoining the sea-shore, upon the enjoyment of the shore by the lieges for the purpose of passage or of relaxation.

Property—Bounding Charter.—A proprietor of ground, described by his title as being of a specified extent, and as bounded by the sea shore, has no right to inclose that part of the shore which is covered by the sea only in ordinary spring-tides, over which the public has been from time immemorial in the habit of passing, and over which he cannot prove any past use or possession by himself.

Crown-Costs.—No costs given to the Crown in an action by it to protect the rights of the public in the sea-shore.

THE Marquis of Abercorn was infeft in the lands and barony of Duddingston, under charter from the Crown, "alga fucoque "maritinis lie wrack, wath, wave," &c. This charter proceeded upon a disposition and deed of tailzie, which reserved power to the Marquis and the heirs of entail, notwithstanding the prohibition therein contained, to grant small feus of any part of the tailzied estate not encroaching upon the manor-place and pleasure-grounds; no feu so to be granted exceeding one-eighth part of an acre.

In 1805 the Marquis, considering that Stewart had made an offer "for one-eighth part of an acre of that piece of ground,

" being part of the lands of Rabbit Hall, as the same is staked " off and measured by William Morrison, marked upon the " plan thereof, A," granted him a feu charter of " all and whole " the foresaid piece of ground, being lot A of the feus of Rabbit " Hall, bounded as follows; viz., *by the sea-shore* on the north; " by lot B, feued to Alexander Brown, on the south; by that " road fifty feet broad, running from the high road to the sea, " on the west; and by our said lands of Rabbit Hall on the " east parts lying within the parish and barony of Duddingstone " and sheriffdom of Edinburgh, and whole parts, privileges, and " pertinents of the same."

A dwelling-house was built upon this feu, which, together with others on either side of it, formed part of the town of Portobello. Ultimately the feu was acquired by the Appellant.

The sea-shore opposite the feu, and for a very considerable distance on either side of it, consists of an extensive stretch of open sands, which in *spring*-tides are entirely covered by the sea. That part of the sand which is covered by the *ordinary* tides is firm and solid; while that which is more landward, and covered only by spring-tides, is loose and deep. The inhabitants of the neighbouring town of Portobello and of the surrounding country have for time immemorial been in the habit of using these sands for the purpose of bathing, riding, and walking, and the royal troops have been in use to be exercised and reviewed upon them.

When the Appellant acquired his feu a wall ran along the inner edge of the belt of loose sand. In the year 1842 the Appellant pulled down this wall, and was in course of erecting another thirty feet more seaward, but still, as he alleged, within the belt of loose sand, when he was interrupted by an application for an interdict presented by the Respondents. By arrangements between the parties, the wall was allowed to be completed, upon the understanding that the case for an interdict should be tried upon the question to be presently noticed as "*matter of*

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

law;" and that if that question should be answered in the negative, the wall should be pulled down. The question of law thus agreed upon was, "Whether—*assuming* in point of fact "that the wall of the Respondent, Mr. Smith, extends beyond "the high-water mark in *ordinary* spring-*tides*—he is, with "reference to the terms of his titles and the rights of the "Crown, entitled to have the wall maintained in that position; "and it is agreed that the record shall be closed, if necessary, "to give effect to the judgment to be pronounced."

The Lord Ordinary made great avizandum to the second division of the Court with cases for the parties. After considering these cases, and hearing counsel, the Court, on 11th of March, 1846, pronounced the following interlocutor: "Grant "the interdict, and declare it to be perpetual, so far as relates "to the encroachments complained of, and extending thirty feet "towards and into the sea over the sands."

This was the interlocutor appealed from.

Sir F. Kelly and *Mr. Anderson* for the Appellant.—I. The grant of a barony carries with it a right to the land between the high and low water mark of ordinary tides. McAllister *v.* Campbell, 5 *D. B.* & *M.*, 490. Any right, therefore, to the ground in question, which was originally in the Crown, became vested in Lord Abercorn, the Appellant's author. The Crown, therefore, has no title to interfere in the way that has been attempted; for in McAllister's case, although there was no mention in the titles of the sea being the boundary, yet the fact being that the sea was the boundary, it was held that the Crown having granted the land on the sea had no right in the shore without an express reservation to that effect.

[*Lord Campbell.*—In McAllister's case there was the conjunction of title with possession. That don't establish a right where the title makes no mention of the shore, and there is *no* possession.]

