who come in and succeed him as creditors should not be entitled to supply what his death prevented from being done, and that they should consequently be deprived entirely of the right of recovering what is due to them. Therefore, upon all the points, I quite concur in the judgment proposed by your Lordships.

Mr Mellish—Will your Lordships allow me, before the question is put, to call your attention to the question of costs. In the Court of Session the costs are regulated by the 25th section of the Montgomery Act, which in substance enacts that where the executor of an heir of entail recovers the full sum which he has demanded, then the defenders shall be liable to full costs of the suit; but if the decree is not obtained for the full sum of money of which payment has been required, it shall be in the discretion of the Court to award cost of suit to either party as the justice of the case shall direct.

Now in the Court of Session the Lord Ordinary declared full costs against us under the first provision of this section, because the respondents recovered under the decree of the Court of Session the full sum demanded. But now, in consequence of your Lordships—

Lord Westbury—It is a most inconvenient thing to have any argument upon costs after judgment. When the counsel for a party considers that there is any question of costs in the case to which he wishes to address himself he must make it part of his original argument and not wait till after judgment has been pronounced, and then claim to be heard with respect to costs.

Mr Mellish—I beg your Lordships pardon for not having done it before, but I thought your Lordships' attention, not having been called to this clause—

Lord Westbury—If we heard you upon the question of cost we might have a long argument in consequence of your observations, because the other side would have a right to a reply.

Lord Colonsay—I do not think that section applies to the circumstances of this case.

Lord Chancellor—My Lord, I think your Lordships will be disposed to hear any argument upon, the subject of costs according to your Lordships' usual practice. As your Lordships do not concur with the interlocutor pronounced by the Lord Ordinary in all respects, it would follow that the costs ordered to be paid under that interlocutor should be repaid to the appellant.

Lord Westbury—So far as the interlocutors require to be altered by reason of the particular point on which we agree with the appellant, I apprehend that the judgment of your Lordships, after specifying distinctly the point on which we differ from the judgment below, and on which you reverse the interlocutors of the Court below, will direct the costs paid by the appellants under those interlocutors to be repaid to the appellant by the respondents.

Mr Mellish—They have not been paid, they are only ordered.

Lord Westbury—That is immaterial. Reversing the interlocutors in that respect, you will reverse the direction as to costs.

Lord Chancellor—The question in the first appeal is, that the interlocutors complained of should be varied by declaring that the late Marquis of Breadalbane, by presenting his petition under the Act of 11 & 12 Vict., c. 36, and the proceedings thereon, elected to adopt the remedies given by that Statute, and to abandon the remedies given by the Act of 10 Geo. III., and therefore assoilzing the defender from the operation of the summons as to the sum of £5202, 16s., but without prejudice to any question in any other action, and ordering any costs paid by the appellant under those interlocutors to be repaid. And on the second appeal, that the interlocutor complained of be affirmed, and the appeal dismissed with costs.

In first appeal, interlocutors varied with direction as to costs in Court below, and cause remitted. In second appeal, interlocutor affirmed, and appeal dismissed with costs.

Agents for Appellant—Adam, Kirk, & Robertson, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondents—Davidson & Syme, W.S., and John Graham, Westminster.

Monday, March 30.

ALEXANDER *v.* OFFICERS OF STATE.

(*Ante*, ii, 34; 4 Macph. 741.)

Appeal—Competency—48 Geo. III., c. 151, sec. 15. The 15th section of 48 Geo. III., c. 151, does not mean that, when a judgment is appealed from, all the preceding interlocutors may, as a matter of course, be appealed from, but only "so far as necessary" to enable the House to deal with the merits of the action. Opinions that the clause applies to interlocutory judgments of the Lord Ordinary as well as of the Court.

Title to Sue—Service—Reduction—Proof. Circumstances in which *held* that the Crown had a right to sue a reduction of services obtained by the defender. Opinion, that though a party might have no right to intervene in a service, he might yet, if his rights were affected by it, afterwards bring a reduction. On the proof, services reduced.

Expenses—Crown. The Act 19 & 20 Vict., c. 56, sec. 24, which allows costs to be given for or against the Crown, applies as well to all causes presently depending, as to those which shall come to depend.

The appellant in this case was Alexander Humphreys or Alexander, designing himself Alexander Alexander, Earl of Stirling, and the respondents, pursuers of the action in the Court of Session, were Her Majesty's Officers of State for Scotland.

The summons, which was one of reduction and declarator, was brought against the appellant and Thomas Christopher Banks for the purpose of reducing a special service and a general service, by which the defender was served "lawful and nearest heir in general to William the first Earl of Stirling, his great-great-great-grandfather," and also to have it declared that "the defender is not the great-great-great-grandson of William first Earl of Stirling, and that he is not lawful and nearest heir in general, nor nearest and lawful heir in special, of the said William Earl of Stirling in the lands, territories, and others above mentioned, and that he has no right, title, or claim whatsoever to the lands, territories, and others, or to any part thereof.

The defender offered, as preliminary defences, that the summons did not set forth any interest on the part of the Officers of State which entitled them to prosecute the action, and therefore that the sum-

mons ought to be dismissed on the following preliminary pleas—1st, No one can challenge a service as heir unless he claim to be served in the same character with the party whose service is sought to be reduced. 2d, It is not set forth in the summons that the pursuers have any interest in the lands entitling them to reduce the deeds challenged, and in truth they have no such right or interest even supposing that the titles of the defender were defective, and his services inept.

The Lord Ordinary (Lord Moncrieff), on the 3d July 1833, pronounced the first interlocutor appealed from in these terms:—"Repels the preliminary defences, and decerns; and the defenders acquiescing in this judgment, assigns to them the first sederunt day in November next as a first term for satisfying the production."

The defender then offered defences on the merits, in which he stated that the action was raised at the instance of the Officers of State, who have no competing service, and who do not assert any right to the lands in question, and they do not appear to have any interest which entitles them to challenge the deeds sought to be reduced. To this the pursuers, by one of their pleas in law, answered—"The defender having stated his preliminary defences at the proper stage, and these having been repelled without reservation, it is not competent for the defender now to plead any defences of a preliminary nature."

This appears to have been the opinion of the Lord Ordinary (Lord Cockburn), for, passing by these defences altogether, he, on the 20th December 1836, pronounced the following interlocutor:—"Finds that the said defender has not established that the character of lawful and nearest heir in general, or in special, to William first Earl of Stirling belongs to him, or that his services as such are warranted by the evidence produced either before the jury or in this action; therefore reduces the said two services, special and general, and the retours proceedings thereon, and decerns."

To this interlocutor the defender presented a reclaiming note to the Second Division of the Court. While this was pending, the defender presented a note to the Court, stating that he had discovered family papers and documents of great importance to the question at issue in the cause, and craving their Lordships to allow him time for making the requisite investigations with the view of having his case strengthened by further evidence. The Court ultimately allowed the defender to lodge a minute stating more fully the nature of the papers and documents referred to, the circumstances connected with their discovery, and the points of evidence arising out of them. The defender accordingly, on the 23d November 1837, presented the required minute.

Certain proceedings, unnecessary to be dwelt upon, followed; and, on the 11th December 1838, the Second Division of the Court pronounced an interlocutor appointing the defender to appear at the Bar for the purpose of being judicially examined on the matters set forth in his minute, and as to how the documents tendered in process came into his possession or knowledge. The judicial examination of the defender took place on the 18th December 1838, when he was interrogated closely, and at considerable length, by the Lord Advocate.

