MARCH 30, 1868.

A. W. F. ALEXANDER (calling himself Earl of Stirling,) *Appellant*, *v.* THE OFFICERS OF STATE FOR SCOTLAND, *Respondents*.

Service—Peerage—Challenge by Crown—Reduction—*The Crown is entitled to raise an action of reduction of a service to a peerage, by virtue of which the heir served claims* quasi *regal rights over a colony of the Crown.*

Appeal—Antecedent Interlocutors—Lord Ordinary's Interlocutor acquiesced in—48 Geo. III. c. 151, § 15—*In an action of reduction H. as defender, stated preliminary defences, which were repelled by the Lord Ordinary, who stated in his interlocutor that H. acquiesced therein, and appointed a day to satisfy production. Thereafter, the merits were disposed of, and ultimately an appeal was brought.*

HELD, *H. was not entitled to bring up the interlocutor repelling the preliminary defences, as these were not necessary to the merits of the case, within the meaning of* 48 Geo. III. c. 151, § 15.

Evidence—Pedigree—Hearsay—*It is not every kind of hearsay that can be admitted in cases of pedigree; it can only be hearsay proceeding from persons who have peculiar means of knowing the relationship to which they speak* (*Per Lord Chelmsford*).

Expenses—Crown's Liability—*The* 19 *and* 20 *Vict. c.* 56, § 24, *allowing costs to be given for or against the Crown, applied to pending as well as future suits.*[1]

This was an action of declarator and reduction by the Officers of State for Scotland; (1) to reduce pretended services of the appellant's (the defender's) father as heir in general to William, first Earl of Stirling, and precepts of sasine thereon; (2) to declare, that the defender was not great-great-great-grandson of William, first Earl of Stirling.

A record was made up in regard to the reductive conclusions. The defender lodged preliminary defences:—1. That no one can challenge a service as heir, unless he claim to be served in the same character. 2. That the pursuers had no interest. 3. That the Court of Session, so far as related to the honours and dignities of the earldom, had no jurisdiction to decide any peerage question. Lord Ordinary (Moncreiff), in 1833, allowed the pursuers to amend their summons to the effect of adding, that the said writs were made to the prejudice of the Crown as Lord paramount, and as having the exclusive right of conferring honours, titles, and dignities. The Lord Ordinary then repelled the preliminary defences, and the defender, acquiescing in this judgment, appointed a day to satisfy the production. In 1836, the Lord Ordinary (Cockburn), reduced the two services general and special, and the retours proceeding thereon, whereby the appellant was served heir to the first Earl of Stirling. The Lord Ordinary said the defender's case depended on the genuineness of two descents which occurred in the chain of title in 1666 and 1712, and he was not satisfied that these were proved. The details of the evidence consisted of affidavits, inscriptions on tombstones, etc. The defender reclaimed to the Second Division. Meanwhile, he had discovered certain family papers, and documents of great importance to the question, which announcement he made in a minute. These documents were contained in a paper packet addressed to Messrs. De Porquet and Cooper, booksellers, Covent Garden, London, who received them by the twopenny post, accompanied by a card purporting to be from Mrs. Innes Smyth of Hackney, who sent them with her compliments, requesting they would be sent instantly to the Earl of Stirling. On receipt of the parcel, the bookseller sent it, with the seal unbroken, to one of the defender's sons, who took the precaution not to open it until in presence of a notary public, and many old family papers were then found enclosed, and one of them being in the handwriting of the defender's late father. The pursuers, in answer to this minute, set forth, that the bundle of papers was stated to have been stolen from old Mr. Humphreys, and returned to his family by the family of the thief, as some reparation for the injury; and as they curiously filled up the gap in the evidence detected by the Lord Ordinary, and therefore were fraught with suspicion, they should be kept in the custody of the Court, and the defender should be judicially examined on the subject. The Court thereupon called on the defender to state how the documents came to his possession; when he stated that the documents were entirely new to him, and that some of them were obtained from Mademoiselle de Normand, an acquaintance of his wife,

[1] See previous reports 2 Macph. 1295 : 4 Macph. 741. 36 Sc. Jur. 646 : 38 Sc. Jur. 389 : S.C. L. R. 1 Sc. Ap. 276 : 6 Macph. H. L. 54; 40 Sc. Jur. 470.

when they were living in Paris, who had been requested to make searches in the French public offices for documents relating to his property.

