shillings a year; and for anything I know the Duke of Athole's advisers may not have thought it worth their while to embark in an expensive litigation or investigation as regards that. But when a large claim like that with reference to Dalcroy is made against him, I do not see how it can be pleaded that because he made an admission in another case he therefore must be held to have made an admission in regard to this case. I do not think it would be fair or just to hold that, and I do not think it is law, for in my opinion the waiver he made as regards the teinds of Dalcroy cannot be held to go to any further extent than this particular subject. It has been suggested that the subjects are both in the same tack, and that the same tack-duty, 5s. 3d., is payable for them, and that it is not possible now to hold the tack subsisting as regards one of the subjects and not as regards the other, because we do not know what tack-duty will be payable for the one that is still included in the tack. I think that is a difficulty which would be easily got over, and if there is to be a division of the tack-duty the fair way would be to take it *pro rata* of the value of the teind subjects. But that would not stand in the way of doing what I think justice to the Duke of Athole. The only other matter that I need refer to is the Lord Ordinary's finding as to the judgment in the *Locality of Calton* ruling this case as regards arrears. In the view I take of the present case it is unnecessary to consider that matter, but I wish to reserve my opinion entirely upon it, because I have personally very considerable doubt as to how far the Lord Ordinary's judgment is sound upon that point. On that point therefore I wish to reserve my judgment.

The Court pronounced this interlocutor—

"Having considered the cause and heard counsel for the parties on the reclaiming-note for the Duke of Athole against the interlocutors of Lord M'Laren of 19th July 1884, and 28th November 1884, recal the said interlocutors: Decern against the defender for payment of £30, 4s. sterling, being the amount of surplus teinds of the lands of Pitdornie from 1861 to 1881, both inclusive: *Quoad ultra* assoilzie the defender and decern: Find the defender entitled to expenses," &c.

Counsel for the Crown—Keir. Agent—Donald Beith, W.S.

Counsel for Defender — Pearson — Graham Murray. Agents—Tods, Murray & Jamieson, W.S.

Friday, March 20.

FIRST DIVISION.

[Sheriff of Chancery.

MAITLAND *v.* MAITLAND.

(*Ante*, p. 418).

Process — Proof — Specification of Documents — Excerpts from Writs in Publica Custodia *— Examination of Havers.*

A specification of documents, for which a diligence was craved, included, *inter alia*, acts of the Legislature in a foreign country, wills, probates, and church registers. *Held*, as to all these documents, that the proper course to follow was to examine the custodiers of these writs as witnesses with reference to the entries under their charge, and *diligence* for their recovery *refused* accordingly.

In obedience to the interlocutor of the First Division, of date 19th February 1885, reported *ante*, p. 418, a condescendence was lodged by Sir J. R. G. Maitland and answers were lodged by Major Frederick Maitland. The condescender alleged himself to be descended from the Hon. Sir Alexander Maitland, fourth son of the sixth earl. Major Maitland, the competing petitioner, also alleged his descent from the sixth earl. He traced it to the Hon. Richard Maitland, an elder son than Sir Alexander Maitland. He alleged that this Hon. Richard Maitland married, on 11th July 1772, in New York, according to the rules of the Church of England, a certain Mary M'Adam, that his, respondent's, grandfather Patrick Maitland was a son of this Hon. Richard Maitland and Mary M'Adam born before the date of the marriage, that the Hon. Richard Maitland was a Scotsman and never lost his Scottish domicile, and that Patrick Maitland was therefore legitimated by his parents' marriage.

The condescender denied that Hon. Richard Maitland ever married, and further averred that he was at his death, and for a long period before it, domiciled in British North America, where the law of legitimation *per subsequens matrimonium* did not exist.

By interlocutor of 18th March 1885 the Court allowed the parties a proof of their averments, Major Maitland to lead in the proof, but with the declaration that the proof was for the present to be limited to an inquiry as to what was the system of law relating to marriage which prevailed in New York in the year 1772.

Specifications of documents, to secure which diligence was sought, were put in by both parties. Sir J. R. Gibson Maitland (the condescender) sought to recover documents relating to real property in what was then British North America, acquired by or granted by the Hon. Richard Maitland in or prior to 1776; Acts of the Local Legislature regarding lands belonging to the Hon. Richard Maitland, including certain Acts specified; wills and probates of wills executed by him; agreements relating to mines in which he was interested; file of newspapers circulating in New York in 1772; church registers in the province of New York for 1772; writings and letters of or by him relating to his *status* or domicile.

Major Maitland objected to this specification, and argued that the commission was too wide, and sought to include Acts of Parliament and public writs in other countries which could not be recovered to be put into process, and even if recovered would not thereby be rendered competent evidence.