After this, the civil proceedings were suspended for a time in consequence of a step taken by the pursuers, of which I cannot refrain from expressing my disapprobation. The defender having been exposed to a very searching examination as to the manner in which he became possessed of the alleged newly-discovered documents, distinguished as "De Porquet Packet," and "Le Normand Papers;" and the Officers of the Crown, having extracted from the defender all the requisite information upon the subject, on the 14th February 1839, caused the defender to be arrested and thrown into prison, his letters and papers to be seized and searched, and many of them to be carried away. A prosecution for forgery was afterwards instituted, when, after a trial which lasted five days, the jury, on the 2d May 1839, returned a verdict of not proven.

On the 12th June 1839 the pursuers presented a note to the Second Division of the Court, in which they moved the Court "to fix an early day for the advising of the cause." The defender, on the 24th June, lodged a note, craving the Court to allow him further proof of the papers contained in "De Porquet Packet," and moving them for further time to prorogate the cause till the third sederunt day in November. On the 26th June, the Lords, having considered this note, pronounced an interlocutor appointing the cause to be put in the roll for advising on the 9th July next; and on that day, in the absence of the appellant, pronounced the following interlocutor:—"9th July 1839.—The Lords having resumed consideration of this note, with the whole subsequent proceedings, in respect that no appearance is made for the defender, adhere to the interlocutor complained of, and refuse the desire of the note."

On the 29th May 1840, the Second Division of the Court remitted the process to Lord Cunninghame (Lord Ordinary) to proceed therein as to his Lordship should seem just; and on the 2d June 1840, Lord Cunninghame pronounced the following interlocutor:—"The Lord Ordinary finds, reduces, improves, declares, and decerns, conform to the conclusions of the libel; and, of consent of the pursuers, finds no expenses due."

On the 27th August 1841, an appeal was presented to this House against the interlocutor of the Second Division of the Court of the 9th July 1839, and against the Lord Ordinary's interlocutor of the 20th December 1836, which it affirmed.

When this appeal came on for hearing, it was insisted by the respondents that it was necessary that your Lordships should have before you Lord Cunninghame's interlocutor of the 2d June 1840. Your Lordships being of that opinion, adjourned the hearing of the appeal to enable the appellant to bring up that interlocutor.

The defender thereupon brought a summons of wakening, under which the Lord Ordinary, of consent, wakened the process and granted leave to the defenders to submit the interlocutor of the 2d June 1840 to review by reclaiming note to the Second Division of the Court, in terms of the Statute 48 Geo. III., c. 151, sec. 16. The defender presented a reclaiming note praying the Court to review or alter the interlocutor of the 2d June 1840. But the Court refused to consider the reclaiming note without a special remit from your Lordships' House. On the 19th February 1846, your Lordships remitted back to the Second Division of the Court "to consider and dispose of the reclaiming note presented by the defender against the interlocutor of the Lord Ordinary of the 2d June 1840, or any other application the said defender may make to review the said interlocutor."

On the 28th June 1864 the present defender was sisted in the room of his father, the original de-

fender. And on the 8th December 1864, the Second Division of the Court remitted to Lord Ormidale, the Lord Ordinary, "to proceed with the preparation and completion of a record applicable to the declaratory conclusions of the summons, and allowed the defender to add additional pleas to the defences."

In their condescendence to the record thus made up, the pursuers averred that the original defender was not the great-great-great-grandson of the first Earl of Stirling, nor his nearest lawful heir in general or in special. And they further averred that there were in existence nearer heirs to the first Earl of Stirling than the defender.

The defender, amongst other pleas, pleaded that the summons, so far as it contains conclusions that the original defender was not great-great-great-grandson of William first Earl of Stirling, and that he was not lawful and nearest heir in general or in special of the said Earl, is incompetent, and *separatim* the Officers of State have no right to sue the action *quoad* these conclusions.

On the 25th May 1866 the Court pronounced an interlocutor, finding that the action, so far as regards the declaratory conclusions, was incompetent; and to this effect they sustained the first plea in law for the defender, and dismissed the action.

On the 9th June 1866, on the pursuer's motion, the Court pronounced this interlocutor:—"In respect of the interlocutor of Lord Cockburn, of 20th December 1836, and of the interlocutor of the Second Division of 9th July 1839, reduce the precept from Chancery, the instrument of sasine, and procuratory of resignation libelled, and decern."

The defender appealed.

Sir Roundell Palmer, Q.C., Anderson, Q.C., Wotherspoon, and Bompas, for appellant.

Lord Advocate (Gordon), Scott, and J. B. Nicolson, for respondents.

Lord Chelmsford—My Lords, this is an appeal from nine interlocutors of the Lords Ordinary and the Second Division of the Court of Session; and the first question that will have to be determined is, whether the first of these interlocutors can be brought by appeal to your Lordships' House.

His Lordship then narrated the procedure in the action, *ut supra*, and continued.

In appealing against these last interlocutors, the appellant has brought up all the preceding interlocutors which have been pronounced in the cause, and amongst them the interlocutor of Lord Moncreiff, of the 3d July 1833, repelling the preliminary defences, by which it was alleged that the Officers of State had no interest entitling them to prosecute the action.

The appellant founds his right to appeal from this interlocutor on the proviso in the 15th section of the 48 George III., c. 151, "that when judgment or decree is appealed from it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as is necessary, may be brought under the review of the House of Lords." It is clear to my mind that the proviso does not mean that when a judgment or decree is appealed from, all the preceding interlocutors may, as a matter of course, be brought under review. The words "as far as is necessary" are qualifying words, and, whatever their exact meaning may be, they exclude the idea of their being no exception to the generality of the proviso.

I do not think that the appellant is entitled to bring the interlocutor in question under review. It was pronounced upon preliminary defences, which were intended to prevent the Court from entering into the merits of the case. These defences related entirely to the reductive part of the summons, as some of the subsequent proceedings were confined to the declaratory part. It is stated in Lord Moncreiff's interlocutor that the defender acquiesced in the judgment, which it was said in argument meant no more than that he presented no reclaiming note against it. But the statement could never have found its way into the interlocutor of the Lord Ordinary unless he had been informed of the defender's intended acquiescence in his judgment. The defender, in this preliminary stage of the cause, had two courses open to him, under the 36th section of the Act of Sederunt of the 11th July 1828; either to object to the title of the pursuers as a reason for not satisfying the production, or to apply to the Lord Ordinary to reserve all objections to the title till the cause should be heard on the merits. He adopted the former course, and the judgment of the Lord Ordinary being against him, he signified his acquiescence, and a day was assigned to him as a term for satisfying the production. These preliminary defences were thus finally disposed of. For although in the defender's defences upon the merits, the very same objection was made to the right of the pursuers to challenge the deeds sought to be reduced, no notice was taken of this objection by Lord Cockburn in his note to his interlocutor of the 20th December 1836: and he seems to have considered either that it was not competent to the defender to raise the objection in his defences on the merits, as it had not been reserved under the Act of Sederunt just mentioned, or that the question had been finally determined.

