praescribitur. And I think it is only carrying out the same principle that the law of Scotland has prescribed certain ways in which questions of disputed settlement are to be determined. A man purchases a brieve for the purpose of getting himself served heir in special, he fails in proving his propinquity, and the court of service refuses to serve him. That is not *res judicata.* He may purchase twenty brieves, and after failing in nineteen, he may succeed in the twentieth. In like manner he may be served on insufficient evidence, and a competitor challenges it and has it reduced. Still the decree of reduction is not *res judicata.* The claimant may still sue another service. Now, is there any formal process by which a competitor of that party, who has himself sued but failed, but yet thinks he has got a better title, can put this man to silence. I know of no such form. I never heard of one. I am taking the case as between two persons who both maintain a right, and the only way in which one can defeat the other is by service, and retour upon the service. For any service may be challenged until it is fortified by possession for twenty years. So that it appears that this question, as between two competing parties, never could be determined by an action of declarator. If both parties take out service, and they come before the Court by advocation, there is then a full and complete trial, and the result arrived at may be *res judicata;* but I know of no other way of coming to a final conclusion. And it would be a very extraordinary thing, looking to the favour of the law for rights of blood. A man may feel morally certain that he is the next heir, and may not be able to prove it, not being in a position, from some cause or other, to command his evidence. His enemy comes instantly into Court with an action of declarator to put him to silence. Is that to be allowed? I should be sorry to think so, for it is quite inconsistent with the genius of our law of service, which allows a claimant to serve as often as he chooses. Leaving the case now before us, let us see if the pursuer of this action is in a better position than two competitors for the estate. I think he is in a much weaker position. The right of the Crown to maintain the conclusions of the action is perfectly manifest. They hold that the charter is invalid, and they are, therefore, in a position to prevent anybody from taking up the rights under it. They are not bound to try the question with every mere pretender, but they have undoubtedly a good title to sue these reductive conclusions; and they may sue any declaratory conclusions which follow upon the reductive. But could they do what would not be competent to a competitor for the estate? That would be very remarkable. Having extinguished the defender's title to try the question of the validity of the charter, the Crown has no more to do with it. No doubt, if the extinction of the defender were to lead to this, that the Crown became *ultimus hæres,* that would be a very different matter. Then we would be landed in an action of declarator of *ultimus hæres,* which is a very peculiar form of process, but is one the object of which is to establish the right of the pursuer of the action. But there is no case of that kind here, and there could not have been, because it is said in the 7th article of the condescendence applicable to the declaratory conclusions, that there are in existence heirs of Sir William Alexander. (Reads 7th article.) As the defender's claims are rested on his descent through the fourth Earl, it is plain that the descendants of the three daughters of the second Earl, who was the son of the eldest son of the first, must be nearer heirs than the defender. To say that the defender is not the nearest lawful heir is not a question in which the Crown has any interest, because there are other heirs who may serve and try with the Crown the question of the validity of the charter. Therefore I think that the position of the Crown is more unfavourable than that of a claimant by right of blood. But I do not mean to say that I wish to put the judgment of the Court on any objection to the Crown's title; and therefore it is the first branch of the defender's plea, that the declaratory conclusions are incompetent, which I think ought to receive effect.

Lord COWAN concurred.

Lord BENHOLME differed. His Lordship could see no incompetency in the declaratory conclusions, after the Crown had gone the length of reducing both the special and the general services, and the infeftments following upon them. The Crown might have to prove a negative, and that might be difficult, but it did not affect the merits of the case. It was said to be a hardship that a claimant, when he was not in a position to prove his case, should have to meet an action of declarator that he was not the nearest lawful heir; but his remedy for that was not to appear in the action, and he might afterwards set aside the judgment as taken in absence. He was not moved by the objection that the process was unprecedented, because the circumstances of the case were unprecedented also. If the Crown had a title, there could be no doubt as to their interest in going on to establish a perpetual immunity against the pretensions of the defender.

Lord NEAVES concurred with the majority.

The action was accordingly dismissed.

Agents for Officers of State—Maclachlan, Ivory, and Rodger, W.S.

Agents for Defender—Wotherspoon and Mack, S.S.C.

Tuesday, May 29.

FIRST DIVISION.

PEARSON *v.* M'GAVIN AND CO.

Process—Reponing Note. An action having been dismissed in respect of the pursuer's failure to sist a mandatory, he was reponed on payment of a sum of expenses. Having failed to pay these expenses, the action was again dismissed, and a note to be again reponed was refused.

On 1st March 1866, the Lord Ordinary, on the motion of the defenders, and in respect of the pursuer's failure to sist a sufficient mandatory, and in respect of no appearance being made on his behalf, dismissed this action, with expenses.

The pursuer presented a reponing note, and on 13th March 1866 the Court remitted to the Lord Ordinary to repone him on such terms as to his Lordship should seem proper.

On 20th March 1866, the Lord Ordinary having heard counsel, reponed the pursuer on payment to the defenders of the sum of four guineas.

On 15th May 1866, the Lord Ordinary, in respect of the non-payment of the sum upon which the pursuer was allowed to be reponed, and his failure to appear by himself or counsel at the calling, of new dismiss the action, with expenses.

The pursuer then presented a second reponing note.

MAIR, for him, argued that a second reponing note was not incompetent. A third one had been granted in Mather *v.* Smith, 28th Nov. 1858, 21 D. 24.

