they gave one back-letter only to the borrowers of the money. The borrowers did not record that back-bond, and what did the lenders do? On the 1st of February they signed another letter, and that other letter, which they called a duplicate, they recorded on the 2d February. Now, I don't blame them for the motive, which is very obvious. If they had not signed that back-letter and recorded it, they would have held an absolute disposition to this property, and they could not have poinded the ground upon that. They do not themselves profess that they could have done so; and so they first grant and then record a new back-letter, which they call a duplicate; and this they did in order to give them the rights of a creditor in addition to the rights of a proprietor, which they previously had, for as the proprietor they could not have used the diligence of poinding the ground. Therefore this granting and recording the back-letter by them was simply done to combine in their persons the inconsistent rights of a proprietor and of a creditor. Now, that I do not think they can do according to law. The case of *Garthland* was very well considered very long ago, and all our recent authorities. Mr Ross, Mr Bell, and Mr Duff, allude to the case as a standard authority, which I never in the least doubted. As Mr Ross says in his Lectures, "No title upon which a man may enter into the natural possession of land can be a foundation for the diligence of poinding the ground," or, as it is put in the judgment itself, the owner of the ground cannot poind his own ground. Now, these parties were truly the owners of the ground, unless the borrower of the money held the back-letter and recorded the back-letter to qualify the right. The recording of their own back-letter was an attempt which I think the law cannot sanction to clothe themselves with the two inconsistent rights. That view I think really disposes of both points, because clearly there could be no *debitum fundi* when the party who calls himself the creditor held the rights to the subjects himself. There was no burden upon the property of another. The lender of the money and the holder of the bond was also the proprietor, and there could be no *debitum fundi*. Therefore I think that truly the two questions turn on the one point, and taking it in that composite view, I am very clearly of the same opinion as your Lordship.

Lord Mure—In the discussion of this case it was not disputed by either party, and it may be assumed as settled law—(1) That an heritable creditor, as holder of a *debitum fundi* burdening the land of his debtor, is entitled to have recourse to a poinding of the ground in order to operate payment of his debt; and (2) that this remedy is not open to a proprietor, because it is held to be incompetent for a party to poind ground belonging to himself. The law is so laid down by Mr Erskine in the passage which has been referred to by the Lord Ordinary in his note; and there are other authorities to the same effect.

In the present case the pursuer's title is not that of an heritable creditor by bond and disposition in security in the ordinary form, but is *ex facie* that of an absolute proprietor, with a separate back-bond or letter of reversion. The parties do not seem to be at one as to the date when the back-letter was granted, or as to whether it has been duly recorded. But it was not disputed by the defenders that such a letter had been granted; and it seems to be admitted that the transaction was substantially that of a security for debt, and intended to be so. Such being the nature and character of the transaction, it has been strongly contended on the part of the pursuers that they were entitled to the same remedies for recovery of their debt as other heritable creditors, including that of an action for poinding the ground.

The question thus raised is, in a general point of view, one of very considerable importance, and is, I think, attended with nicety; and if the matter were still open I should have had some difficulty in coming to the conclusion that the substance of this transaction was to be disregarded, and that because the title of the creditor was *ex facie* that of a proprietor he was not in a position to sue a poinding of the ground. But the question is, in my opinion, no longer an open one. For it seems to have for long been held that parties whose titles are *ex facie* absolute, although they may not be out-and-out proprietors, such as liferenters and wadsetters, are not entitled to have recourse to a poinding of the ground, but must operate payment of their debts in some other way. That was decided as regards a wadsetter in 1632, in the case of *Garthland*, referred to by the Lord Ordinary. Now, a wadset is defined to be "a conveyance of land in pledge for or in satisfaction of a debt or obligation, with a reserved power to the debtor to recover the lands on payment or performance;" and that I apprehend is substantially the position of the pursuers in this case. Upon the authority of the case of *Garthland*, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be adhered to.

The Court adhered in both actions.

Counsel for the Pursuers—Dean of Faculty (Watson)—Keir. Agents—Stuart & Cheyne, W.S.

Counsel for Allan, Campbell, & Co., Defenders — Kinnear — H. Johnston. Agents — Leburn, Henderson, & Wilson, S.S.C.

Counsel for John Watson and Others, Defenders —M'Laren—M'Lean. Agents — Millar, Allardice, Robson, & Innes, W.S.

Saturday, January 15.

FIRST DIVISION.

[Lord Curriehill.

LORD BLANTYRE *v.* THE LORD ADVOCATE.

Process—Party—Sist.

In an action of declarator of property, *held* that a third party claiming a right of property in the subject of the litigation was entitled to be sisted as a defender.