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

No possession as against the Crown is necessary. The title is sufficient.

II. The right which was vested in the Marquis of Abercorn is now in the Appellant by virtue of the feu disposition from his Lordship, to which the Appellant has acquired right. Campbell *v.* Brown, 18th November, 1813, *F. C.* 444. It is not necessary for this purpose that the disposition should expressly convey a right to "wrack and wave," to which the Marquis was entitled by his charter; the right to these was sufficiently given by the conveyance of "parts, privileges, and pertinents." Leven *v.* Magistrates of Bruntisland, *Hume's Dec.*, p. 555.

III. The right which was in the Marquis being in the Appellant, by virtue of his feu disposition, which describes the boundary of his feu to be the "sea-shore" on the north, the Appellant is entitled to appropriate whatever ground is not covered by the ordinary tides; for that is not sea-shore which is never covered by the sea unless by spring-tides.

Stair, ii. 1, 5, says, "The shore in the civil law is defined to "be so far as the greatest winter tides do run, which must be "understood of ordinary tides, and not of extraordinary spring-"tides;" and in the same passage he says, "The use of the "banks of the sea ofttimes belong to private persons, by their "proper right, or by custom, or by public grant." And *Ersk.*, ii. 6, 17, "Though by the Roman law the sea-shore "reached as far from the sea as the highest spring-tide, it goes "no further, by the custom of Scotland, than the sand over "which the sea flows in common tides; and by our constant "practice proprietors who border on the sea inclose as their "own property grounds far within the sea-mark." As authority for this he refers to Bruce *v.* Rashiehill, *Mor.*, 9,342, where it was found that sea greens were not *inter regalia*, and that they might "belong to the neighbouring heritors as part and perti-"nent, without a special right." The authority of Bell in his *Principles*, from sect. 641 to 644, is to the same effect. In

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

Innes *v.* Downie, *Hume's Rep.*, p. 552, a bank of shelly sand covered by the sea in ordinary tides was found to be a pertinent of the adjacent lands. In the Magistrates of Culross *v.* Geddes, *Hume's Rep.*, 554, it was found that a proprietor had right to inclose and gain on the sea under a feu right to lands bounded by the sea-shore. The decisions in Campbell *v.* Brown, 18th November, 1813, and in Boucher *v.* Crawford, 30th November, 1814, were to the same effect; and so were the opinions of the Judges in Kerr *v.* Dickson, 3 *Dunlop*, 154.

The English authorities run the same way. In *Hale's M.S.*, as published in *Hargrave's Tracts*, at p. 12 he says, "that which the sea overflows, either at high spring-tides, or "at extraordinary tides, comes not, as to this purpose, under "the denomination of *littus maris*, and consequently the King's "title is not of that large extent, but only to land that is "usually overflowed at ordinary tides." And again at p. 26 he says, "There seem to be three sorts of shores or *littora* "*marina*," and after describing that created by the high spring-tides at the equinoxes, as belonging to the subject, he continues: "The spring-tides which happen twice every month "at full and change of the moon, and the shore is by some "opinions not denominated by these tides neither, but the "lands overflowed with these fluxes ordinarily belong to the "subject *prima facie*, unless the King hath a prescription to "the contrary." He then speaks of "ordinary tides or nepe-"tides," and goes on, "this is that which is properly *littus* "*maris*." *Hall*, on Sea-Shores, at p. 8, is to the same effect. In Blundell *v.* Catterell, 5 *B.* & *Ald.* 291, *Holroyd* and *Bailey*, Js., said the shore was the land "between the *ordinary* high "and low water-mark;" and in Lowe *v.* Govett, 3 *B.* & *Ad.* 863, it was ruled, that soil overspread with sea and beach, and covered by the high water of spring-tides, but not by the ordinary tides, was to be presumed to belong to the owner of the adjoining estate.

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

Mr. Bethel and *Mr. Elliott* for the Respondent.—Fact is better than argument. The Appellant is precluded by his title from averring that he has a right to inclose the land in question. By the Abercorn entail the heirs have a special power to grant land for building purposes, not exceeding in each instance one-eighth of an acre. The contract of the Appellant's author with Lord Abercorn was made under this power, and was specifically for the limited quantity of one-eighth of an acre, and his feu disposition gives him that quantity and that alone. The boundary of this specific grant is the sea-shore, and the possession has been conformably until the attempt complained of was made. The Appellant cannot alight on the shore, therefore, without overstepping his boundary. By his disposition he has a grant of one-eighth of an acre, and cannot be heard to say that it gives him thirty yards more, or what it was not in the power of his author to grant.

