The LORD JUSTICE-CLERK (after narrating the circumstances) said that there were three matters of fact involved in the issue. The *first* was that the deceased met his death by the breaking of the rope; the *second*, that the breaking arose from defect or insufficiency; and the *third*, that the defect or insufficiency was imputable to the fault of the defender. There was no dispute about any of these except the last. The only question, therefore, was whether the defender was in fault. That fault might be either personal and individual, or on the part of some one for whom the defender was responsible. He was not disposed to say there was no case (though there was not a strong one) to go to the jury of the former kind. But the other was the delicate part of the case. It was maintained by the pursuers, and maintained with more force as regards the evidence, that the fault which caused the occurrence in question was that of Gemmell, who was described as underground oversman of the defender. Now, whether the defender was to be made answerable for fault on the part of Gemmell (assuming fault to be distinctly proved), depended on whether this fault was committed by Gemmell when he was acting in a representative capacity, performing a duty delegated to him by his master, or whether the fault consisted in his doing or omitting something not within the scope of the authority delegated to him. Upon this point, the evidence was extremely defective. It was absolutely necessary that this matter be cleared up, in order that the Judge might give the jury the proper directions in law, and that the jury might have distinctly before them the grounds on which they were to proceed in returning their verdict. It was this defect in the evidence which had led to the unsatisfactory result in the trial of the cause. A general verdict had been returned under a general direction from the Judge, from which it was impossible to tell upon what views the jury had proceeded. In this state of matters it was unnecessary to dispose of the exceptions taken at the trial. If it had been absolutely necessary to look to these, he would have had considerable difficulty in disallowing the exception to the Judge's charge. The want of attention to that which was the turning point of the case—whether Gemmell was acting within the scope of the authority delegated to him—had perhaps led to the charge being worded as it was, in such general terms as to leave him in doubt whether the jury had this matter properly before them. The case has not been satisfactorily tried, and there ought to be a new trial.

Lord COWAN concurred. His Lordship thought it was not clear in what capacity Gemmell had acted. Could it be said that Gemmell's fault was the fault of the defender? That entirely depended on the capacity in which he acted, and his powers. There was no distinct or clear evidence on that part of the case. Assuming the fault to be Gemmell's, the question came to be whether his actings were those of a person to whom the furnishing of the rope had been delegated, or whether the defender had done his duty, and the fault of Gemmell was such as could not affect him. This part of the case had been left in great obscurity.

Lord BENHOLME was not prepared to dissent from the opinions delivered. The case had been unsatisfactorily tried. The extent to which the master had delegated his duties to Gemmell must be attended to on the new trial of the cause. However, he thought that the fair meaning of the charge was, that the jury had been directed that the defender was liable for Gemmell's fault *within the line of his delegated duties*. That was what was meant by the words "acting as oversman," to which exception had been taken on the ground of their generality.

LORD NEAVES agreed that there should be a new trial. It would be wrong in such circumstances to anticipate this by a statement of the law applicable to the case, which was attended with great nicety and delicacy. If he had been satisfied that the verdict had proceeded upon the footing that there had been personal fault on the part of the defender a new trial would have been unnecessary. But there was very slight evidence to inculpate the defender personally. It was therefore necessary to see that the other ground upon which liability might be attached to the defender was clearly before the jury in the evidence, and in the Judge's charge. Upon the footing that Gemmell was to blame and not the defender, were the evidence and the charge bearing upon it in such a satisfactory state as to enable the jury to see their way clearly through the case? Two propositions might here be maintained. One of these was that the defender was liable for all Gemmell's actings. The other was that he was liable for none of them. He was not prepared to affirm either of these. A great deal depended upon what the oversman was. This was not cleared up in the evidence. An oversman, as a master's delegate, was one thing; as a superior servant he was quite another. He frequently acted in both capacities. He was sometimes a master's delegate, and sometimes a *collaborateur* w th the other workmen. In which of these capacities was Gemmell acting in the transaction in question? There was no clear information on this point. There was no statement of the bounds of his duties. There was much nicety of fact in the case which had not been brought out in evidence, though it had been argued upon hypothetically in the discussion.

The Court therefore granted a new trial, reserving all questions of expenses.