This was an action at the instance of Lord Blantyre and his son against the Crown, for declarator that "the ground forming the shores and banks of the river Clyde between high-water mark

and low-water mark, including the space between high-water mark and the longitudinal walls or dykes which have been erected along or near to certain parts of the deepened channel of the said river, *ex adverso* of the estates of Erskine, Bishopton, and Northbar, in the county of Renfrew, and *ex adverso* of Kilpatrick and Dalnottar, and of Shorepark and Glenarbuck, in the county of Dumbarton, belonging to the pursuers, belongs in property to the pursuers, and is part and pertinent of the adjoining lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Acts of Parliament."

In defence the Crown stated—"The defender avers that the Trustees of the Clyde Navigation maintain that, under certain royal charters in favour of the city of Glasgow, and also under the Acts of Parliament by which the Trust is constituted, the foreshores of the river Clyde, including those *ex adverso* of the pursuers' property, belong to the Trustees, together with all the right and interest originally competent to the Crown. The respective rights and interests of the Crown and the Trustees have never been judicially ascertained; but whilst the defender does not admit that the full right of property has been transferred to the Trustees, the rights and interests conferred on the latter by the charters and Acts of Parliament foresaid are of so large and important a character as to render it expedient and necessary that they shall be made parties to the present process."

The defender's first plea in law was—"The present action should be sisted till the Trustees of the Clyde Navigation are also called as defenders."

The Clyde Trustees appeared, and put in a minute stating that the foreshores of the Clyde, including those *ex adverso* of the pursuers' property, and the whole right and title thereto originally competent to the Crown, belonged to them, and craving the Lord Ordinary to sist them as defenders and allow them to lodge defences.

The defender's plea was repelled by the Lord Ordinary, and the motion of the Clyde Trustees was refused, on the ground principally that the question was *res inter alios acta.*

The defender reclaimed.

At advising—

Lord President—I cannot understand on what ground the pursuers resist the sisting of the Clyde Trustees in this process. It seems to be their clear interest to have that party sisted; but whether it be their interest or not, it is the duty of the Court to see that all parties asserting a right should have an opportunity of establishing their claim. If the pursuer's case is a good one, and he prevails, he can have a more effective judgment if all parties are convened, for he would then have a decree which would be valid against all. The peculiarity of this case is that both parties, the present defenders and those who ask to be sisted along with them, represent the public. The Dean of Faculty has said that the Crown stands only in a fiduciary position, while the Clyde Trustees are, and have been for nearly a century, in possession of the Clyde, and more effectually represent the public. If the pursuers are right, their decree will affect the public, and from every point of view it is desirable that the Clyde Trustees should be sisted.

In the conclusion of the summons there is a reservation that the finding and declarator asked shall be "subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Acts of Parliament." Mr Balfour admits that this was not intended to be a reservation of a claim of property, and it is not a reservation of such a claim as the Clyde Trustees are now maintaining.

The first plea in law for the defenders must be sustained.

Lord Deas—It is an important rule of practice, laid down in the House of Lords, and affirmed here, that it is *pars judicis* to give an opportunity of appearing to any party that the Court sees in the course of the process to be interested in the result. In the present instance the deep interest of the Clyde Trustees is apparent, and seeing that, it is *pars judicis* to direct that they be called. The clause of reservation in the summons is the introduction to various statements on the part of the pursuers that the Clyde Trustees are interested in this action; and in the condescendence the pursuers think it necessary to set forth as part of their case that no right of property was conferred on the Clyde Trustees by their Acts of Parliament. But it is not necessary for the Court to consider whether this would entitle the Trustees to appear, for the first plea in law for the Crown, and their statement of facts, are enough for us to decide the point, and if anything further is necessary we find it in the minute which the Trustees have lodged.

I have no more doubt than your Lordship of the regularity and expediency of this course than of the abstract right.

Lords Ardmillan and Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the defender, the Lord Advocate, against Lord Curriehill's interlocutor, dated 17th December 1875, Recal the said interlocutor; sist the Trustees of the Clyde Navigation as defenders in the action, in terms of their minute No. 22 of process; in respect of the sisting of said parties, find that the first plea stated for the defender, the Lord Advocate, has been satisfied and obviated; remit the cause to the Lord Ordinary to proceed further as shall be just; find the reclaimer entitled to expenses since the date of said interlocutor reclaimed against; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount of said expenses."

Counsel for Pursuer — Balfour — Hunter Agents—Skene, Webster, & Peacock, W.S.

Counsel for Defender—Dean of Faculty (Watson)—Ivory. Agent—Donald Beith, W.S.

Counsel for Clyde Trustees—Asher—Lorimer. Agents—Webster & Will, S.S.C.