At last, in 1838, the defender was judicially examined as to the documents. Men of skill were also examined as to postmarks on the letter; and in 1839 the defender was indicted, and tried for forgery of these documents, but was acquitted; after which, he pressed the Court to dispose of the cause, and the Second Division, in 1839, adhered to the interlocutor of the Lord Ordinary. An appeal was then brought to the House of Lords, in 1841, but, upon a technical objection taken, was not proceeded with.

The appellant in 1845 raised a process of wakening, and various proceedings were taken. The original defender died in 1859, and the present appellant was sisted in room and place of his father. On 29th June 1864 the Second Division pronounced an interlocutor finding the defender liable to the pursuers in expenses prior to an interlocutor of 2d June 1840.

Afterwards the Court having ordered the record to be made up on the declaratory conclusions, on 28th May 1866 an interlocutor was pronounced, dismissing the action as to those conclusions, with costs to the appellant since 8th December 1864. The respondents have not appealed against this interlocutor. The appellant having again pressed for the other conclusions in the action being proceeded with, the Court made an interlocutor on 19th June 1866, reducing the precept from Chancery and sasine thereon.

The appellant brought up all the interlocutors, and obtained leave to revive the appeal presented in 1841.

The *appellant*, in his *printed case*, stated the following reasons for reversing the interlocutors:—1. The proceedings adopted in the Court below were irregular and oppressive. 2. The Court ought to have granted the prayer of the appellant's note of 24th June 1839. 3. There were no sufficient grounds for reducing and setting aside the appellant's services. 4. The admission of the respondents in the new record, that there are heirs of the first Earl of Stirling still living, establishes, that they have no title to sue in this action. 5. The appellant ought not to have been found liable to the respondents in the expenses incurred in the action previous to the 2d June 1840. 6. The interlocutors on the reductive conclusions are erroneous.

Sir R. Palmer Q.C., *Anderson* Q.C., *Wotherspoon*, and *Bompas*, for the appellant.—1. The appellant was entitled to bring up all the interlocutors in this cause from 1833, for the Statute 48 Geo. III. c. 151, § 15, enables all the preceding interlocutors, so far as necessary, to be brought under review. The general rule is, that all interlocutors may be brought up, unless some Statute take away the right.—*Kerr* v. *Keith*, 1 Bell Ap. 386; *Scots Mining Co.* v. *Leadhills Co.*, 3 Macq. 743, *ante*, p. 852. Here there was no acquiescence on the part of the appellant in the interlocutor repelling preliminary defences; all that he did was merely to say, that he would not appeal at that point, but would reserve his right till a later stage. He is now entitled to re-open the question of preliminary defences. 2. The interlocutor sustaining the respondent's title to sue was wrong. It is well settled, that no one but a competing heir can oppose a service—*Graham* v. *Graham*, 13 D. 125; *Robson* v. *Lawrie*, M. 16,139; *Forbes* v. *Hunter*, 3d July 1810, F.C.; *Cochrane* v. *Ramsay*, 28th June 1821, F.C. It cannot be said the Crown is affected, at least at the present stage, and it will be time enough for the respondents afterwards to dispute subsequent proceedings. It being admitted, that there is some one now living who is heir to the Earl, it can make no difference to the Crown in whom the privileges and rights are vested. Neither the general nor the special service encroaches on the *jus coronæ*. 3. The Court below ought not to have given expenses against the appellant up to June 1840. As the law stood at the date of 1840 and 1845 the Crown could neither be required to pay, nor entitled to receive, costs; and unless the obligation is mutual, it is unjust to make one party pay—*Lord Advocate* v. *Douglas*, 1 Bell App. 93; *Smith* v. *Officers of State*, 6 Bell App. 503. The law has since been changed by 19 and 20 Vict. c. 56, § 24, but this question must be governed by the antecedent law. Besides, it was impossible the appellant could have been liable to pay all the costs before the date of 1840, for some of the expenses must have been incurred as to other conclusions of the summons. Moreover, the proper construction of the interlocutor of 1840 is to make the appellant pay the costs of that interlocutor only, and not of previous interlocutors. 4. The interlocutors on the reductive conclusions are erroneous on the merits, for the evidence fully established the appellant's title, and he fully discharged the *onus* of proof so far as incumbent on him.

Lord Advocate (Gordon), and *C. Scott*, for the respondents.—The preliminary defences cannot now be made available, for they were disposed of, and the interlocutor repelling them acquiesced in. The 15th section of 48 Geo III. c. 151, prevents all interlocutors but those which are necessary being brought up. Here the interlocutor repelling the preliminary defences was not necessary. The Crown is entitled to reduce these documents because the appellant claims a title to interfere with the *jus coronæ* over territories of the Crown. The title of the Crown is paramount to that of a competing heir in that respect, and it is the duty of the Crown to watch over peerage claims, to see that no abuse occurs. The interlocutors dealing with the merits were right. The evidence was wholly insufficient to support the claim made. Much of the evidence, besides being

open to the objection of forgery, was inadmissible or unworthy of credit. The interlocutor as to costs was also right.

Cur. adv. vult.

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 which will have to be determined is, whether the first of these interlocutors can be brought by appeal to your Lordships' House.

The summons, which was one of reduction and declarator, was brought against the appellant, 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 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 summons 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 Moncreiff, 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 the 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, general and special, retours proceeding 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 matter 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 the De Porquet Packet and the "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 of 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 the 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 Cuninghame, Lord Ordinary, to proceed therein as to his Lordship should seem just, and on the 2d June 1840, Lord Cuninghame 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 Cuninghame'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 defender 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, § 16. The defender presented a reclaiming note, praying the Court to reverse 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 defender, 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; *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, as 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."

In the 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 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 Geo. III. c. 151, "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 is necessary, may be brought under the review of the House of Lords." It is clear, to my mind, that this 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 there 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 parts 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 objection 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 competently 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 respondents were not to object, or 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, had 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 affected 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 *primâ 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 the case, that the Earl of Stirling exercised this right of conferring honours and titles by creating Sir Claude St. Etienne 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 Brown 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 resign 16,000 acres of land in Nova Scotia in favour of Banks, and to grant new infeftments of the same to him and his heirs male and assignees 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 pretensions. However good the grants to the Earl of Stirling, confirmed as they were by an Act of the Scotch Parliament, may be, the Crown must be interested to prevent its prerogative of conferring titles and dignities from being claimed by a person who has no connexion 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 service giving the defender a *primâ 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 recognize the title thus acquired, and 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 the 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 service, and the pursuers have to prove, that the services ought to be reduced. The defender is not put to his answer till 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 cause 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 genuineness of two descents. The appellant's father had to establish, that his grandfather, the Rev. 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 examined, of whom the most important were Margaret M'Blain and Eleanor Battersby—(His Lordship then examined the details of the evidence at considerable length).

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 speak.

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 shewn to have been in any way connected with the Alexanders, and her evidence is, that she had "heard her grandmother say, that she had heard her father say, that John of Antrim was come of the Alexanders from 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 Gartmouth was the Hon. John Alexander, and was the father of John of Antrim." It is unnecessary to consider whether, in the 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 they 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 interlocutor 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 investigation 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 the De Porquet 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 the 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, and upon the account given by the defender of the way in which they came to his hands. (*His Lordship then examined the details of this part of the evidence.*)

It only remains to notice the interlocutor of the 29th of June 1864, by which the Second Division of the Court found the party compearing liable to the pursuers in the expenses incurred by them in the process previous to the date of the interlocutor of the 2d of June 1840, reclaimed against. The counsel for the appellant objects to this interlocutor, because, they say, that at the time when these expenses were incurred, the Crown neither paid nor received costs. But the 19 and 20 Vict. cap. 56, § 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 for the defendant. 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 analyzed the evidence given and proposed to be given in this case. 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 there never will be an attempt again to maintain, that an interlocutor by which a preliminary defence of the complaining party was overruled in 1833, can be fitly reviewed in your Lordship's 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."

But 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 48 Geo. III. chapter 151. The object of that Statute was to prohibit all appeals from interlocutory 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 enactments, that there should not be an appeal to this House from interlocutors or decrees of the Lord Ordinary which have not been reviewed by the Judges sitting in the Division to which the Lord Ordinary belongs. So that an interlocutory judgment 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, viz. 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, so 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 question 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.

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 transmissions 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. It is perfectly clear, that the Crown had a 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 entitled to exercise them. Such is the nature of the action that has been brought on the part of the Crown. Therefore 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 assumptions 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 Statute 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 is, 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 the clause applies to interlocutory judgments of the Court, and to judgments of the Lord

Ordinary, but it applies to them only as 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 had 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 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 the points, but if otherwise no defences shall be given at this stage of the proceeding, declaring always, that it shall be competent to the Lord Ordinary, on cause shewn, 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 the 6th Geo. IV. chap. 120, § 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 Court, 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 title to pursue I apprehend could not again be revived. It was argued, 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 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*, 6 S. 359 : 8 S. 526, 796. But that case is not a precedent. It was a case with respect to a right of fishery, 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 mean time, *esto*, that you have such a title, it is only a title of tack, and that is not a ground of 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 defendant 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 a 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 argued, that no party can appear to oppose any general service who 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 pretension to use that service against the interest 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 had 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 to 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.

Appellant's Solicitors, Bischoff, Coxe, and Bompas, London.—*Respondents' Solicitors*, J. Hope, W.S.; Connell and Hope, Westminster.

MAY 14, 1868.

JOHN BELL, Esq. of Enterkine, *Appellant*, *v.* MRS. ANNE BELL or KENNEDY, and Others, *Respondents*.

Domicile—Scottish Origin—Leaving Jamaica for Scotland—Looking out for an Estate—*B., the son of Scottish parents, who were domiciled in Jamaica, was born there. At the age of two years B. was sent to be educated in Scotland, and remained there till twenty-two, when he returned to carry on the business of a sugar planter on his paternal estate in Jamaica. In* 1828 *he married a Scotch lady in Jamaica. After making a fortune, he left Jamaica in* 1837 *for good, arrived in Scotland, and began to look out for an estate in England or Scotland upon which to settle. He lived in hired houses in Scotland, and did not find a suitable estate till* 1839, *in Scotland, when he purchased it, and had lived there ever since.*

HELD (reversing judgment), *That, though he had intended in* 1837 *to abandon, and did then abandon, his Jamaica domicile, yet he had not acquired a new domicile till* 1839, *when he purchased and settled on his estate in Scotland.*

This was an action by Mrs. Mary Anne Bell or Kennedy, wife of Captain Kennedy of Bennane, against her father, John Bell, Esq. of Enterkine, to recover her share of the goods in communion falling due on the death of her mother in 1838. The claim was founded on the state of the law prior to 18 and 19 Vict. c. 23, § 6. (See a like case, *ante*, p. 938.)

The defender pleaded *inter alia*, that at the time of his wife's death he was domiciled in Jamaica, and by the law of the domicile such a claim was incompetent.

The record was closed, and a proof taken, and the Lord Ordinary (Kinloch) held, that the defender was in 1838 domiciled in Scotland. On reclaiming note, the Second Division, on 17th July 1863, adhered. The cause proceeded, and ultimately the defender appealed.

The main facts bearing on the question of domicile were as follows:—The defender was born in Jamaica of parents domiciled there. He was sent when about the age of two years to be educated in Scotland, and remained there till he was of the age of twenty-two years. He then returned to Jamaica to carry on his father's business of a sugar planter on his paternal estate of Woodstock. In 1828 he married in Jamaica Miss Hosack, a Scotch lady, and mother of the respondent. He made a considerable fortune in Jamaica, but in consequence of the abolition of slavery, and other causes, he made up his mind to leave, and actually left Jamaica in 1837 for good, and set sail to Scotland, and, a few days after his arrival, took up his residence with his mother-in-law in Edinburgh. He then began to look out for an estate in England or Scotland. He next took a furnished house meanwhile in Ayrshire, and then his wife died in 1838. He had been in treaty for more than one estate before that, but had not fixed on any; and it was not till 1839 that he purchased the estate of Enterkine in Scotland, where he had lived ever since.

Sir R. Palmer Q.C., and *Cotton* Q.C., for the appellant, contended, that, though Mr. Bell had intended never to return to Jamaica when he left it in 1837, still he did not acquire any new domicile till 1839, when he settled on his own estate in Scotland, and therefore the original domicile being in force at his wife's death, the present action was incompetent.

Anderson Q.C., and *Mellish* Q.C., for the respondent, contended, that the domicile became Scotch the moment Mr. Bell arrived in Scotland in 1837, and therefore the action was competent.

The arguments were confined entirely to the question of domicile, and turned exclusively on inferences to be drawn from the facts and documents in the case. The following cases were

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[1] See previous report 1 Macph. 1127: 35 Sc. Jur. 651: 36 Sc. Jur. 285. S. C. L. R. 1 Sc. Ap. 307: 6 Macph. H. L. 69: 40 Sc. Jur. 476.