Agent for Pursuers—Alexander Wylie, W.S.
Agent for Defender—John Leishman, W.S.

OFFICERS OF STATE *v.* ALEXANDER.

Declarator—Service—Competency—Jus tertii. Declaratory conclusions that a party alleging a certain relation to another, as the ground of his claim to be served heir in general and special to him, did not stand in that relation, *held* not competent in respect the subject of the conclusions was *jus tertii* of the pursuers of the action.

This is an action of reduction improbation in which the Crown sought to reduce two services, one special, the other general, obtained in 1830 by Alexander Humphrys or Alexander, who claimed to be the great-great-great-grandson of the first Earl of Stirling. These services were reduced, and the judgment of the Court of Session is now under appeal to the House of Lords. The facts out of which the case arises are shortly these:—

By a charter under the Great Seal, dated 10th September 1621, King James I. conferred on Sir William Alexander of Menstrie a considerable portion of the continent of North America, conferring upon him dignities and powers of an almost regal nature, including among others the privilege of wearing the royal arms, the power to build fortresses, to maintain a standing army, to equip ships of war, &c. This grant was to heirs and assignees, and was confirmed by charter of confirmation, dated 12th July 1625, by Charles I. By

diploma or patent, dated 4th July 1630, the said Sir William Alexander was made Earl of Stirling, with the rank of a viscount of Scotland. This is the Earl of Stirling to whom the defender in the action, at the instance of the Officers of State, served himself heir in general and special (the said defender is now represented by his son). In addition to the reductive conclusions of the summons the action also contained declaratory conclusions to the following effect:—

"And further, it ought and should be found and declared, by decree of our said Lords, that the defender, the said Alexander Humphrys or Alexander, is not the great-great-great-grandson of the said deceased William, first Earl of Stirling, and that he is not lawful and nearest heir in general to the deceased William, the first Earl of Stirling, and that he is not the nearest and lawful heir in special of the said deceased William, Earl of Stirling, in the lands, territories, and others abovementioned, and that he has no right, title, or claim whatsoever to the said lands, territories, and others, or to any part thereof; and that he has no right or title whatever to assume or bear the name and style of Earl of Stirling and Dovan, Viscount of Stirling and Canada, Lord Alexander of Tullibodie, &c."

The competency of these declaratory conclusions was the subject of the present judgment of the Court. In support of them the following averments were made:—

"By the treaty of St Germains, entered into between his Majesty King Charles the First and the King of France, and dated 29th March 1632, the whole of the said lands and barony of Nova Scotia, *inter alia*, were ceded to France. This cession was subsequently confirmed by his Majesty King Charles the Second, who, by the treaty of Breda, dated 21st (31st) July 1667, ceded to France the whole of the said lands and barony of Nova Scotia. The said lands and barony remained in the possession of France down to 1713, when they were, by the treaty of Utrecht, dated 11th April 1713, ceded to the British Crown. They have ever since remained in the possession of the British Government, and her Majesty the Queen has, *jure coronæ*, or as lord paramount, superior, or otherwise, an undoubted right, title, and interest to the whole lands, territories, and others above mentioned. Her Majesty the Queen has further, in virtue of her royal prerogative, the sole and exclusive right of conferring honours, titles, and dignities within Great Britain and its dependencies, and as one of these, within the territory of Nova Scotia."

"The said Sir William Alexander, first Earl of Stirling, continued to enjoy the title and honour thus conferred upon him until his death in February 1640. He was succeeded in the earldom by his grandson William, only son of his eldest son William, Viscount Canada, who predeceased him. The said William, second Earl of Stirling, died in May 1640, and was succeeded in the earldom by his uncle, Henry, third son of William, first Earl of Stirling, Anthony, the second son of the said William, first Earl, having predeceased his father.

"The said Henry, third Earl of Stirling, died in 1650, and was succeeded in the earldom by his only son Henry, fourth Earl of Stirling. The said Henry, fourth Earl of Stirling, died in February 1690, and was succeeded in the earldom by his eldest son Henry, fifth and last Earl of Stirling. The said Henry, fifth and last Earl of Stirling, died in December 1739, and left no male issue. His brothers, of whom he had five, all predeceased him, and left no male issue. William, Viscount Canada, eldest son of the said William, first Earl of Stirling, was survived not only by one son, the said William, second Earl of Stirling, but also by three daughters, and of these there are descendants. The said Henry, fourth Earl of Stirling, besides the sons who survived him, the eldest of whom became Henry, fifth Earl, was survived by three daughters, of whom there are descendants."