Mr Anderson laboured hard to prove that an objection to the title of a pursuer was good, both by way of preliminary defence and also upon the merits. If this were so, then the Act of Sederunt, enabling the Lord Ordinary to reserve all objections to the title till the cause should be heard upon the merits, was quite unnecessary. From the time of this interlocutor in 1836, till the interlocutor in 1866, the preliminary defences were never heard of, except incidentally upon the appeal to this House in 1841. The cause was finally disposed of upon the merits in 1866; and the appellant seeks in this appeal to bring under review an interlocutor pronounced thirty years before, on the ground that whatever may be the merits of the case, the pursuers had no interest to question them, and consequently no title to institute the suit.

The appellant's counsel lay some stress upon an admission made in the respondent's case when the appeal was formerly before the House, "that the judgment of the Lord Ordinary repelling the preliminary defences was completely brought by appeal before your Lordships." But neither the present law officers for Scotland, nor your Lordships, can be bound by any such admission. Suppose an appeal were to be brought to this House upon an interlocutory judgment without leave of the Judges, and the respondent were not to object, or were even to admit that it was properly brought, your Lordships would not permit any acquiescence of one of the parties to bind you to hear an incompetent appeal.

The appellant seeks also to avail himself of the admission of the respondents in the new record prepared by the Lord Ordinary upon the declaratory conclusions of the summons, that there are heirs

of the first Earl of Stirling still living, to prove that they have no title to sue in the action. But the declaratory conclusions of the summons are quite distinct from the reductive conclusions, and the admission upon the record applicable to the declaratory conclusions cannot be used against the title of the Crown to reduce the services obtained by the appellant's father, even if it would have been a good objection that it appeared originally upon the record.

The interlocutor of the Lord Ordinary repelling the preliminary defences having, by the acquiescence of the defender, and the absence of all notice of it afterwards, been virtually withdrawn from the cause it could not be "necessary," upon the appeal from the final interlocutor upon the merits, to bring it under the review of your Lordships' House.

I should certainly regret to have arrived at this conclusion, if it had appeared that the Crown had no right to bring an action for the reduction of the services of the appellant's father. But I am clearly of opinion that the action was rightly brought.

The appellant contends that the Crown, having had no title to oppose the service of the appellant's father, cannot pursue a reduction of it after it has been retoured. But it by no means follows because a party may have no right to intervene in a service, that, if his right is at all effected by it, he may not afterwards have an action of reduction. The cases cited by the appellant of *Forbes* v. *Hunter* and *Cochrane* v. *Ramsay* in the Faculty Collection relate to appearances upon general and special services, and it may be admitted that the Crown could not have appeared upon the general service, and perhaps not upon the special service, though with respect to the latter service there may be some question. But if the rights of the Crown are at all affected by the appellant's father having been served heir to the first Earl of Stirling, it cannot be but that there must be some mode of protecting these rights, and none can be suggested, but that of reducing the services if improperly obtained.

The effect of the special service of the appellant's father as heir of the first Earl of Stirling, was to clothe him with a *prima facie* title to the extensive territories granted by the Crown to the Earl in 1621 and 1625, comprising Nova Scotia and a great part of Canada, together with the power of conferring honours, offices, and titles at his will and pleasure. It appears by the defences upon the merits in this case that the Earl of Stirling exercised this right of conferring honours and titles by creating Sir Claude St Eheune and his son Baronets of Nova Scotia, by patents of the 30th November 1629 and 30th April 1630; and in like manner, by patent dated 17th June 1636, he created Sir John Browne a Baronet of Nova Scotia, which title is still enjoyed by his descendants. The appellant's father, also claiming as heir of the first Earl of Stirling, assumed to confer upon the defender Thomas Christopher Banks the degree and style of Baronet, and bound himself to assign 16,000 acres of lands in Nova Scotia in favour of Banks, and to grant new infeftments of the same to him and his heirs-male and assigns whatsoever.

Under these circumstances, it would be strange indeed if the Crown could not challenge the service which gives a colour of right to such large pretentions. However good the grants to the Earl of Stirling, confirmed as they were by an Act of the Scotch Parliament, may be, the Crown may be interested to prevent its prerogative of conferring titles and dignities from being claimed by a person who has no connection with the grants, and consequently it must have the right to question his service as heir to the original grantee which gives him the pretence of a title. But it seems to me that the Crown has the right to sue the conclusions of reduction in respect of the services giving the defender a *prima facie* title to the extensive territories in North America which passed by the grant to the first Earl of Stirling. The grant proceeded from the favour of the Crown towards the Earl and his descendants, and it must surely be the right of the Crown to prevent its bounty being diverted into a different channel. Suppose the descendants of the Earl had expressly waived their right to oppose the service of the appellant's father, or to pursue its reduction, would the Crown have been bound to recognise the title thus acquired, and to permit a stranger to introduce himself into the succession? Possibly the Crown would have no right to intervene upon the ground of its eventual interest as *ultimus hæres*, although that interest might be seriously affected by the fee being taken up by any other person than the true heir; but, as pointed out by the Lord Advocate, the Crown has an immediate interest to protect the fee from the intrusion of a stranger, as it has a right of non-entry so long as the proper heir does not appear. For these reasons, it appears to me that the Crown has a right to pursue the action for reduction of the services.

Having disposed of these preliminary matters, the first subject of consideration upon the merits is, whether the proof given before the jury in the proceedings of the service of the appellant's father, together with the additional evidence produced in the cause, is sufficient to sustain the service.

A question was made as to the *onus probandi* in this case, the Lord Advocate contending that it did not lie upon the Crown, but this appears to me to be incorrect. The action is brought for a reduction of services, and the pursuers have to prove that the services ought to be reduced. The defender is not put to his answer until a case is made out against him. The proper course of proceeding in a case of this kind would seem to be that the pursuer should begin by attacking the proof adduced by the defender before the jury upon the proceedings in the service, and establishing that there is no admissible evidence sufficient to sustain the verdict and then bringing forward any counter proof he may have in opposition to the defender's case, the defender being at liberty to support his case by additional evidence; but the question of the order and burden of proof is immaterial, as the whole evidence is before your Lordships, upon which you are enabled to decide whether the interlocutor of the 19th June 1866, finally determining the case against the appellant, ought to be maintained.

"The whole of the defender's case," as Lord Cockburn, in the note to his interlocutor, observed, "depends upon the genuinness of two descents." The appellant's father had to establish that his grandfather, the Reverend John Alexander, was the son of John of Antrim, who is said to have died in 1712, and that John of Antrim was the son of John of Gartmore, who is said to have died in 1666. The proofs adduced by the defender before the Jury in support of these essential links in the pedigree consisted of affidavits of Sarah Lyner and Henry Hovenden; and, in the action, additional evidence was given of an alleged inscription on a tombstone in Newtonards in Ireland, and witnesses were exa-

mined, of whom the most important were Margaret M'Blain, and Eleanor Battersby.

The affidavits of Sarah Lyner and Henry Hovenden were admitted by Lord Cockburn with some hesitation, and they are certainly of questionable admissibility. It does not appear on whose behalf, and for what reason, they were made. In the years 1722 and 1723 (which are the dates of the respective affidavits) Henry the fifth and the last Earl of Stirling was living, as was also the Reverend John Alexander, whose descent from John of Gartmore, through John of Antrim, is to be established in this case. One can only conjecture that he was laying the foundation for the assertion of his claim to the Earldom of Stirling at some future day. But it is singular that though he survived the last Earl nearly four years—the Earl dying in December 1739, and he in November 1743—and though he was armed with these affidavits in support of his title, he never appears to have taken any steps towards its assertion. In this total ignorance of the circumstances connected with these affidavits, and the object for which they were procurred, we must proceed to examine them with a view to test their credibility and sufficiency.