With regard to the title of the Crown to prevent the encroachment complained of, all the authorities admit that the shore is originally in the Crown, to grant to whom it will; that the right of property is in the Crown with all necessary use in the subject. Now the charter to Lord Abercorn expresses by its terms a gift of what it was in the power of the Crown to grant, but is no way inconsistent with a reservation of enjoyment of the beach by the public. In fact the Crown cannot grant anything derogating from the right in it necessary to protect the right of ordinary use in the public, and the Crown has necessarily a title to protect this use for the public.

The Respondents' counsel then went into an elaborate argument in contradiction of that used for the Appellant, in regard to what is to be understood by the sea-shore and the rights of adjoining proprietors, in the course of which they cited the King *v.* Seafield, *Balf. Prac.*, 2 *Rolls Abr.*, 170, tit. *Prerog.*; 3 *Dyer, de Alluvione;* Attorney *v.* Johnston, 2 *Wils.* 87; *Bell's Dict.*, 888; *Ersk.* ii., 6, 17; *Bank*, p. 83; *Callis on Sewers*, p. 45;

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

Hale's M.S., Hargrave's Tracts, p. 12; Attorney *v.* Parmeter, 10 *Pr.* 378; Attorney *v.* Burridge, 10 *Pr.* 355; Ker *v.* Dickson, 3 *Dun.*, 154. But the view which the House took of the case makes it unnecessary to notice this argument.

Sir F. Kelly in reply.—Unless the effect of the reservation of a specific boundary in the Appellant's title relied upon by the Respondents is to convey to the Crown all beyond that boundary, which will hardly be alleged, the Crown can have no title to interfere to protect that which *ex hypothesi* of its not being in the Appellant, is, at all events, in the Marquis of Abercorn by virtue of his charter.

LORD BROUGHAM.—My Lords, in this case a very important question was raised. Mr. Smith, possessing certain lands in the immediate neighbourhood of the sea-shore at Portobello, a village at some short distance from Edinburgh, under a grant from the Marquis of Abercorn, built a certain wall encroaching upon the sea-shore, as it was contended by the Respondents, encroaching as it is contended upon that which is the property either of the Crown or of the public, or of the Crown with an easement to the public, or of the Crown and the public jointly, it signifies very little which, with a view to the bearing of the matter upon the present question.

The officers of State who represent the Crown here proceeded against Mr. Smith for this purpresture or encroachment, and Mr. Smith sets up as his defence, in the first place, that he was not a wrong-doer, because he had a right to build the wall in consequence of his title to the ground immediately adjoining the sea. In the second place, he states, that even *be* it that he was a wrong-doer still the Crown had no right to interfere, unless the Crown could show some title either to the property or in some other respect; and there can be no doubt that either if Mr. Smith had a right to build that wall, or be it that he was

a wrong-doer and had no right to build the wall, if the Crown, nevertheless, had no right in any capacity to interfere, in either case he is right, and the judgment cannot be supported.

The argument that was chiefly maintained before us turned upon a point which is one by no means unencumbered with doubt and difficulty, and which, therefore, in the view I take of the question, it becomes very satisfactory to me, and I think it will prove the same to your Lordships, not to be called upon imperatively to decide, because, in the first place, it is not the ground upon which the judgment below proceeded, and it is always a satisfactory thing in a Court of Appeal of the last resort to be able to dispose of the question brought by appeal before it on the grounds which were presented to the minds of the Court below. But in the next place, it is satisfactory not to be called on here to dispose of that question, because it is one upon which there is perhaps no precise and distinct decision, and upon which there is some little conflict of authority. The conflict of authority to which I shall presently allude is chiefly in the learned and authoritative treatise, *De Jure Maris*, of that most learned Judge, Lord Hale, the second part of which, perhaps, is more frequently referred to than the first or the third, I mean that called *De Portibus Maris*. That is a posthumous treatise, but it is of high authority. Its authority cannot be impeached, and its authority must not be understood, in any way, to be doubted by us either as to its being Lord Hale's, which the profession and Parliament, in which it has been frequently cited in debates, as well as before courts of law, have never doubted (I state that because it was disputed at the bar); nor, secondly, can we dispute the high authority of that work of Lord Hale's, from its own intrinsic merits and from the venerable authority of the author.