W. M. THOMSON, for the defenders, argued that the note should be refused, because the delay was inexcusable. On 12th April the defenders' agent had written to the pursuer's agents, asking whether he would send a receipt for the expenses found due. No answer was returned, and on 12th May the case was again enrolled for decree. The pursuer did not attend to explain the delay in any way, and the action was dismissed a second time. In these circumstances, the pursuer should not be again reponed.

MAIR stated that after the decree had been pronounced, the expenses had been tendered to the defenders' agent and declined.

The LORD PRESIDENT—In Mather's case the failure was to find caution, and the delay was explained, there having been an objection to the bond of caution offered. I think the procedure adopted here ought not to receive countenance. The Court went very far into the case of Mather, and I am not disposed to regard that case as a precedent. But in it there was an explanation. Here there is none, but there was no appearance before the Lord Ordinary. The offer afterwards made was not one which the defenders were bound to accept, because the expense of obtaining the decree was not tendered.

The reclaiming note was refused with additional expenses.

Agents for Pursuer—R. & R. H. Arthur, S.S.C.

Agents for Defenders—John Ross, S.S.C.

SECOND DIVISION.

MACALISTER *v.* M'CLELLAND.

Process—Bill Chamber—Death of Party. A note of suspension having been passed on caution, and the respondent having died before caution was found, held that the note still depended in the Bill Chamber, where the respondent's successor should be sisted.

A note of suspension of a decree of removal was passed on caution; before caution was found, but within the fourteen days allowed for finding it, the respondent died, and an application was accordingly made to sist the respondent's successor in his room. The Lord Ordinary (Mure) had some difficulty as to whether this was a competent proceeding in the Bill Chamber, and whether the Lord Ordinary was not, after passing the note, *functus officio*. His Lordship accordingly reported the point.

The Court were unanimously of opinion that the application was competent. An interlocutor passing a note of suspension on caution was an interlocutor subject to a suspensive condition. If the condition were not purified, the interlocutor fell with it, and the case still remained in the Bill Chamber. Besides, if the original charger had been alive, he would have been entitled to go before the Lord Ordinary and have it found that no caution had been found, and might then obtain decree for expenses. This alone showed that the Lord Ordinary on the Bills was not *functus*.

Counsel for Macalister—Mr W. M. Thomson.

Counsel for M'Clelland—Mr Shand.

Wednesday, May 30.

FIRST DIVISION.

FERGUSON *v.* SUTHERLAND AND OTHERS.

Property—Salmon Fishings—Interim Interdict.—Terms of interim interdict granted in a disputed question of right to salmon fishings.

This is a suspension and interdict at the instance of Colonel Robert Munro Ferguson of Raith, Novar, and Culrain, against his Grace the Duke of Sutherland; George Young, salmon fisher, residing at Invershin, in the county of Sutherland; Joseph Peacock, factor for the said Duke of Sutherland, residing at Rhives, by Golspie; Donald Gray, bank agent in Golspie; and Colin Mackenzie, W.S., Edinburgh. The complainers prayed the Court to interdict, prohibit, and discharge the respondents from fishing for salmon in the Kyle of Oykell, on either side of the same *ex adverso* of any part of the lands and estate of Culrain, belonging to the complainer, extending from about a mile to the westward of the point where the Casalay River joins the Kyle of Oykell to the point where the Culrain Burn joins the said Kyle, and from landing or in any way trespassing on the complainer's said lands and estate, or any part thereof, and from molesting the complainer or his servants in fishing for salmon in the said Kyle of Oykell, on either side of the same *ex adverso* of the complainer's said lands and estate, or any part thereof, and from taking possession of, or interfering with, the complainer's boats, nets, or other implements used by him or his servants in fishing as aforesaid.

On 17th February 1866 Lord Mure granted *interim* interdict against the respondents landing for the purpose of fishing, or otherwise in any way trespassing on any part of the lands and estate of Culrain belonging to the complainer, extending from a mile to the westward of the point where the Casalay River joins the Kyle of Oykell to the point where the Culrain Burn joins the said Kyle, or molesting the complainer or his servants in fishing for salmon in the said Kyle of Oykell, from the south side of the same *ex adverso* of the complainer's said lands and estate or any part thereof, or taking possession or interfering with the complainer's boats, nets, or other implements used by him or his servants in fishing as aforesaid.

Thereafter, answers having been lodged for the respondents, Lord Mure pronounced the following interlocutor:—

Edinburgh, 31st March 1866.—The Lord Ordinary having considered the Note of Suspension, Answers, and Productions, and heard parties' Procurators,—On caution passes the note, and in the meantime interdicts the respondents from fishing for salmon in the Kyle of Oykell, on either side of the same, from the point where the Casalay River joins the Kyle of Oykell, to the island commonly known as the Isle of Oykell, situated about three miles to the eastward of the point where the said Casalay River joins the said Kyle; or from molesting the complainer or his servants in fishing for salmon in the said Kyle, on either side of the same, between the said two points: And *quoad ultra* continues the interim interdict, and ordains both parties to keep an authentic note or account of the number and weight of the fish caught by them respectively—the complainer between the Isle of Oykell and the Culrain Burn, and the respondent between the said Isle and the mouth of the Shin.

(Signed) DAVID MURE.