The affidavit of Sarah Lyner is remarkably deficient in all the formalities of attestation, and, as Lord Cockburn said, "It is difficult to imagine any document introduced into a cause with fewer recommendations." It is produced for the purpose of proving the important and essential links in the pedigree from John of Gartmore to the Reverend John Alexander, and as far as positive assertion can go it fulfils this duty. The deponent swears that her mother was in service at Lord Montgomery's, and while there Mr John Alexander of Gartmore, a son of the Lord Stirling in Scotland, came to see my Lord and brought with him his only son, and that Mr John Alexander of Antrim, in whose service she afterwards lived upwards of twenty years, was the same only son of the said John of Gartmore.

If this is true, the first important step in the pedigree is completely established. But how did the witness become acquainted with the alleged facts? It was her mother, and not she herself, who was in the service of Lord Mongomery. Whether she was in the house at the time of the visit of John of Gartmore, or was told of it by her mother, does not appear, and in either case it is singular that she should have been informed that the son who accompanied John of Gartmore was his only son. Again she may have lived afterwards in the service of John of Antrim for a length of time, but her identification of him as "the same only son of the said John of Gartmore,"—whom it does not appear she saw at Lord Montgomery's—is extremely suspicious, and looks like the trained evidence of an ignorant markswoman, swearing to any thing which was prepared for her.

But the proof of the next step in the pedigree is still more loose and unsatisfactory. Sarah Lyner depones that she nursed the wife of John Alexander of Antrim at the time her only son was born, in September 1686. She does not say when she left this service, but as she only lived with John of Antrim 20 years, it must have been before the son was old enough to take orders. Whether she ever saw this son after she left John of Antrim is not stated, but as she probably remained in Ireland for the remainder of her life (her affidavit of her age of eighty-four being sworn in that country) how she could know "that the present Rev. Minister, John Alexander, now or late dwelling in Stratford-upon-Avon in Warwickshire, is the said ounely sone of the aforesaid John Alexander of Antrim," is not easy to conceive.

The whole affidavit is so obviously prepared to serve a purpose, and the deponent must have been so deficient in the means of information of the only important facts to which she is made to swear, that I cannot regard it as being entitled to the smallest credit.

The affidavit of Hovenden is impeached upon the ground that the paper on which it now appears was originally covered with some other writing, which is alleged to have been the affidavit really sworn before Baron Jocklington, and which had been removed by some chemical application. Your Lordships have had an opportunity of seeing this document which certainly presents a stained and soiled appearance. But as the evidence on the subject is of a doubtful character, I prefer to take the affidavit in its present shape for what it is worth.

Hovenden appears to be in no way connected with the family of the Alexanders, but merely to be an intimate acquaintance of "the Reverend Minister John Alexander." It was probably at Mrs Alexander's instigation, that the affidavit was made. From him he must have received the genealogical description of "grandson, and only male representative of John Alexander of Gartmore, the fourth son of William first Earl of Stirling, which said John Alexander was formerly of Antrim, but is now dwelling in Warwickshire." It is impossible that Hovenden could have known this alleged descent of his own knowledge, and if it was communicated to him by the Reverend John Alexander for the purpose of inserting it in his affidavit, it is worthless as evidence.

It appears that Hovenden, who was living in Ireland, had been in communication with the Reverend John Alexander, who was in Warwickshire shortly before he made his affidavit, for he deposes "that he had lately received information from the Reverend John Alexander that the original charter of the earldom and estates of William Earl of Stirling was in the possession of Thomas Conyers." And he went to Conyers, by the desire of the Reverend John Alexander, to see this charter, evidently for the purpose of stating its contents in an affidavit. The particulars of this charter are unimportant in the present case; but one cannot help expressing surprise that it should have been in the possession of the Countess of Mount Alexander, and not of the Earls of Stirling, and should have been intrusted to Mr Conyers, whose connection with the family nowhere appears. As the signature of Thomas Conyers to the memorandum on the back of Hovenden's affidavit is believed by the respondent's witness Mr Donald Gregory to be genuine, it must be taken that the affidavit, if originally different from the present one, must have referred to the original charter of the 7th December 1639. But assuming that the contents of the affidavit are the same as when it was sworn, it is not of the least value as evidence of the descent of the Reverend John Alexander from John of Gartmore.

Such, with the deposition of Mrs Jountney, the aunt of the appellant (which does not touch the question of the descent), was the meagre evidence upon which the appellant's father was served heir to the first Earl of Stirling. But in the present action the defender produced additional proof.

At the time of the proceedings upon the service the appellant's father must have had in his posses-

sion, but did not think proper to produce to the jury, a copy of an inscription upon a tombstone to the memory of John of Antrim, containing the whole history of the pedigree which it was necessary for him to prove. This inscription purports to have been copied into a Bible belonging to John, the uncle of the appellant's father. The leaf upon which it was written is stated to have been "taken out of poor John's Bible" by Hannah Alexander (the mother of the appellant's father), and put up with the other family papers for her son Benjamin.

This is stated to have been "*done*" (which I understand to mean the leaf to have been taken out) in the presence of three witnesses, who all sign their names in attestation of the fact. If the the removal of the leaf from the Bible required this precaution to proof whence it was taken, the question naturally occurs, Why was it taken out at all? The age of the Bible might have gone some way to authenticate the entry.

There is no proof in whose handwriting this entry purports to be. It is headed, "Inscription on my grandfather's tomb at Newtown, copied for me by Mr Hum. Lyttleton," and then follows the inscription itself. It is very improbable that Mr Lyttleton, an eminent attorney and solicitor, should himself have written this copy in John's Bible. If it had such a mark of authenticity it would be important evidence indeed. If Mr Humphrey Lyttleton, the solicitor of Birmingham, ever went to Ireland to copy this inscription for John Alexander it would not be likely that, upon delivering or sending the copy to John, he would be asked to make another copy of it in the Bible. And I cannot help thinking that the copy of the inscription was not written by Mr Lyttleton, because proof is given by Mr Lee, a magistrate of Warwickshire, and many years practising as an attorney and solicitor at Birmingham, of the handwriting of two of the witnesses to the comparatively insignificant act of taking the leaf from the Bible, and no attempt is made to prove by this or any other witness the important fact of the entry in the Bible being made by Mr Lyttleton, described by Mr Lee as an eminent attorney and solicitor, with whom he probably held frequent professional communications, and whose handwriting was likely to be well known to him and others. I cannot, under these circumstances, believe that any such inscription as the one written upon the leaf of the Bible was brought from Ireland by Mr Lyttleton.

There is one circumstance, also, which confirms my suspicions of this document. It brings the proof of the pedigree too pointedly home in the direction where it was especially wanted. The essential fact to be established was the descent of the grandfather of the appellant's father from John the father of John of Antrim, and the inscription, as if to leave no doubt of the fact, seems to take especial care to identify the son of John of Antrim by describing him as being "at the present time Presbyterian Minister at Stratford-on-Avon in England."