It is not denied that the Crown has certain rights with respect to the sea-shore, and to the sea between high and low water-mark. But on looking over the judgment below, from one

or two expressions of the learned Judge, there seems to be some little colour for believing that another point had been ventilated though not much relied upon, nor distinctly put forward in the Court below. It is this. With respect to high spring-tides, that is to say, the equinoctial spring-tides, which occur twice in the year, at the spring and the fall, it is not contended that the Crown has a right to claim up to those tides; but the dispute between the parties is, whether the Crown is not also precluded from claiming up to the ordinary spring-tides, which would reduce the claim of the Crown to land flowed over by the ordinary tides. That is the question; and upon that there is considerable discrepancy between two passages, one in the 12th page and the other in the 26th page of Mr. Hargrave's edition of Lord Hale's work. It is particularly as to the third head of the three into which the subject matter of the 25th and 26th pages is divided, that there is some little discrepancy, but which, perhaps, is not impossible to be reconciled. The passage in page 12 gives the authority of Lord Hale clearly against the Appellant; that there is no doubt about. That would mean, applying to it a reasonable rule of construction, ordinary spring-tides, though the word "ordinary" is not used. But I do not think it is quite impossible to reconcile that with the 26th page, because, in the second of the three heads, Lord Hale says, "it "is the opinion of persons;" and it is possible that that may have been the prevailing notion in his mind during the third as well as the second head. However, the third, I do not deny, apparently makes for the Appellant, and is in some apparent conflict with the passage in page 12. It is therefore very satisfactory to me that I do not see an absolute necessity for us to dispose of that question.

I said before to your Lordships, that this is equally satisfactory on the other ground which I first stated, namely, that the Court below do not appear to have disposed of that question. I find, however, which I had not observed so much at first, that

when I spell more minutely the elaborate judgment of the Lord Justice Clerk, he does refer a little to that point, and Lord Cockburn a little also, but not so much. He says, "I hold "certainly the right of property to be solely in the Crown." I do not think he goes so far as to say that he means to decide the point respecting spring or ordinary tides; because he may mean, where he speaks of "property in the Crown," that the Crown is entitled in respect of a proprietary right. I think that is the meaning which his words may probably bear. It is very certain that he does not rest his judgment upon that ground. For he says, "But even if the property in the shore "passes to the proprietor of the lands, and without special "grant, still the right in the Crown is a right over and in the "property of some sort or kind which makes the Crown a sort "of joint proprietor to the extent that the rights of neither are "to be defeated nor to clash." I do not quite comprehend that. I do not comprehend the sense. "I have no doubt, however, "in further holding, that one of the public uses, to protect "which the Crown has either a right of property in or of "guardianship over the shore, is the common use of the shore "by the subjects." There I go entirely along with him.

Lord Moncrieff, as usual, distinguishes himself by the great clearness with which he gives his opinion, and here he takes exactly the same ground which I do upon the subject.

Now I have to state, with respect to Mr. Smith, that I have no doubt whatever that Mr. Smith here is a wrong-doer. Mr. Smith has shown no use whatever of this land; Mr. Smith has shown no several exclusive possession of this land. Mr. Smith cannot stand before your Lordships as a party who by possession has ever shown that he has any right to encroach. He produces, in proof of his title, a clause to be found in his charter, but which rather seems to exclude him, for it says, "the ground is bounded upon the north by the sea-shore." The only question, therefore, is, what is the sea-shore? He

has given us no ground whatever for supposing that by possession or use his ground extends into that part of the sea-shore upon which, it is undeniable, he has built. He has gone down so far as to interrupt the passage to and fro of the Queen's subjects walking along there, of the persons who bathe there in all probability, and of the troops who are reviewed there; for, as Lord Moncrieff observes, it is well known to the inhabitants of the neighbourhood as a place where troops are reviewed, and I myself have been on those sands on military reviews. These are very celebrated sands in that neighbourhood, which have never before been used or attempted to be used in severalty by any of the neighbouring proprietors.