In defence it was pleaded that the "summons, so far as it contains conclusions that the original defender Alexander Humphrys or Alexander was not the 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."

The LORD ADVOCATE, the SOLICITOR-GENERAL, and H. J. MONCREIFF, for the Officers of State, argued—It cannot be pretended, after the treaty of St Germains, that any subject of her Majesty can take up the rights and privileges conferred upon Sir William Alexander by the charter of 1621. But then there is the title, and that is a question of dignity which is truly a patrimonial interest in the Crown which it is entitled to vindicate as if it were real estate. No object will be gained by the Crown by merely reducing the services, if it is possible for the defender to come forward at a later date and seek to establish his claim to the peerage, and to the lands in question. Accordingly the Crown is entitled to put a stop to his pretentions at once, by having it decided, under the declaratory conclusions of the summons that he is not what he says he is. Magistrates of Arbuthnott *v.* Panmure, 1676, M. 1870; Town of Stirling M. 1916; Barbers of Edinburgh *v.* Barbers of Canongate, M. 1956; Earl of Aboyne *v.* Magistrates of Edinburgh, March 1775, M. 1972; Moray *v.* Magistrates of Kinghorn, M. 1988; Todd *v.* Magistrates of St Andrews, M. 1997; Gilchrist *v.* Magistrates of Kinghorn, M. 7366; Reay *v.* Mackay, 25th Nov. 1823, 2 S. 457; King *v.* Earl of Strathmore, M. 6691; Riddell's Peerage, i., 268.

FRASER and SCOTT, for the defender, answered—It is not competent for the Crown to maintain these declaratory conclusions. It is of the nature and essence of a declaratory action that the pursuer of it shall declare some right in himself, but that is not done here. On the contrary, it is set forth by the Crown, in the record applicable to the declaratory conclusions, that there are other lineal descendants of Sir William Alexander alive, and that being so, they must exclude the Crown. Further, the contention of the Crown is altogether opposed to the service law of Scotland, according to which a claimant asserting right to an estate may take out as many services as he likes. If the delcaratory conclusions put forward by the Crown were to receive effect, the defender might be excluded from the use of any additional evidence by which he might on a future occasion be able to instruct his title. Such a form of process is altogether unprecedented. And the case of the Earl of Strathmore, so much relied upon by the Crown, does not apply, because that was a case in which the king was sueing, not in the exercise of his prerogative, but for his own personal interest. Stair, 4, 3, 47.

The LORD JUSTICE-CLERK said—The argument in this case was directed to a consideration chiefly of the first plea of the defender in the record recently made up. That plea is in the following terms:—"The summons, so far as it contains conclusions that the original defender Alexander

Humphrys or Alexander was not the 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." The other pleas have not been discussed, and they are not of much moment, except as raising the question which is raised by the first plea. I think the question is one of considerable importance; and in order to make the view which I take of it intelligible, it will be necessary to go back to some extent upon the history of the case. The charter granted by King James I. to Sir William Alexander, afterwards Earl of Stirling, is a charter of historical interest and notoriety. It conveys to that distinguished statesman and poet a considerable portion of the continent of North America, and it confers upon him powers almost regal. It gave right to him to bear royal arms, to maintain a standing army, and to equip ships of war. It is needless to go back to the history of North America at that date; but it is sufficient to say that the Officers of State say that that charter conveys a right which no subject of her Majesty, or any other person can now take up and enjoy. They say the charter is invalid. They say that by treaty with France in 1632 the subjects embraced in the charter were ceded to France, but that they were afterwards recovered by this country by the Treaty of Utrecht, and are now held, not on the same footing as under James I., but under a public treaty, and are now vested in the Crown *jure coronæ*. Of course the Crown, through its Officers of State, are quite entitled to challenge the right or title of any person who pretends or desires to take up the rights created by the charter of 1621. Now, in 1830, the original defender of this action obtained himself decerned heir in general and special to Sir William Alexander, the grantee of the charter of 1621, which is conceived in favour of heirs and assignees, and on a retour of that service obtained a precept of Chancery, and was infeft upon it. Thereupon it was open to the officers of the Crown to adopt one or other of two courses. If desirous to try the question of the validity of the charter, they might have called the original defender, so served and infeft, as contradictor; but they also might have said, "We wont try the question with you, because you are not truly the heir of Sir William Alexander." They chose the latter alternative, and challenged the service of the defender. For that purpose they brought an action, concluding that the service, precept, and infeftment should be reduced and set aside, on the ground that the service was obtained on insufficient evidence. The third reason of reduction is as follows:—"The defender, the said Alexander Humphrys or Alexander, is not lawful and nearest heir, either in general or in special, to the said deceased William, first Earl of Stirling; and the said deceased Earl was not his great great-great-grandfather; and, at all events, the said defender has never, by legal and sufficient proof, established and made out his claim to any such character or connection." Now, the latter part of that reason is the true ground upon which the pursuers were entitled to pursue a reduction of the service. All that is necessary for a reduction of a service on the merits is that the evidence is insufficient. And accordingly the judgment of the House of Lords, and of this Division of the Court, proceeds upon that as the true ground of reduction. In his interlocutor Lord Cockburn 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, and the retours proceeding thereon, and decerns." And he says in the first paragraph of his note:—"The object of the action is to set aside two services, one general and the other special, which have been obtained by the defender, designed in the defences as Earl of Stirling, and to have it found and declared that this person is not the nearest and lawful heir, either in general or in special, to William, the first Earl of Stirling, who died in February 1640. The discussion before the Lord Ordinary was restricted, *hoc statu*, to the reduction of these services, without following this out to all the consequences which the summons asserts that the reduction ultimately leads to." In other words, nothing was done toward disposing of the declaratory conclusions of the summons. But now we are asked to give judgment for the pursuers in terms of the declaratory conclusions, and it is quite necessary to attend very precisely to the way in which they are expressed. (Reads the declaratory conclusions.) It will be observed that there are four propositions here sought to be declared. (1) That the defender is not the great-great-great-grandson of the first Earl of Stirling. (2) That he is not the nearest lawful heir in general; that is to say, that he is not entitled to be served as heir in general to the first Earl of Stirling. (3) That he is not the nearest lawful heir in special; that is to say, that he is not entitled to be served heir in special to the first Earl of Stirling; and (4) That he has no right to assume the title of the Earl of Stirling, and to the lands, territories, &c., conveyed by the charter of 1621. Now, in disposing of these we must consider what course is to be followed upon the proof that has already been taken as applicable to those conclusions; and although, of consent of parties, that might be taken as part of the proof, still a new issue applicable to this part of the case would be necessary; and therefore we must look forward to the proceedings that would occur if these declaratory conclusions are sustained as competent. If the question is to be tried by a jury, what is to be the issue? Are the pursuers to stand pursuers in the issue, and to prove these negatives; or is the defender to stand pursuer in the issue, and to prove (1) his propinquity; (2) that he is the nearest lawful heir in general; (3) that he is the nearest lawful heir in special? Are these to be points in which proof is to be led by the defender? If so, I must say the proposal is quite startling, because it is quite unprecedented. I never heard of such a form of process, in which the Crown can say, on my demand, you shall serve heir in general and special to your deceased ancestor. No such process is known in the law of Scotland. The court of service is the proper court for such proceedings. Still less can that be done on the order of somebody who is not asking to be served himself. These are the difficulties that appear on the first blush; but on a close examination it is more apparent that it is quite impossible to sustain these conclusions. It is a perfectly well known principle in the law of service of Scotland that a person is entitled, *jure sanguinis*, to take up the succession of a deceased person at any time, if he is not anticipated by somebody acquiring a right, and fortifying that right by prescription. No lapse of time will prevent the assertion of rights *jure sanguinis*. *Juri sanguinis nunquam*

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

Lord COWAN concurred.

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

Lord NEAVES concurred with the majority.

The action was accordingly dismissed.

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

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

Tuesday, May 29.

FIRST DIVISION.

PEARSON *v.* M'GAVIN AND CO.

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

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

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

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

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

The pursuer then presented a second reponing note.