The attempt to prove that there once existed a tombstone upon which there might have been (not that there was) such an inscription entirely fails. The evidence of Margaret M'Blain that her husband told her upwards of forty years before the time of her examination that he had seen a tombstone near that of Lady Mount Alexander with the name of "John Alexander, Esquire, Antrim," upon it amounts to nothing. This stone was built (as he said) into one of the walls of the church for its better preservation, and yet there is not a particle of evidence that it was afterwards seen by any person in a place where it must have been visible to all. I lay no stress upon the evidence of persons of a later date of their not having seen this stone, because it might have been there, and they not observe it. But the absence of all evidence on the part of the defender, not of the existence of some stone to the memory of John of Antrim, but of a stone bearing or likely to have borne the alleged inscription, added to all the circumstances connected with supposed copy, satisfies me that no such inscription ever existed.

In addition to this evidence of the tombstone, the defender produced in this action two witnesses to speak to declaration respecting his alleged pedigree. The first of them, Margaret M'Blain, was eighty years of age at time of giving her evidence. She had been formerly for about ten years in the service of the Countess of Mount Alexander, and deposed that she had often heard Lady Mount Alexander speak of a John Alexander, who had a son also called John Alexander, who married Mary Hamilton; that John the second and Mary Hamilton had a son, who was the Reverend John Alexander; that John the first was called of Gartmore, and John the second lived in Antrim, and the Reverend John Alexander was a minister in Dublin, and died there, all which she swore she had heard from Lady Mount Alexander on several occasions.

It is very difficult to understand why Lady Mount Alexander should have taken such interest in all these particulars, to be so often talking about them, and why she should have communicated them to the witness. She was a Frenchwoman, a stranger to the Alexander family till she was brought into it by marriage, and the two lines of descent from the first Earl of Stirling had branched off, so as to be widely separated from and distantly related to each other. Margaret M'Blain was five years old when she entered Lady Mount Alexander's service, and was about fourteen or fifteen years of age when her Ladyship died; "her duty was to run on errands for the servants and for her Ladyship, and as she grew up to attend in cleaning the furniture and assisting the cook. She was never employed about her Ladyship's person." It seems very unlikely that Lady Mount Alexander, not once merely, but on several occasions, should have entertained a child in this menial capacity by relating to her in minute detail the pedigree of her husband's distant relations.

The evidence of Margaret M'Blain was given more than 64 years after the death of Lady Mount Alexander, and, notwithstanding this lapse of time, she states with wonderful minuteness every particular necessary to the defender's case which her Ladyship condescendingly communicated to her. It was said by the counsel for the appellant that the memory of old persons is generally remarkable retentive of events of their early life, and no doubt this is frequently found to be the case; but that this witness, at the end of sixty-four years, should remember with the most minute particularity conversations relating to the marriages and descents and relationships of persons wholly unknown to her, in whom it was not possible for her to feel the least interest, and having probably never afterwards thought of what was told her, is utterly incredible.

The evidence of the other witness, Eleanor Battersby, is wholly inadmissible. The law of Scotland admits hearsay evidence in all cases where the statement of a deceased person is offered in

proof which would have been admissible if the person making it could have appeared as a witness. Cases of pedigree are those in which hearsay evidence is most commonly produced. But it is not every kind of hearsay which can be admitted in these cases. It can only be hearsay proceeding from persons who have peculiar means of knowing the relationship to which they spoke.

But the statements proved by Eleanor Battersby were made by persons not proved to be in any way related to or connected with the Alexander family. Her mother, Mary Lewis, was called as a witness to prove such relationship; but her evidence was that she had heard of a person of the name of Alexander who married a woman called Mary Hamilton; that she did not know whether Mary Hamilton was any relation to her or not. Under these circumstances, the declarations deposed to by Eleanor Battersby cannot be admitted. Her grandmother, Sophia Monk, is not shown to have been in any way connected with the Alexanders, and her evidence is that she had "heard her grandmother say that John of Antrim was come of the Alexanders of Scotland, and was nearly related to the Earl of Mount-Alexander of Ireland. Heard her grandmother also say that she had heard from her father that John of Gartmore was the Honorable John Alexander, and was the father of John of Antrim." It is unnecessary to consider whether in these cases of pedigree hearsay upon hearsay can be received; for the declarations proved by Eleanor Battersby were made by persons who, for aught that appears, were strangers to the family, and, therefore, are altogether inadmissible.

Such is the insufficient and unsatisfactory evidence offered by the appellant's father in support of his services as heir to the first Earl of Stirling, fully justifying, in my opinion, the finding of Lord Cockburn, in his interlocutor of the 20th December 1836.—"That the defender has not established that the character of lawful and nearest heir in general or in special to William first Earl of Stirling belongs to him, or that his services as such are warranted by the evidence produced before the jury, or in this action."

But the appeal from the other interlocutors has still to be dealt with by your Lordships. After the defender had presented a reclaiming note, praying for a review of the above-mentioned interlocutor of Lord Cockburn, he alleged that he had discovered family papers and documents of great importance to the question at issue in the cause, and he prayed the Second Division of the Court to allow him time to make the requisite investigations respecting them. The Court directed him to lodge a minute as to the nature of the papers and documents, and the circumstances connected with their discovery. The minute was lodged and was followed by the judicial examination of the defender, and his trial for forgery. After the trial, the pursuers moved the Court to fix an early day for the advising of the cause. The defender, on the 24th June 1839, lodged a note setting forth the proceedings in the Criminal Court, and containing the following statement.—"According to the finding of the jury, as matters now stand, your Lordships are bound either to give faith to the papers contained in 'De Proquet Packet,' or to cause some further investigation into the verity of them to be made by the parties." And he moved the Court "to prorogate the time for advising the cause till the third sederunt day in November next."

The Court, on the 26th June 1839, pronounced an interlocutor "appointing the cause to be put on the roll for advising on Tuesday 9th July next;" and on that day, in the absence of the defender pronounced another interlocutor, adhering to the interlocutor complained of, and refusing the desire of the defender's note.

Whether the Court ought to have granted the prayer of the defender's note, or to have refused it, depends upon the nature and character of the alleged newly discovered papers and documents, way upon the account given by the defender of the and in which they came to his hands.

The papers and documents are said to have been obtained from two different sources. Some of them were sent to Messrs de Porquet, Booksellers in Tavistock Street, Covent Garden, and are described as "The De Porquet Packet," the rest were said to have been handed to the defender in France by a Madamoiselle le Normand. The counsel for the defender abandoned the attempt to establish the genuineness of these latter documents; but they cannot be altogether put aside as they came to light almost contemporaneously with the De Porquet packet, and, like the contents of that packet, if genuine, would supply proof of the most important links in the pedigree, which was wanting in the evidence before the Lord Ordinary. In the note to Lord Cockburn's interlocutor of the 20th December 1836, his Lordship observed that the fact "that the heir of the first John Alexander's marriage with Agnes Graham of Gartmore was a daughter," rendered it necessary that the defender should establish, that although he had no son in 1646 (the date of an apprising against the daughter as heir of Gilbert Graham of Gartmore), he had one afterwards. But his Lordship adds, "It is a very serious defect in the defendant's case that of this alleged second marriage there is no proof whatever, except that which is implied in the evidence of his afterwards having a son."