Mr. Smith, therefore, is a wrong-doer; and the remaining question is, has the Crown any right to interfere? I hold that, as against a wrong-doer, the Crown has undoubtedly such a right; very little title will be sufficient as against a wrong-doer, the presumption is against him and in favour of the party challenging his act. If Mr. Smith has a right to build this wall upon the sea-shore, where he has built it, every other owner of that line of houses has exactly the same right. It is enough for the purpose of this suit to say, that for one person so to jut out a wall, or any other tenement, as to oblige the King's subjects to go round or to go into the water, and not to go as they more conveniently and commodiously might nearer the land and less further into the sea, is, of itself, a trespass upon the public rights, and upon the enjoyments of the public. Where the Crown has the property and an easement, or where the Crown, having no property, has an easement alone, it is quite undeniable that this act of Mr. Smith makes him a wrong-doer. It is to the detriment and the damnification of the Queen's subjects, even if no other person follow his example. Other persons, however, past all doubt, would have the same right which Mr. Smith would have, and thereby the whole of that ground would be destroyed, as regards the easement enjoyed by the public,

as much as if it had been inclosed from the beginning, and the public would be so far damnified.

Then, if that be so, whether the Crown has any property in it or not, does not become a necessary question for us to dispose of. We leave, therefore, that more thorny path entirely on one side, and we arrive, by a much smoother and more level path, at a conclusion in support of the judgment below. The ground, indeed, upon which mainly the judgment by the learned Judges is rested, is, that the Crown, as the guardian of the public interests, has the right to interfere on behalf of those interests, just as the Attorney-General might do in this country, by information against a nuisance, and as the Officers of State do in Scotland who exercise that control.

My Lords, it is satisfactory to me to think that it is unnecessary that anything more should be said upon the point disputed before us. Upon these grounds I have to recommend to your Lordships that the judgment of the Court below be affirmed.

LORD CAMPBELL.—My Lords, I am likewise of opinion that the interlocutors appealed from ought to be affirmed. I agree that we are bound to decide the question of law on which issue was joined, "whether assuming, in point of fact, that the "new wall of Mr. Smith extends beyond the high water-mark "in ordinary spring-tides, he is, with reference to the terms of "his titles and the rights of the Crown, entitled to have the wall "maintained in that position?" But we are not bound to decide the general abstract question, whether, by the law of Scotland, the sea-shore belongs to the Crown as high as ordinary spring-tides, or only as high as ordinary neap-tides? We are required to take into consideration "Mr. Smith's titles" and "the rights of the Crown."

Looking to those as they are alleged and admitted on the Record, I am clearly of opinion, without any adjudication of the

general question, that the new wall was wrongfully erected, and that there ought to be judgment *quod prosternetur.*

Mr. Smith, in erecting it, was evidently a wrong-doer. He does not pretend to say that he had possession of any ground to the north of the old wall, on the contrary, he allows that all the space to the north of the old wall was open to the sea, and that, without any visible boundary, it joined the Porto-Bello sands, on which the public *de facto* have immemorially walked, not only for recreation, but in travelling between Leith and Musselburgh and other adjacent villages. Then examining the Feu Charter from the Marquis of Abercorn to Sir John Stuart, under which Mr. Smith claims, it is clearly a grant of a definite piece of ground " measured off and laid out, not exceed-" ing one-eighth part of an acre," with specified boundaries, and the feuar had as little right to exceed the specified boundary on the north as on the south, the east, or the west.

Such are the titles of Mr. Smith. Now let us see the injury to the public from the new wall which he has erected. This wall is " beyond the high water-mark in ordinary spring-tides." Therefore, as often as the ordinary spring-tides rise to it, the inhabitants of Porto-Bello, Leith, Musselburgh, and the adjacent villages, are cut off, not only from the means of recreation but from the right of way which they have immemorially enjoyed.

Mr. Smith's counsel have contended that he has a right to inclose the sands for the width of thirty feet to the low water-mark; and, on the same principle, he might certainly do so to high water-mark in neap-tides. All the other feuars along the shore might follow his example, and, for large portions of time, the public would be excluded from the sands of Porto-Bello.

The question is, whether the Officers of State representing the Crown have a sufficient interest to apply for an interdict? Mr. Smith objects that the public have made use of these sands only by sufferance, without any legal right, and that the Crown can have no right to the soil, or interest where the new wall is

erected, because it is above the sea-mark of ordinary neap-tides. It is not disputed that the Officers of State are the proper parties to sue, either if the rights of the public have been violated by the erection of the wall, or if an injury is thereby done to the property of the Crown.