Authorities—Dickson on Evidence, sec. 1354; *M'Lean & Hope* v. *Fleming*, Mar. 9 1867, 5 Macph. 579.

No material objection was taken to the specification of Major Maitland.

At advising—

Lord President—The articles of this specification to which objection is taken are numbers

2, 4, 6, 7, 8, and 9. As regards the whole of them they seem to refer to public documents said to be in existence in the United States of America, and more of them appear to be books of records, while those that are not so are instruments *in publica custodia*. Now, it appears to me that the proper course to follow with reference to all those documents is to call the custodiers as witnesses. In the case of a register, let the registrar be called and let him be examined with reference to any entries which may be in the books under his charge. If the entry be short it may be taken down *in toto* as part of his deposition, and by his oath it would then be made good evidence. There would then be no examination of him as a haver, but he would be examined simply as a witness in the cause. Further, as to the other writs they appear to me to stand in very much the same position. They are probates of wills and documents of that class which clearly cannot be allowed out of the country; but all that the witness has to do is to exhibit the originals, and if he is unable to do this, copies may be furnished and excerpts taken therefrom, and such excerpts when sworn to will also become good evidence in the cause. What I have said applies to all the numbers which are objected to, and I can see no need in having the parties examined as havers and also as witnesses, thus doing twice over what requires only to be done once.

I am therefore for giving effect to these objections, and rejecting all these articles of the specification.

Lord Mure concurred.

Lord Shand—The result of your Lordship's judgment is that Sir James Maitland will have no difficulty in getting all that he really desires. The substance of the document is not objected to; it is merely the form in which their contents are to be made available. In that view of the matter my opinion is of little consequence. I think, however, that a somewhat different course might have been followed from that proposed by your Lordship, when in a litigation in which proof has to be taken both in this country and abroad, either party is entitled to have a diligence to recover documents apart from and in addition to a commission to examine witnesses. If that is the rule when proceedings are to go on in this country, I cannot see that there is any difference because some of the documents happen to be abroad. I think that Sir James Maitland is entitled both to a diligence and a commission to examine witnesses. Two specifications are before us, and I wish that we had so settled their terms, trusting to the Foreign Courts to give effect to the call, as to have been able to save the parties the expense of a discussion in America. The mere fact that interrogatories are to be adjusted does not appear to me to be any sufficient reason for refusing the diligence in America. I am therefore of opinion that this diligence should be granted, with the exception of those articles which call for public documents of State. As regards the probates and extracts of wills, I can see no reason for refusing them and am therefore for granting all the articles of this specification with the exception which I have just referred to.

Lord Adam—I concur in the opinion expressed by your Lordship. In the execution of a diligence there is a well known distinction between productions and exhibits, or in other words, between documents put in process, and those which can only be seen. Now, this is not one of those cases in which we can grant warrant for productions in any proper sense; we can only grant leave that exhibits may be made; and in these circumstances it appears to me that it would be quite wrong to grant a diligence for the recovery of documents which from their very nature cannot be produced in process.

The Court granted diligence for the recovery of documents relating to real property, mines, letters-patent, &c., in which the Hon. R. Maitland was interested; files of New York newspapers for 1772, certificates, warrants, &c., relating to the *status* of the Hon. R. Maitland; writings and documents, including letters to or by him tending to show where he was domiciled at his death and prior thereto; and refused diligence to recover Acts of the Local Legislature, wills and probates of wills, records of New York courts of law, registers of New York churches, and marriage registers.

Counsel for Sir James Maitland—Mackintosh—Pearson. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Major Maitland—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Adam, Ordinary.

MAGISTRATES OF GLASGOW *v.* THE POLICE COMMISSIONERS OF THE BURGH OF HILLHEAD.

Road—Roads and Bridges (Scotland) Act 1878, *secs.* 37, 38, *and* 88—*Bridge Locally Situated in Two Burghs—Outside Traffic.*

Held (*diss.* Lord President) that the provisions of the Roads and Bridges (Scotland) Act 1878, sec. 88, apply to the case of bridges locally situated partly in one county or burgh and partly in another, which accommodate traffic coming from adjoining counties or burghs.

Opinion (*per* Lord President) that sec. 88 only applies to bridges situated wholly within one county or burgh, and that secs. 37 and 38 deal with bridges which are not situated within one county or burgh.

Observations on the effect of the Act 13 and 14 Vict. cap. 21 (an Act for shortening the language in Acts of Parliament), sec. 4.

By the Roads and Bridges (Scotland) Act 1878, it is, by sec. 37, *inter alia*, provided (subsection 1, *d*), that "Where a bridge is not situated wholly within one county or burgh, the expense of maintaining, and, if need be, of rebuilding, the same shall, failing agreement, be a charge equally against the trustees of the county or counties and local authority or authorities of the burgh or