The De Porquet Packet was received by the booksellers in April 1837. The first intimation of the Le Normand Papers was in July of the same year. The defender, in his minute upon his alleged discovery of these documents, lodged by order of the Court, states that he has lately came to the knowledge of various documents, which tend very materially to strengthen the evidence of propinquity in regard to the two descents referred to by the Lord Ordinary. By these newly discovered documents he trusts he will be able to establish that John Alexander of Gartmore, after he lost his wife Agnes Grahame, heiress of Gartmore, married, as his second wife, Elizabeth Maxwell of Londonderry, by whom he had an only son John, and that he died in Derry in 1665–1666. It must be admitted that both sets of documents fully supply the required proof. The De Porquet Packet contained "a reduced pedigree of the Earls of Stirling" indorsed thus—"Part of the geneological tree of the Alexanders of Menstry, Earls of Stirling in Scotland, showing the fourth and now existing branch, reduced to pocket size from the large emblazoned tree in the possession of Mrs Alexander of King Street, Birmingham, by me, Thomas Campbell, April 15th, 1759." The pedigree states the marriage of John of Gartmore, first with Agnes Grahame, heiress of Gartmore, and secondly with Elizabeth Maxwell of Londonderry, and John of Antrim is named as the son of this second-marriage.

The indorsement on this pedigree corresponds remarkably with the evidence of Mrs Pountney, the

aunt of the appellant, given in the action. She deponed that she had repeatedly heard her mother mention that she had seen in her mother's (the deponent's grandmother's) possession an emblazoned pedigree of the Earls of Stirling, setting forth their marriages, issue, and descent, but which pedigree, her mother stated, had been in some manner or other lost, or surreptitiously stolen away, together with divers other family papers and valuable documents respecting the title and descent of the Earldom of Stirling to her family.

Proof is thus singularly afforded of the recovery of the pedigree from the felonious possession in which it had been long retained—both that there was an emblazonment generally of the Earls of Stirling in the possession of Mrs Pountney's grandmother, and also that it was lost or surreptitiously stolen.

This important evidence of the two essential links of the pedigree is a little prejudiced by the attempt to strengthen it by means of the other set of alleged newly discovered documents — the Le Normand Papers, which are not insisted upon as genuine—amongst them is a supposed autograph letter from John of Antrim to the Marchioness de Lambert, giving her some particulars of his family history, amongst others, mentions that his father, who was the fourth son of the Earl of Stirling, married first the heiress of the House of Gartmore in Scotland, and that his mother, of the family of Maxwell, was his father's second wife.

But this is not the only instance in which the two sets of documents agree in supplying or strengthening the evidence given in the action.

The proof of the supposed inscription upon the tombstone of John of Antrim at Newtownards, was thought by the Lord Ordinary to be insufficient. Amongst other circumstances connected with it was the statement of Margaret M'Blain—of her husband having told her that the stone was broken, and that he built it into one of the walls of the Church for its better preservation. As Lord Cockburn said, "According to this, the stone was visible and safe in the wall in the year 1792." Many witnesses were produced by the pursuers, who gave evidence that they never saw it. Although this negative evidence was of no great value, yet it assisted in throwing doubt upon the existence of the stone. But a letter in the De Proquet Packet shows not only that it was impossible for the witnesses for the pursuers to have seen this stone, but that Margaret M'Blain's husband could not have built it into the wall of the Church in 1792. This letter is supposed to be from Benjamin, the brother of Hannah, the grandmother of the appellant, and is dated London, the 20th August 1765, a few months before his death. It contains the following passages—"No other copy of the inscription can be had at Newton. The country people say they managed one night to get the slab down, and it's thought they buried it. However, C. does not think you need mention this loss, as Mr Lyttleton's copy can be proved." Whether this letter is genuine or not, it represents that all trace of the tombstone was gone as early as 1765, and consequently long before the time to which M'Blain's statement applies. But the proof of the inscription in the alleged copy by Mr Lyttleton required some corroboration, and, accordingly, not only does the letter state that the loss of the tombstone is immaterial, as Mr Lyttleton's copy can be proved, but the Le Normand papers contain another copy of the inscription identical with Lyttleton's copy, and certified by a person named Gordon to be a faithful copy of the inscription to the memory of John Alexander Esq., upon the tablet over his tomb at Newtownards, County of Down, Ireland, the certificate being dated Stratford-upon-Avon, October 6, 1723. This copy of the inscription is said to have been communicated by Madame de Lambert. It is idle to stop to inquire how it came into her possession, because the counsel for the appellant have abandoned the hope of establishing the genuineness of the Le Normand documents, but these, as well as those in the De Porquet Packet, being produced to the Court at the same time as newly discovered evidence, it is impossible that the undoubted fabrication of one set of documents, both directed to the establishment of similar facts, should not throw considerable suspicion on the others which came to hand at a different time, and under different circumstances, but in a strange and unaccountable manner.

That there ever was an emblazoned tree from which the pedigree in the De Porquet Packet was reduced, appears to me not to be established by evidence. Mrs Hannah Alexander, according to the evidence of Mrs Pountney, her daughter, never saw the emblazoned pedigree herself, but said that she had repeatedly heard her mother mention that she had seen it in her mother's (the witness' grandmother's) possession. Hannah Alexander must have been born as early as 1743, as her father, the Rev. John Alexander, died in that year. According to the indorsement upon the pedigree in the De Porquet Packet, the large emblazoned tree from which it was reduced must have been in the possession of the mother of Hannah as late as the 15th April 1759, when Hannah was at least sixteen years old, and it is not a little extraordinary that her mother should never have shown her this valuable and interesting document, tracing "the title and descent of the Earldom of Stirling to her family."

This large emblazoned tree, which was either lost or surreptitiously stolen away from Hannah, Alexander's mother, together with the other family papers and valuable documents, are not those contained in the De Porquet Packet. For in the anonymous note to the defender, giving an account of the possession and restoration of the contents of the packet, it is said the inclosed was in a small cash box, which was stolen from the late William Humphrey, Esq., at the time of his removal from Digbeth House, Birmingham, to Fair Hill. So that this family appears to have had the misfortune twice to have valuable documents purloined for them.

What could have been the motive which induced the "young man in a situation in trade which placed him above suspicion" to commit this theft cannot even be conjectured. He is stated in the letter not to have broken the seals, and therefore, one is at a loss to imagine how it occurred to him that the packet superscribed "some of my wife's family papers" contained documents worth stealing. No information is given how long before his death this packet, with the seal unbroken, had been in his possession. But the fact of the theft must have been confessed, for the discovery of the packet itself would not show how the possession was obtained. It might have been expected that, having gone so far as to acknowledge his offence, the thief would be anxious to make atonement for it during his life by restoring to the persons interested—and who were discovered without difficulty within a

month after his death—a packet of the value of which he was wholly ignorant.