Without placing any reliance on notoriety or local knowledge from which the Judges below seemed to think they might almost take judicial notice of the rights of the public on Porto Bello sands, where they probably often invigorate themselves for the discharge of their laborious duties, looking only to the record, it is quite clear that the public are, and have long been, in the enjoyment of these rights. But it has often been held in England, and the doctrine resting on sound principles it must be equally applicable to Scotland, that a party in possession, even with a doubtful title, shall be protected against a wrong-doer by an injunction. Therefore, irrespective of the right of the Crown to the property of the sea-shore, and without touching the question whether the sea-shore extends to the flood-mark of ordinary spring-tides, or only of neap-tides, I am of opinion that, by reason of the easement enjoyed by the public over the *locus in quo* from which they are now excluded, the Officers of State had a right to apply for this interdict, and that it was properly granted in their favour.

Without pronouncing or even hinting at any opinion as to whether the sea-shore extends to the flood mark of ordinary spring-tides, I should have thought that as against this wrong-doer a sufficient case for an interdict had been made out *ratione soli*. Notwithstanding some loose dicta to the contrary, there can be no doubt that by the law of Scotland, as by the law of England, the soil of the sea-shore is presumed to belong to the Crown by virtue of the prerogative, although it may have been alienated, subject to any easements which the public may have over it. Here the sea-shore was considered to go up to the old wall, which bounds these feus from the sands. There is no boundary or division between that old wall and the

sands at low-water mark, and the same rights appear to have been exercised over the whole of this area. Shall a wrong-doer in such a proceeding be permitted to defend himself by a doubtful construction of a charter granted by the Crown to the Marquis of Abercorn, or by raising the doubtful question, upon which the authority of Hale is contradictory, as to the line of ordinary spring-tides and ordinary neap-tides?

I am of opinion that the Court below did well in granting the interdict, leaving the question undetermined. Could a stranger from Orkney, having no right to a foot of land in the county of Mid-Lothian, by inclosing the space between the old and the new wall, when an interdict against him was applied for by the Officers of State, have defended himself by the doubtful construction of the Crown's charter to the Marquis of Abercorn, or by raising the vexed question respecting flood-tides and neap-tides? Mr. Smith is in no better situation for this purpose, although he is rightful owner of a feu which extends to the old wall and no further.

The interdict being duly granted, the consequence inevitably follows, that the wall which was wrongfully erected shall be prostrated.

Although I have examined the authorities which have been cited at the bar, I studiously abstain from giving any opinion as to the evidence, either by grant or by enjoyment, which is required to show that the sea-shore, which *prima facie* belongs to the Crown, has become vested in a subject; but I may venture to say that, whatever may be the effect of the grant of a barony described to be upon the sea-shore, there is no foundation in law for the position, that the simple grant of a piece of land will pass the sea-shore by which it happens to be bounded.

For these reasons I concur with my noble and learned friend in the opinion that these interlocutors should be affirmed, with costs.

[*Sir Fitzroy Kelly*.—With great submission, your Lordships

will recollect that this is a case by the Crown or by the Officers of State. No costs were given below.

Mr. Bethell.—If your Lordships will hear me upon the point, I shall satisfy you in a moment.

Sir Fitzroy Kelly.—That was so in the case of the Commissioners of Woods and Forests against Lord Bute. The same demand was there made, and the same answer was given.

Lord Brougham.—What do you say, Mr. Bethell?

Mr. Bethell.—It is, my Lord, the clearest thing in the world, that whenever the Crown sues for a public object it has costs.

Lord Brougham.—Were there costs given in the Court below?

Sir Fitzroy Kelly.—No, my Lord.

Mr. Bethell.—I do not know how that is.

Sir Fitzroy Kelly.—You say you do not know, but if you look to the judgment you will find it.

Mr. Bethell.—I apprehend the rule is indisputably this. It is the rule that your Lordships has been familiar with for years, that whenever the Crown sues for a public purpose and on behalf of a public right, the Crown has costs. Witness what is done in the Court of Chancery every day, where the Attorney-General sues in respect of charities, which is a mere suit by the Crown for a public right; the Crown has costs. If this had been a case of perpresture ——

Lord Brougham.—Where the Crown sues by a relator of course it has costs; but suppose there is no relator, are costs given?

Mr. Bethell.—My Lord, the Attorney-General has his costs every day.

Lord Brougham.—Though there is no relator?

Mr. Bethell.—Yes; though there is no relator, and where the Attorney-General is a Defendant.

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

Lord Brougham.—I never heard of the Crown in any case, except where there were relators, either getting costs or paying costs. Would the Crown have paid Mr. Smith his costs here if the Crown had been unsuccessful? for it must be mutual. It would be the hardest thing in the world upon a party, if the Crown got costs if it were successful, and paid no costs if it were defeated. Suppose there is a decision in the Rolls or before one of the many hundred Vice-Chancellors with which we are blessed. Suppose there is a decision before any of that large judicial body against the Crown, and the Crown appeals to the Lord Chancellor, and the Crown is defeated in the appeal, would the Crown's costs be awarded by the Lord Chancellor in a decree affirming the decison of the Court below? I am sure I never heard of such a case.

Mr. Bethell.—Costs personally against the Crown are quite out of the question.

Lord Brougham.—I am talking of a suit of the Crown upon a charity, where the Crown files an information without a relator. Where there is a relator the relator pays the costs, and that in point of fact is the use of a relator. I never understood it otherwise than that you had a relator to enable the Crown to pay costs and to get costs. But suppose there is no relator, and that the Court of Chancery reverses the decision of the Vice-Chancellor upon a charity suit, would the Crown have to pay the costs of the party appealing?

Mr. Bethell.—That, my Lord, is very easily answered. Your Lordship knows very well that where the Crown has a decision in the Court below and that is reversed in the Court above, there can be no costs given. The answer in that case is a simple one.

Lord Brougham.—Suppose the decision is against the Crown below, and the Crown appeals and brings the party which it has charged with a breach of trust before me as Chancellor in the Court of Chancery, can I give costs against the Crown when I affirm the Vice-Chancellor's decision?

Mr. Bethell.—Certainly not, my Lord.

Lord Brougham.—Could anything be more hard than that the Crown should never pay costs, but should always get them?

Mr. Bethell.—The best way sometimes, if your Lordship will forgive me, to answer one question is by proposing another.

Lord Brougham.—I should say that that is the very worst way.

Mr. Bethell.—It is a very approved mode; and I will answer your Lordship's question, if your Lordship will permit, with the greatest humility, by asking you this. Suppose a subject has a conflict with the Crown, and the Crown has a judgment in its favour, and that the subject brings the Crown first to the Lord Chancellor and then to this House, upon an unfounded groundless appeal, is the public, through the medium of the Crown, to pay the costs of that groundless appeal? This very point was discussed the other day, when I took the liberty of using the arguments which your Lordship has just urged, before his Lordship the Master of the Rolls in a precisely parallel case, The Attorney-General against The Corporation of London. There, the Attorney-General, on behalf of the Crown, was contending that the Corporation of London was not entitled to the soil of the River Thames between high and lower-water mark (it is this very case), and the Master of the Rolls undoubtedly decided there, that the Corporation would be liable to pay the costs of the Crown. Although, my Lords, when I succeed, as I anticipate doing ——

Lord Brougham.—Was there a relator there?

Mr. Bethell.—No, my Lord; the Attorney-General is suing in his own name. When I succeed, as I anticipate doing, in disposing of the Attorney-General's information, I am afraid that I shall look to my learned friend, Sir John Jervis, in vain to get the costs of the Corporation of London.

Lord Brougham.—We will look into it.

Lord Campbell.—You have put a case which is very near this, but there may be one still nearer. Suppose the Attorney-

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

General files an information in respect of the violation of a public right of way, and then applies for an injunction, how would the costs be dealt with there?

Mr. Bethell.—I understand the rule in the Court of Chancery to be, that if the Crown sues for a public purpose, the Crown has a right to its costs. If the Crown sues in respect of its private property, it neither pays nor receives costs. That the Crown can never pay costs is perfectly clear; but it does not follow, that if the Crown chooses to sue on behalf of the public without a relator, it may not receive costs.

Lord Brougham.—We will look into it.

Lord Campbell.—We shall abide by the rule, whatever it may be.

Lord Brougham.—I only know that in this House we have never given costs under such circumstances, during my time, and it is now eighteen years since I entered it.