The transmission of this packet to the appellant's father, is enveloped in mystery. Messrs De Porquet, the booksellers, on the 21st April 1837, received a paper packet containing a note from a Mrs James Smyth, of whom nothing is known, nor is any proof given of the existence of any such person. It was suggested by the counsel for the appellant that probably this was a feigned name; but as the lady who is said to have undertaken the office of conveying the packet to London is not represented to have been related to the family of the person who committed the theft, the reason for concealing her name is not quite apparent. But the mode of dealing with this packet when it reached the hands of the defender's son is extraordinary. What reason was there for believing that a packet for the defender sent to his publishers, Messrs De Porquet, contained papers of such importance that it ought to be opened in the presence of a notary, or that the inner packet should have been thought likely to contain documents of so much greater importance that the notary should be employed as a witness merely to its being taken out of the external cover, but that it itself should be opened with more ceremony before a proctor of Doctors Commons? All these preparations for bringing to light this alleged newly discovered evidence, together with the supposed circumstances connected with the abstraction and possession of the packet in which it was contained, and its alleged discovery after so many years in the same state as when it was stolen, and the extraordinary mode adopted for conveying it to the defender, together with the suspicious character of some of the documents within, all satisfy me that no credit can be given to the De Porquet Packet, and that the Court of the Second Division was right in refusing to prorogate the time in order to allow the defender an opportunity of stating whether he would abide by the documents or offer further proof thereof.

It only remains to notice the interlocutor of the 29th June 1864, by which the Court of the Second Division found "the party compearing liable to the pursuers in the expenses incurred by them in this process prior to the date of the interlocutor of 2d June 1840, reclaimed against.

The counsel for the appellant object to this interlocutor, because they say that at the time when these expenses were incurred the Crown neither paid nor received costs. But the 19th and 20th Victoria, cap. 56, sec. 24, which allows costs to be given for or against the Crown, applies as well to all causes presently depending as to those which shall come to depend.

The Court therefore was perfectly justified in finding the defender liable to those expenses. But, as the Lord Advocate agreed not to press for them, the interlocutor may be amended by striking out this part of it; and, with this alteration, I submit to your Lordships that this and the other eight interlocutors ought to be affirmed and the appeal dismissed, with costs.

Lord Westbury—My Lords, I think your Lordships will agree with me, that we are much indebted to my noble and learned friend who has last spoken for the very able manner in which he has analysed the evidence given and proposed to be given in this case. My Lords, I entirely concur in the conclusion at which my noble and learned friend has arrived, and I do not mean to trouble your Lordships with any remarks upon that part of the case. But the argument at the bar involved a point of some general interest, and it may be desirable to say a few words upon it, although I trust that there never will be an attempt again made to maintain that an interlocutor by which a preliminary defence of the complaining party was overruled in 1833, can be fitly reviewed in your Lordships' House at the expiration of thirty-five years, when in truth it seems from the beginning to have been agreed upon between the parties that there should be no further proceedings upon that interlocutor. For such I take to be the meaning of the words which we find in the interlocutor, "the defenders acquiescing in this judgment."

But my Lords, without relying upon that point at all, it is plain that such an interlocutor as that cannot be brought up together with the final decree on the merits. That is manifest from the language of the statute. The point depends on the 15th section of the 48 Geo. III., cap. 151. The object of that Statute was to prohibit all appeals from interlocutory judgments—and to confine those appeals to judgments or decrees on the whole merits, with two exceptions—First, where the judge pronouncing the interlocutory judgment gives an opinion that it should be appealed; and secondly, where there is a division of opinion among the judges pronouncing the interlocutory judgment. And then afterwards there is this general enactment, applicable even to those appeals that were included under the excepted cases to be brought up—namely, the enactment that there should not be appeals to this house from interlocutors or decrees of the Lord Ordinary which had not been reviewed by the judges sitting in the division to which the Lord Ordinary belongs. So that an interlocutory judgement of the Lord Ordinary cannot be brought up by appeal to this house, unless it has been reviewed by the judges sitting in the division to which such Lord Ordinary belongs. Then to that general rule there is this exception—and upon that exception this case turns—namely, a proviso "that when a judgment or decree is appealed from" (that is a judgment or decree upon the merits), "it shall be competent to either party to appeal to this house from all or any of the interlocutors that may have been pronounced in the cause" (which I think would include an interlocutor pronounced by the Lord Ordinary), "so that the whole, as far as it is necessary, may be brought under review." Now "necessary" for what? "Necessary" for the determination of the propriety of the judgment on the merits—"necessary," therefore, for all the questions upon the merits. It is plain that an interlocutor may have been pronounced by the Lord Ordinary, and not reclaimed against, which may interfere with some particular part of the merits of the case. But an interlocutor pronouncing the incompetency of the party to maintain the action is not such an interlocutor. You cannot arrive at the merits of the case without that interlocutor having first been pronounced. It is plain therefore that this interlocutor does not come within the category of interlocutors which are necessary to be brought under review, in order to pronounce on the merits of the case.

My Lords, I think it is plain beyond the possibility of doubt that there is competency in the Crown here to maintain the action. It has been argued at the bar that, in order to entitle you to intervene, you must have an interest to set up a competing claim to either special or general service. But it is not

here a question of competing service. It is a question of a right to reduce the service. And that must depend on the right of the party to maintain an action of reduction. Now is there not, having regard to the subject matter here, a plain right and duty—and therefore an interest—in the Crown to watch over the transmission of the subject matter of this grant? And does not the public interest require that that duty shall be exercised in order to prevent these great powers being exercised by hands which are not entitled to exercise them, according to the true tenor of the grant? What is the subject matter of the grant? It is something surprising and unheard of. There is delegated—in terms whether good or not in law is another question—but in terms there is delegated, to a subject the right of exercising royal prerogatives, the right of dealing out grants of immense territory, and I presume the corresponding right of exercising all the powers and duties of government, over an extent of land equal in dimensions to some kingdoms. My Lords, it is perfectly clear that the Crown had a public duty to perform, on the assumption of the validity of such a grant, to see that the powers so granted are not exercised by any person not coming within the terms of the original grant. That public duty is to be performed by the Crown for the public interest and benefit, and that it is which entitles the Crown to maintain an action of reduction, in the event of there being an irregular, improper, and undue service that would transmit the title to these franchises to a hand which is not intitled to exercise them. Such is the nature of the action that has been brought on the part of the Crown. Therefore if we go into the question, whether there be an interest in the Crown to maintain this action, I think there is the clearest possible interest to maintain the action, because it concerns the interest of the Crown, on the assumption of the validity of the grant, that these rights should not be exercised by an improper person, for in that case they might be exercised to the great scandal of the Crown, and the great detriment of the public. Therefore, in my opinion, there can be no doubt that no appeal can be brought from the original interlocutor; and I entirely agree in the judgment which has been proposed by my noble and learned friend.

Lord Colonsay—My Lords, before we arrive at the consideration of the merits in this case, it is necessary to see whether there is any obstacle in the way of this action. Certain objections have been stated on the part of the appellant, which are important to be considered. The appellant objects to the title of the pursuers in this action of reduction, and the answer is made that that point is closed against him—that he cannot bring it here by appeal. The Lord Ordinary decided it against him; he acquiesced in the judgment of the Lord Ordinary, and it is not competent to him to appeal from that judgment of the Lord Ordinary to this House. It appears to me that the position of the matter in reference to that part of the case is this. In the matter which has been referred to there is a general enactment that it shall not be competent to appeal from a judgment of the Lord Ordinary which has not been submitted to the review of the Inner-House. And then the first question which arises, whether the proviso or exception to that rule is one of which the appellant can avail himself? The terms of it are—"Provided that when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords."

I think that clause applies to interlocutory judgments of the Court, and to judgments of the Lord Ordinary, but it applies to them only so far as "necessary"—that is, so far as necessary to enable this House to deal with the merits of the action. Now, the purpose of bringing up this interlocutor by appeal is not to enable the House to deal with the merits of the action. The purpose of the appellant in endeavouring to bring up this interlocutor is to exclude the House from dealing with the merits of the case. It is to exclude inquiry by holding that the Crown has no title to pursue. I think that this case is not within the comprehension of that clause of the Statute. In the Court below, I apprehend that this interlocutor was a final one. It could not be questioned in the Inner-House after the procedure which has taken place before the Lord Ordinary. By an Act of Sederunt, which possesses the force of an Act of Parliament, because it is made in pursuance of directions of an Act of Parliament, it is provided—"That in reductions to be enrolled before the Junior Lord Ordinary if the the defender is to object to the title of the pursuer, or to plead on an exclusive title, or to state any other objection against satisfying the production, he shall return defences confined to these points; but if otherwise, no defences shall be given at this stage of the proceedings, declaring always that it shall be competent to the Lord Ordinary, on cause shown that no defences should be given at this stage, to reserve all objections to the title till the cause shall be heard on the merits, and the Lord Ordinary shall dispose of such objections" (that is objections that may be stated in preliminary defences) "in terms of the Act of 6 Geo. IV. chap. 120, sec. 5."

Now, that Act of Sederunt declares that an interlocutor of the Lord Ordinary sustaining preliminary defences shall be final unless brought under review of the Court within twenty-one days, and it provides also that an interlocutor of the Lord Ordinary repelling preliminary defences shall be final unless the party announces at the time that it is his intention to bring the judgment under the review of the Court. Now, this party announced that it was not his intention to bring the judgment under review of the point, but that he acquiesced in it, and he did not appeal. Therefore that interlocutor was final in the Court below, and the question as to the title to pursue, I apprehend, could not again be revived. It was agreed that it might be revived as a defence upon the merits, because it involved two elements, one which went to exclude satisfying the production, and the other which went to exclude the following out the cause to a favourable judgment for the pursuer. But it was only a defence against satisfying the production, inasmuch as it was a defence against the title to pursue. The question was, as to the title to pursue, and that is the point that is concluded, both by the Act of Parliament and the Act of Sederunt to which I alluded.

One case was referred to as being an authority for reviving such a discussion in the Inner-House, after it had been disposed of by the Lord Ordinary, the case of *Mackenzie* v. *Houston*. But that case is not a precedent. It was a case with respect to a right of fishings, according to my recollection. The

pursuer in the action set forth that he had a right and interest in all the fishings in the Don, and he brought his suit to set aside the title of the defender. The defender raised an objection to the title, and said you have no title to all the fishings, but that is a matter to be afterwards inquired into. In the meantime, *esto*, that you have such a title, it is only a title of tack, and that is not a ground for insisting in the action. The Lord Ordinary repelled the defence. The case went to the Inner-House. The record was made up on the merits. The pursuer in the action no longer stood on the ground that he had a right to all the fishings, but limited his allegation to a certain portion of the fishings. Then the defender renewed his objection, and said, as to that limited portion of the fishings which you now appear to possess, that does not give you a title to pursue. And it was upon that ground that the opinions of several of the judges went in dealing with the case. And so far from its being a judgment in favour of the view contended for here by the appellant, the grounds upon which it proceeded were antagonistic to it. But if the defence stated by the appellant in the Inner-House was something different (as was alleged) from what he had stated before the Lord Ordinary, the words not being identical, if any clear distinction can be extracted from the difference of expression, it may be that he is entitled to renew the discussion; but taking the words that he has used—taking the defence as it has been pleaded by him as an objection to the title to sue, and holding that there is no obstacle to his pleading it in the form in which he has put it—I yet entirely concur in the opinion which has been expressed by my noble and learned friends, that the Crown had a perfect title to pursue the action. It was agreed that no party can appear to oppose any general service which does not claim the same title which the party pursuing the service claims. But that is not quite a clear point with reference to the interest of the Crown. But assuming it to be so, it has no relevancy here. It is necessary for the appellant to go a step further, and after saying that he has obtained such a service, to set forth his pretentions to use that service against the interests and rights of another party, and that that other party, be it Crown or be it a subject, has no right to sue a reduction against him. I apprehend there is no authority for that. Here, I think, it is clear the Crown had a right and interest to sue on the grounds which have been stated by my noble and learned friend who last addressed the House, and therefore I hold that the objection to the title to sue has no good foundation.

We then get into an examination of the merits as appearing on the evidence. Into that subject I do not mean at all to go, because it has been so fully analysed by my noble and learned friend who spoke first, and by Lord Cockburn in the Court below, that it is in my mind quite conclusive upon this case. As to allowing any further inquiry, I think there has been enough inquiry already.

Interlocutors appealed from affirmed, with an alteration in one of the said interlocutors; and appeal dismissed, with costs.

Agents for Appellant—Wm. Wotherspoon, S.S.C. and Bischoff, Cox, & Bompas.

Agents for Respondents—James Hope, D.K.S., and Connell & Hope, Westminster.

COURT OF SESSION.

Friday, 27th March.

SECOND DIVISION.

BURNETT *v.* DOUGLASS.

*Superiority and Property Titles — Possession — Islands—Jetty—*Alveus—*Suspension and Interdict.* A proprietor of lands and barony on the bank of a river whose titles did not expresslyi nclude, but were *habile* under which to hold an island in the river, and who alleged exclusive right to, and possession of the island—*held* entitled (1) to interdict against the proprietor of the opposite bank—whose titles were also *habile* under which to hold the island, and who also alleged exclusive right to and possession thereof—cutting down trees or bushes, or planting others on the island, the proof having disclosed a sort of mixed possession by the two proprietors; also (2) to interdict against the respondent enlarging or extending a jetty erected by him in the *alveus* of the river opposite to lands of which the complainer was superior, and a little higher up the stream than lands on the opposite side, of which the complainer held the *plenum dominium;* and also (3) to interdict against further erections by the respondent in the *alveus* of the river opposite to the complainer's lands; but (4) interdict against the respondent entering upon the island and shooting or fishing thereon refused.

This was a suspension and interdict brought in December 1865 by Sir James Horn Burnett of Leys, Baronet, against Mr John Douglass of Tilwhilly, and the object thereof was (1) to have the respondent prohibited from entering upon and shooting over, fishing from, or dragging nets upon, two islands in the river Dee nearly opposite to the village of Banchory Ternan, and particularly from cutting down and removing any trees or bushes upon or from the same, and from planting trees, bushes, or any plants thereupon; and (2) to have the respondent prohibited from enlarging and extending further into the bed of the river Dee a certain jetty or embankment erected by him about five years before; and also from making any further erections in the *alveus* of the river opposite the complainer's lands. The complainer averred that the islands in question were his property; that they formed parts and pertinents of the lands and barony of Leys and others belonging to him; that they were originally formed by part of the mainland of his property on the north side or bank of the river Dee being detached by floods. He likewise averred that he and his authors had had the exclusive possession of the islands; had regularly let them to tenants, and drawn rent for them; that they had killed game and rabbits upon them, and fished for salmon in the Dee from and around the same by every lawful mode; that the respondent had recently set up a claim to the islands, and, in particular, had recently cut down trees and burnt furze upon the islands, and made preparation for planting them with other trees.

The complainer further averred that the effect of a jetty erected some years before by the respondent in the *alveus* of the Dee was to divert the water of that river and of a hill stream called the Feugh, which flowed into the Dee a little above the island,