Sir Fitzroy Kelly.—This demand, my Lords, is perfectly unprecedented; it is unsupported by precedent or authority.

Lord Brougham.—Just attend to the case put by Mr. Bethell. He says the Master of the Rolls gave costs to the Crown the other day.

Sir Fitzroy Kelly.—The Master of the Rolls, my Lord, has not given costs. All that the Master of the Rolls has done has been to express an opinion in an interlocutory proceeding which has never been brought to judgment, and in which of course there has been no opportunity of taking the opinion of a Court of Review.

Lord Brougham.—The Attorney-General is here in person; what does he say?

Mr. Bethell.—He will I am sure support what I state.

Lord Brougham.—What do you say, Mr. Attorney-General?

Mr. Attorney-General.—My Lord, I know that in the case of the city of London the gentleman who appeared for me, Mr. Turner, applied to the Master of the Rolls for costs. His

Lordship stated that the Corporation would be liable to costs, and that he would take into consideration whether he would enforce payment, and we waived them.

Lord Brougham.—Of course nothing is decided. I will speak to the Master of the Rolls about it.

Mr. Attorney-General.—There is a case expressly upon this point decided in the House of Lords. I have seen it over and over again in manuscript at the office of Woods and Forests. It is the Officers of State for Scotland against some one whose name I forget. Mr. Gardiner has furnished it to me over and over again, and I have cited it in the Queen's Bench.

Sir Fitzroy Kelly.—I will mention two cases to your Lordships upon which there can be no doubt entertained.

Lord Brougham.—Let me remind you of one thing. If you produce a case where we did not give costs against the appealing party, that would not prove anything unless the right came in question; but a case in which we have given costs on the other side is fatal. It is decisive.

Mr. Attorney-General.—In the case to which I refer the question was discussed, and the Court decided that it would not give costs.

Lord Chancellor.—Was it that they could not or would not?

Mr. Attorney-General.—That they would not; that they would follow the practice of the Court below.

Sir Fitzroy Kelly.—I will merely mention the cases to which I refer. I do not want to argue them. The cases are, The Lord Advocate of Scotland against Lord Dunglass, which is in 1st Bell's *Appeal Cases*, page 93. There it was held, that "the Lord Advocate suing on behalf of the Crown, or of any officers in whom the revenue of the Crown is vested, is not liable for the costs of the action, whether competently or uncompetently brought in its form or otherwise. The Lord Advocate suing on behalf of the Crown, or of officers in whom the revenue of the

SMITH *v.* EARL OF STAIR AND OTHERS.—13th July, 1849.

Crown is vested, is not bound to enter into recognizances. Where the liability of the Crown for costs was in dispute the competency of an appeal on that subject was sustained." Then the other authority is the same case upon appeal, Lord Dunglass against the Officers of State for Scotland,—"The grant of an "office or the grant of a royal forest," and so on. Then this point is decided: "Query, Whether the Crown or the Re- "spondent has a right to reply?" In that case I do not know whether that point appears. But my learned friend, Mr. Anderson, says that in that case the costs were asked for.

Mr. Bethell.—If it be private property of the Crown, or pertaining to the Crown's revenue, the rule is clear.

Lord Brougham.—The revenue is another case; you except that case from your argument.

Mr. Bethell.—Quite so.

Lord Brougham.—You suppose the Crown not to be suing as the owner of the revenue, but as the guardian of a public right. The case of a charity would not exactly apply, but the case of the city of London before the Master of the Rolls is on all fours with the present. It is just this case.

Sir Fitzroy Kelly.—We say there is no distinction at all between those cases and the present; but we leave it in your Lordships' hands.

Lord Brougham.—We will speak to the Master of the Rolls about it.

Sir Fitzroy Kelly.—If your Lordship pleases.

Lord Brougham.—And we will look into the precedents in this House also.

Lord Campbell.—We will abide by the rule, whatever it may be. The more convenient rule would be, that the Crown should both pay and receive costs.

Lord Brougham.—Quite so. Sir Samuel Romilly brought in a Bill to that effect.]

On a future day, viz., the 31st July, 1849, Lord Brougham

gave the judgment of the House upon the question of costs in these terms: We have considered this case of Smith and the officers of State, and we are of opinion that there can be no costs given.

It is ordered and adjudged by, &c., 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.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH.