the church it had ceased to be a fabric dedicated to that use. It had in fact become a ruin, and was by decree of the Court appropriated to the purposes of burial. They could not, it is thought, by acquiring the church, and making alterations upon it, with reference to which the existing inclosure of a burying-ground became inconvenient, oust parties who had been in possession for an indefinite period of time.

"On the other hand, the Lord Ordinary thinks that the former railing having been improperly and injuriously attached to the stair of the church, the pursuers are not entitled to require it to be replaced, or to do so at their own hand. He is also of opinion that, looking to all that has passed between the parties, the pursuers are only entitled to erect such a railing or chain as is necessary to prevent the ground being walked over, and that they must do so at their own expense.

"The defenders maintain that, whatever may be the rights of the pursuers, the action has been improperly directed against them. The Lord Ordinary thinks that they are certainly not the proper parties against whom to direct conclusions for establishing the absolute and permanent right of the pursuers and their successors in all time coming, in the burying-ground, with the right of inclosing it. To that extent the action is dismissed, as well as in regard to the conclusions which the Lord Ordinary holds, as already explained, not to be well founded on the merits. But the pursuers having been interfered with, in regard to their rights to the burying-ground, by the committee, which is not a corporate or public body, they were entitled to direct their action against all or any of its members. The defenders do not ask that the other members of committee shall be called, and they have come forward to defend the action on grounds which, if well founded, would support the proceedings of the committee, and are entirely subversive of the rights of the pursuers. After the action was raised, both the defenders took an active part in causing an alteration to be made on the inclosing cope, for the purpose of restoring the ground to its former dimensions, showing that they took, along with other members of the committee, a control over the proceedings complained of. On the whole, looking to the course taken by the defenders, both judicially and extrajudicially, the Lord Ordinary is of opinion that they are liable to the limited decree now pronounced. But he thinks that the expenses in which they are found liable must be subject to a very considerable modification."

Both parties reclaimed.

GIFFORD and MACDONALD for pursuer.

MILLAR, Q.C., and BURNET for defenders.

The Court, after some discussion, made a remit to Mr Carrick, Master of Works in Glasgow, the import of which was, that the cope was not sufficient to carry an iron railing. On resuming consideration of the case, with the report, the Court appointed the defenders to surround the whole lair with a cope sufficient to carry the railing. The Lord Justice-Clerk did not dissent from the views of the Court, but concurred with hesitation. He was inclined to think that there was no desecration in walking over a lair in a churchyard, and that the proposed railing would be not only inconvenient, but even dangerous on dark evenings.

Agents for Pursuers—Hamilton & Kinnear, W.S.
Agent for Defenders—William Mason, S.S.C.

Friday, January 22.

EARL OF PERTH *v.* WILLOUGHBY D'ERESBY'S TRUSTEES.

Attainder — Service — Heir-apparent — Hæreditas jacens—*Restoration Act—Heir-male—Title to Sue—Prescription—Production of Titles—Title to Exclude—Corruption of Blood—Satisfying Production—Unreduced Service—Alien.* James Drummond, Duke of Perth, having been engaged in the rebellion of 1745, an act was passed which provided that he should submit to justice before 12th July 1746, and that if he did not submit he should be attainted of high treason. He died on 11th May 1746, before the period fixed for the submission, without issue, and was survived by his brother John, who was also engaged in the rebellion, was embraced in the statute, and survived the period fixed for submission. John was attainted, and the lands were seized by the Crown as forfeited. The estates thus seized were annexed inalienably to the crown by the Act 25 Geo. II, c. 41, and remained under charge of the Commissioners till 1785; but in 1784 an act was passed for restoring the estates to the heir-male of John Drummond, the attainted person. Titles were made up under the destination of the Act of Restoration. An action of reduction and declarator is now brought against the successors of the person who, in 1785, obtained a decree of declarator that he was at that time next heir-male of John Drummond, and the title libelled by the pursuer is that he is lawful heir-male in general to James Drummond who died in 1746 conform to service expede by him in that character. That service stands reduced. *Held* (1) That when the succession opened to John Drummond by the death of his brother James on 11th May 1746, he had a capacity to inherit, and although the Act of Attainder had a retrospective effect to a date anterior to his succession as heir-apparent, the estates passed to the Crown by John's attainder, and the pursuer's service could carry no right to the lands as in the *hæreditas jacens* of James; (2) That the forfeiture of an heir-apparent operates as a complete vesting of the Crown, not merely in the apparent-heir's right measured by his existing title, but in the estates themselves to which he is heir-apparent; (3) That the object and intention of the Restoration Act were to confer the estates on the heir-male and not the heir-male-general of the attainted person, and therefore, that in the latter character the pursuer had no title to sue the present action. Action therefore dismissed.

Circumstances in which held—(1) That a plea of prescription in absence of proof cannot be sustained without production of titles; (2) that a title to exclude could not be sustained without production of the title-deeds instructing it; (3) that a plea of corruption of blood in respect of the attainder of an ancestor would be a good answer against production of titles, but could not be entertained in presence of an unreduced service which presumes that the title libelled has been validly deduced.

Observed per Lord Justice-Clerk (Patton),

that it is not a doctrine of the law of Scotland that a right of succession cannot be transmitted through an action.

This was an action which involved the title to the estates of Drummond Castle and others in Perthshire, and which was pursued by the Earl of Perth against the Trustees of the late Lady Willoughby d'Eresby, and also against the Officers of State as representing the interests of the Crown.

The action was brought by the pursuer as duly served and decerned nearest and lawful heir-male in general to James Drummond, third Duke of Perth, who died in 1746. This James, third Duke of Perth, was proprietor in possession of the Perth estates, of which he expede a crown charter of resignation and novodamus in 1731 in favour of himself and the heirs-male of his body, whom failing, his other heirs-male, whom all failing, his own nearest heirs and assignees whomsoever. It does not appear whether he took infeftment. He died unmarried and intestate, and after his death the estate was seized by the Crown as being forfeited by the attainder of his brother and apparent heir, Lord John Drummond. It continued in the hands of the Crown till 1785, when, under the Restoration Act, it was granted to the late Lord Perth, then Captain Drummond, the titles being taken to him and his heirs and assignees. On the death of Lord Perth it passed to his only child, the late Lady Willoughby d'Eresby, and is now held by the defenders, her testamentary trustees.

The object of this action was to reduce the titles taken by the late Lord Perth, and all the subsequent titles and conveyances of the estate, and to have it declared that the pursuer has right to the estate, and to make up titles to the same as heir-male of the said James Drummond, third Duke of Perth. The pursuer maintained that the estate was not lawfully forfeited by the attainder of Lord John Drummond, and that it was still in the *hæreditas jacens* of the third Duke.

The defenders made the following statements:—"(1) In the year 1695, John Drummond, Earl of Melfort, second son of the third Earl of Perth, and brother of the Chancellor, was convicted of high treason in the Scottish Parliament, and decree of forfeiture and tainting of blood was pronounced against him and his posterity. The decree of Parliament was dated 2d July 1695, and is referred to. The posterity of the said John Drummond, Earl of Melfort, by his marriage with Sophia Lundin, on account of the services which that lady's family had rendered to the country, were specially excepted from the effects of the decree of forfeiture. (2) Sometime after the Perth estates were forfeited, and after the Vesting Act of 1747 (20 Geo. II, c. 41), under which the Crown possessed the estates, James Drummond of Lundin, grandson of the said John Earl of Melfort and of the said Sophia Lundin, raised an action against the Crown, claiming the Perth estates as heir-male of James Drummond, third Duke of Perth, being the character now claimed by the pursuer and in which the pursuer sues, on the ground that James Drummond had died last vest and seized in the estates, and that the same had not been duly or lawfully forfeited by the attainder of John Drummond, the brother of James Drummond, in respect John Drummond had lived and died a professed Papist, and so had never succeeded to the estates, and was incapable of succeeding thereto. The Crown was assoilzied from the conclusions of the action. The Lords, of this date (Dec. 13, 1750), found that James Lundin, the claimant, could not be served heir-male to James Drummond, deceased, the person who stood last infeft, in respect that he behoved to connect his title through the person of James Drummond, formerly Lord Drummond, whose blood was corrupted by the attainder; and further found that, the said James Lundin not having claimed as Protestant heir before the estate was forfeited by the attainder of John Drummond, commonly called Lord Drummond, he could not over-reach the forfeiture and draw back the estate from the Crown on pretence of his being the nearest Protestant heir. The proceedings are referred to."

And they pleaded:—"The defenders are not bound to satisfy the production, and they ought to be assoilzied, or the action should be dismissed, because—(1) the pursuer has no title to sue, in respect he does not truly possess the character of heir-male of James Drummond, third Duke of Perth, as alleged by him. (2) The pursuer has no title to sue, in respect his claim to the character of heir-male foresaid is barred by the attainder of John Earl of Melfort, and, *separatim*, by the attainders of James Lord Drummond, and his son Lord John Drummond. (3) *Esto* that the pursuer's father, Leon Maurice Drummond, was an alien; he was incapable of holding heritable estate in this country, and a right of succession to such estate could not be transmitted through him to the pursuer, who has therefore no title to sue. (4) In respect of the action and decree set forth in the defenders' statement, it is *res judicata* that the pursuer has no title to sue. (5) Any claim competent to the pursuer as the alleged heir-male of James third Duke of Perth is excluded by the disposition granted by him in favour of Thomas Drummond. (6) The pursuer's claim is excluded both by the negative and positive prescription, or by one or other of them. (7) The titles made up in the persons of James, Lord Perth, Charles Selkrig, and others, his trustees, Lady Wiloughby, and the defenders, or one or more of them, with the possession following thereon, form a valid and effectual title to exclude. (8) The claim of the pursuer is excluded by the Vesting Act, the Annexing Act, and Act of Restoration, or by one or other of them; and, *separatim*, it is excluded by the said Acts, or one or other of them, and by the subsequent titles and possession. (9) Any right under prior investitures was evacuated by the charters in favour of Lord Perth in 1785, 1787, and 1789, and the deeds subsequently executed by Lord Perth. (10) The action is irrelevant, and, upon his own statements, the pursuer has no good claim to the estates in question, or to call for production of the writs sought to be reduced."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—

"*Edinburgh, 12th December* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the closed record on the preliminary defences and process,—Repels the pleas for the defenders as defences against satisfying the production, reserving their effect as defences on the merits: Appoints the cause to be enrolled, that the defenders may take a day to satisfy the production: And the defenders having intimated their intention to reclaim, finds them liable in the expenses of this preliminary discussion, allows an account thereof to be given in, remits the same, when lodged, to the Auditor to tax and report, and grants leave to reclaim."

"*Note.*—From the peculiar and complicated nature of the averments and pleas in this case, the Lord Ordinary thought it proper to have a record made up and closed upon the question raised in the defences against satisfying the production. But after hearing a full debate, in which these questions were largely discussed, he has come to the conclusion that, in the position of the case, none of the pleas set forth by the defenders can be sustained as defences against satisfying the production.

"These pleas consist, in the first place, of objections on various grounds to the title to sue. The action is brought by the pursuer as duly served and decerned nearest and lawful heir-male in general to James Drummond, styled third Duke of Perth, who died in 1746. He was proprietor in possession of the Perth estates, of which he expede a crown-charter of resignation and novodamus in 1731, in favour of himself, 'et hæredibus masculis ipsius corporis quibus deficien. aliis suis hæredibus masculis quibuscunque quibus omnibus deficien. (quod absit) aliis suis hæredibus et assignatis quibuscunque.' It does not appear from the statements on record that he took infeftment. He died unmarried and intestate; and after his death the estate was seized by the Crown, as being forfeited by the attainder of his brother and apparent heir, Lord John Drummond. It continued in the hands of the Crown till 1785, when, under the Restoration Act, it was granted to the late Lord Perth, then Captain Drummond; the titles being taken to him and his heirs and assignees. On the death of Lord Perth it passed to his only child, the late Lady Willoughby de Eresby, and it is now held by the defenders, her testamentary trustees.

"The action is brought for the purpose of reducing the titles taken by the late Lord Perth, and all the subsequent titles and conveyances of the estate, and of having it declared that the pursuer has right to the estate, and to make up titles to it as nearest and lawful heir-male of James Drummond, third Duke of Perth, to whom he has already expede a general service in that character. The pursuer maintains that the estate was not lawfully forfeited by the attainder of Lord John Drummond, but the foundation of his claim, in so far as it is necessary at present to consider it, is his contention that the destination to heirs-male in the old investiture is a binding and subsisting destination, which was not set aside, but given effect to by the Restoration Act, and which it was not in the power of the late Lord Perth or his daughter to alter.

"Such being the nature of the pursuer's case, he has libelled at least a *prima facie* title to sue the action. The alleged right which is sought to be enforced must, if it exists, be in the person of the heir-male of James Drummond, third Duke of Perth, to whom the pursuer has expede a general service in that character. There cannot be a special service, both because James Drummond held at his death only a personal title to the lands under an open charter, and because he did not die last vest and seized in them, more than one entry having been given since his death. A general service is the appropriate title for bringing such an action; *Horns* v. *Stevenson*, 6th November 1746, M. 16,117. The defenders state objections to the pursuer's title which are of the most material importance, to the effect that the descent or pedigree on which he relies, as connectiug him with James Drummond, third Duke of Perth, is legally barred—1st, by the attainder of certain parties through whom it is necessary for him to trace his consanguinity; and 2dly, by the fact that his father, who is a necessary link in the descent, lived and died an alien. The facts of attainder and alienage on which these objections are founded are established by the pursuer's averments. But whatever legal validity the objections may have, they appear to the Lord Ordinary to be in the meantime excluded by the pursuer's decree of service, of which he produces an extract. The pursuer founds upon the decree as the proper and conclusive legal evidence that he possesses the character which he claims, and in which he brings the action. Such a writ cannot be impugned *ope exceptionis;* and if the defenders are to call it in question, they can only do so by way of reduction. It is of no importance that the defenders had no direct interest in the pursuer's service, and could not have appeared in it as competitors or otherwise. As the pursuer is now using it for the purpose of setting aside their titles, and claiming the estate from them, they have a clear legal interest and title to set it aside. Tbe Lord Ordinary is therefore of opinion that the objections taken to the title to sue cannot be sustained as defences against satisfying the production.

"The other pleas, in so far as they are preliminary, substantially resolve into the defence of title to exclude. More especially, the defenders found upon a prescriptive title in the persons of themselves and their authors, constituted by the writs called for. But they advisedly decline at this stage to produce any of these writs, and merely refer to the pursuer's statements in regard to them. The Lord Ordinary is not aware that a title to exclude has ever been sustained where it has not been produced by one or other of the parties. It has frequently happened that the title to exclude has consisted of one or more of the writs called for. But in these cases the writs which were so founded on by the defender were produced, and the effect of sustaining them as a title to exclude was to exempt the defender from the necessity of producing the other documents called for. In so far as the plea of title to exclude is rested upon the effect of titles which are not produced, or upon prescription following on these titles, the Lord Ordinary is of opinion that it cannot be sustained as a defence against satisfying the production. The defenders further plead on the Vesting, Annexing, and Restoration Acts, as excluding the pursuer's claim. But the Lord Ordinary does not think that there is anything in these statutes which can warrant a judgment in the defenders' favour at this stage, apart from a consideration of the titles which followed on the Restoration Act.

"The defenders plead generally that the action is irrelevant. But that is very much another mode of stating the defence of title to exclude rested on the various grounds referred to in the preceding pleas, to which, for the reasons already explained, the Lord Ordinary does not think that effect can be given at present. In any view, it is so much mixed up with the subject matter of these pleas that the Lord Ordinary is of opinion that it must be reserved along with them, and, on the same grounds, to be disposed of after the production has been satisfied."

The defenders reclaimed.

SOLICITOR-GENERAL, CLARK, and SHAND for them.

LORD ADVOCATE, GIFFORD, and RUTHERFURD in answer.

At advising—

LORD JUSTICE-CLERK—The case before us is a

reduction and declarator at the instance of the Earl of Perth, directed against the parties holding the estates which were formerly held in conjunction with that earldom. He seeks to set aside a decree of declarator obtained in 1785 by Captain James Drummond, afterwards Baron Perth. by which, in a question with a party called John Drummond, he established that he was at that time the next heir-male of John Lord Drummond, who was attainted in 1746. He seeks to set aside, also, a series of titles completed under the Crown; and, by virtue of grants from the Crown in 1785, 1786, 1787, and 1789, of deeds executed by Baron Perth in favour of his trustees, and the titles made up in the person of his daughter, the late Lady Willoughby, in 1807, under the trust-deed executed by him, and also as his heir-at-law, and of a trust-deed executed by Lady Willoughby in favour of the present defenders. The summons calls for production of all these titles, and for declarator that the defenders have no right to these lands, and are bound to denude in favour of the pursuer, who has the only right to them. The defenders object that the pursuer has no good title to call for the production, or to insist in the action, on the showing of the pursuer himself.

The pursuer libels as his title to follow out these proceedings, that he is lawful heir-male in general to James Drummond, sixth Earl of Perth and third Duke of Perth, under a title to the dukedom conferred by James VII after his ceasing to be King, who died on the 11th May 1746. He has expede a service in that character, which service has not been brought under reduction; and, although the validity and effect of the service as a mode of transferring to him any right to the lands which might have existed in James Drummond might have been questioned, it was not disputed—or at least in this stage of the proceedings not contested—that he *de facto* stands in that relation of propinquity on which his claim to serve was rested. He says that by his service he has attached a personal right to the lands and estates of Perth which was vested in James Drummond, his ancestor, which has never been taken out of his *hæreditas*. He sets out a series of deeds by which this personal right was, he says, so vested in James Drummond. The first is a deed of entail executed by the fourth Earl of Perth and Chancellor of Scotland, the grandfather of James the third Duke, on the 11th October 1867. By this deed it is said that the estates of Perth were conveyed, under reservation of the granter's liferent, to his son, James Lord Drummond, and heirs-male of his body, whom failing, to his other heirs male. It is said that resignation followed upon the procuratory contained in this entail, and that a Crown-charter was expede in favour of James Lord Drummond the third, and the series of heirs mentioned in the entail, on which infeftment followed.

This James Lord Drummond, the institute in the entail, in his contract of marriage in 1706, the pursuer further says, bound himself to resign the lands in favour of himself and the heirs-male of his body in that marriage, or, failing these heirs, to the heirs-male of any other marriage, whom failing, to the heirs-male of tailzie and provision contained in the infeftments of the earldom of Perth. It is said that this deed contained prohibitions against altering the order of succession. In 1713, James, the institute under the entail, and the party under obligation under the marriage-contract before mentioned, conveyed the estates, reserving his liferent, to his son (to whom the pursuer served), and infeftment was expede in his favour.

In 1731, James Drummond is stated to have expede a Crown-charter of resignation, in which he disponed the estates in his person to himself and the heirs-male of his body, whom failing, to his other heirs-male, whom all failing, to his heirs whomsoever. We have not the deeds before us, and we must therefore assume in this question in favour of the pursuer all that he affirms in regard to them. We must deal with the defenders' case on the footing that the fourth Earl executed an entail embracing the estates, and fettered with all the usual conditions, and we must further hold that a personal title stood in the person of James Drummond at the time of his death, which contained not only the destination to heirs-male, but was affected by the conditions ordinarily inserted in deeds of entail. But it is averred that no such entail was registered, and it certainly cannot be assumed that the deed of entail was registered in the Register of Tailzies. It is plainly not in the register; if it had, we should have had an extract from the register, or a reference to it. Registration of the entail is not averred, and, if necessary for the pursuer's case, cannot be assumed. It is the personal right under this deed which is said to be carried by the service.

This James Drummond was engaged in the rebellion of 1745, fought at Culloden, and escaped in a French vessel of war. Shortly afterwards an Act was passed which provided that James Drummond, taking upon himself the title of Duke of Perth, should render himself, along with other parties mentioned in the Act, "to one of his Majesty's Justices of the Peace on or before 12th July 1746, and submit to justice for the treasons aforesaid;" and if he did not render himself, it was provided that, from and after the 18th of April 1746, he should "stand and be adjudged attainted of the said high treason, to all intents and purposes whatsoever." He died before the expiry of the period fixed for his appearing, and it was held, in proceedings which followed, that he was not duly attainted; and consequently it was so found against the Crown, who had taken possession of his estates as forfeited by his attainder. The Act contemplated, in the event of his non-appearance in compliance with the summons, that he should be forfeited as from the 18th April, the day on which the rebel forces at Ruthven in Badenoch resolved to discontinue their rebellion; but, inasmuch as death prevented the possibility of his compearance, he was held to die a liege subject of the King. James died without issue, and, on his death, his brother John survived him, and died in 1747. John Drummond was also engaged in the rebellion, and fought at Culloden, and was embraced under the same statute. He survived the period at which he was cited to appear and was attainted, and the Crown surveyed, seized, and entered into possession of his lands and estates as forfeited.

By the Act 25 Geo. II, c. 41, the estates of traitors engaged in the rebellion were vested in the Crown, but claims were allowed to be given in by parties claiming right to the estates to the Court of Session, within a period fixed by the Act. A claim was lodged on the part of Thomas Drummond of Logiealmond, as trustee under a deed executed by James Drummond, third Duke of Perth, in 1743, in which he (Drummond of Logiealmond) claimed the estates for the benefit of the parties for whom he held in trust, but the claim was disallowed, and the forfeiture of John Lord

Drummond confirmed in the judgment. This judgment was affirmed in the House of Lords. It is stated by the pursuer, and the fact was so, that this disposition was simulate, and granted in order to elude the consequence of anticipated rebellion. But the question was determined, both in the Court of Session and in the House of Lords, on the footing—important in the present contention—that John Drummond was not forfeited when the succession to his brothor opened to him, and, consequently, had a capacity to inherit the estates when his brother died.

The estates thus surveyed and seized under the Act 20 Geo. II, c. 41, were annexed inalienably to the Crown in 1752 by the Act 25 Geo. II, c. 41, the annexing Act, and remained under the charge of the commissioners till 1785. In 1784 an Act was passed for restoring these estates to the heir-male of John Drummond, the attainted person. The detailed provisions of this act will fall to be considered hereafter. In this year, 1784, Captain James Drummond, thereafter created Baron Perth, obtained the decree of declarator fixing upon him the title of heir; but which decree, directed against a pretender to the position, is not impugned on its own merits. In 1785 Captain James Drummond obtained a charter and letters of presentation from the Crown, as the pursuer says, (Cond. 29) in favour of himself and his heirs and assignees. These titles formed the basis of the rights now held by the defenders. It is said that these titles were not in conformity with the provisions of the Act of Restoration, which authorised, the pursuer says, according to a sound construction, the restoration of the estates to the heirs-male of the family, as in the old investiture, and not to the heir-general. Captain Drummond Baron Perth, in virtue of the title so completed, conveyed, subject to certain burdens, the estates to his daughter Lady Willoughby, and possession followed, though not, as the pursuer says, for the prescriptive period; there being, as he alleges, interruptions from various causes, preventing the operation of the statute 1617, in favour of the defenders.

I may at once dispose of the defence on alleged prescriptive possession. It seems to me to be quite premature to deal with it at this stage of the case. It would require investigation; and there is as yet no proper state of ascertained fact before us as to the state of possession, on which we could proceed to give judgment for the defenders. Moreover, the plea of prescription is unsupported by production of the title on which it is rested, and therefore cannot possibly admit of being sustained at this stage of the proceedings. Prescription is not an objection to production at all.

The defenders further founded on their alleged titles since 1785, and, in the absence of any production in support of it, the defenders plead a title to exclude. A title to exclude must be founded upon rights in the persons of the defenders standing upon independent title; but it is a plain proposition stated by the Lord Ordinary, and one to which I entirely assent, that this Court cannot sustain in this case a title without production of the title-deeds instructing that title. To a successful plea of exclusive title, the production of a title in the person of the party pleading it is essential.

The defender states an objection of a more formidable character in the form of a plea upon corruption of blood arising from the attainder of the Earl of Melfort in 1690 and of James Drummond, the father of the third Duke, to whom the pursuer was served. He states that the corruption of blood of these parties excludes the possibility of his connecting himself through them with the ancestor with whom he seeks to connect himself, so as to acquire by service any right to the estates vested in him. The objection is the more formidable in that the statute restoring to the pursuer his title to the Earldom, while it removes the taint of a corrupted blood said to interpose against his resumption of the title, expressly reserves the effect of such corruption as it may affect the inheritance of lands. It is plain, as we learn from Elchies, that in a claim made to these estates by the Protestant heir of John Drummond—Drummond of Lundin—though the case involved difficulty, the Court thought the corruption of blood through the attainder of James Drummond broke down the bridge, as it was said, by which he could reach the estate. I think this objection is of a kind which, if we could entertain it, fell to be considered properly as a defence against production of titles, because no party who has not a title connecting him with anterior deeds, and whose title, if the deeds called for were reduced, would not be good to establish a right in him, can ask to throw open his adversary's charter-chest by a call for production of the deeds by which the estate is held. But we cannot, I think, entertain the objection, because the pursuer has served as heir-male-general of James Drummond, and his service is not reduced or brought under reduction. Like the Lord Ordinary, I feel that, while the service is unreduced, we must assume it to have been to all intents and purposes validly deduced, and to carry every right in the person of the ancestor which a good service could carry. I reject therefore from consideration in this judgment the element of the alleged corruption of blood as a legitimate ground of judgment on which we can at present proceed.

Another plea of the defenders I also entirely disregard,—not only on the ground of the unreduced service, but from the plain error on which it rests. The pursuer's father, it is said, was an alien, and it is contended that a right of succession cannot on that ground be transmitted through him. I am unaware of any such doctrine in the laws of this or any other county as to alienage involving a corruption of blood.

The defenders, however, say that they can make it clear, upon the legal result of the facts as stated by the pursuer, that he has no case,—that the title on which he founds cannot possibly carry any right in his favour,—and that the series of statutes appealed to by himself exclude and contradict the case as it is maintained by him. They plead the sacredness of their charter-chest from invasion by one whose title, if the deeds sought to be recovered were reduced, could establish no right in his person; and they seek, from the alleged manifest absence of interest in the pursuer according to the result, as they say, as legally deducible from the facts to which he himself appeals, that we should refuse the call for production and dismiss the action. If this contention of the defenders be well founded, it is their right to ask judgment upon it at this stage, and it is of the greatest consequence to all parties that the matter should be at once determined. If the pursuer has a case which upon the facts stated by himself cannot legally prevail, it is of the utmost consequence to his opponents that they should be freed from the delay, the expense and the anxieties, incident to prolonged litigation. It is equally im-

portant to him that a litigation, which must in that view end unfavourably, should be brought to a termination speedily, and at a comparatively small cost. The pursuer has presented his case in a spirit which cannot be too much commended for its candour and fullness, and has put us in a situation of having before us all the averments and statements on which the legal questions—some of them of difficulty, and all of them of interest—fall to be decided.

The first question is as to the effect of the forfeiture of John Lord Drummond in 1746. John Lord Drummond became, by the death of his brother on 11th May 1746, heir-apparent to the estates of Perth. Though by the Act the decree was to take effect as from the 18th April, the day of the dispersion of the rebel forces at Ruthven, in the event of his not surrendering before 12th July, the fact was that he did not surrender. In reference to the effect of the service led by the pursuer the defenders maintain that it could carry no right to the lands as in *hæreditate jacente* of the ancestor, because the estates passed to and were vested in the Crown by John's attainder. If the service can attach nothing, the pursuer's title, founded on the alleged service, can confer no right, and therefore we must conclude that the action is not maintainable. The pursuer meets the objection, in the first place, by affirming that the attainder could carry nothing, because John Drummond, when attainted, must be held by the retrospective effect of the statute to have been forfeited as from 18th April, that is, from a date anterior to his succession as heir-apparent, which would prevent him from inheriting. The defenders reply, that when the succession opened, John had capacity to inherit, because it was not then known whether he would or would not outlive the period fixed for his surrender, or actually surrender before the period arrived. The matter seems to me clearly in favour of the defenders on principle, and on very direct authority;—on principle, because till the expiry of the 12th of July, as was found with respect to James, there was no forfeiture; and on authority, because the very question was raised, and the opinion of the Court here and in the House of Lords expressed on it in a case with reference to these very estates. It is not *res judicata*, but it is of the highest authority; and it is founded on considerations which necessarily involve the very matter upon which we are now asked to pronounce a judgment. The case is reported in 1 Craigie and Stuart's Appeals, 503.

The Court of Session, on 1st December 1750, found that John Drummond, second son of the late Lord Drummond, was attainted of high treason; was, upon the 11th of May 1746, when James Drummond his elder brother died, capable to take by descent from his said elder brother, and that the estate of Drummond in question did then descend by James' death to John Drummond, now attainted, and was forfeitable and forfeited by the treason and attainder of the said John Drummond, and that the said trust-disposition of Thomas Drummond, now claimed on, is not sufficient to exclude the forfeiture. An appeal having been taken from that interlocutor, the judges were directed to give their opinions on a question framed with a view to obtain their opinion upon the very case which is now presented to us in argument. The question was put, "Whether by the law of England, John Drummond, second son of the late John Drummond, was, on the 11th of May 1746, capable of taking lands by descent? And whether, by his not rendering himself to justice on or before the 12th July 1746, according to the Act of the 19th year of his present Majesty, such descent became divested or avoided, so as to prevent the forfeiture in prejudice of the Crown? Whereupon the Lord Chief Baron of the Court of Exchequer, having conferred with the Judges present, acquainted the House 'that they were unanimously of opinion that the said John Drummond was capable at that time of taking lands by descent; and that, by his not rendering himself to justice on or before the 12th July 1746, according to the aforementioned Act of the 19th year of his present Majesty, such descent did not become divested or avoided so as to prevent the forfeiture in prejudice of the Crown.' And, upon due consideration had of what was offered on either side in this cause, it is ordered and adjudged, &c., that the said petition and appeal be, and is hereby dismissed, and that the said judgment be affirmed." Therefore it appears to me that we have an authoritative decision of the highest tribunal to the effect that the forfeiture did not operate to prevent the succession opening to John Drummond upon the death of his brother on 11th May; and consequently, if the right in John Drummond was such that there was conferred upon the Crown by the forfeiture a right to the entire lands, no objection can be stated founded upon the mere fact of the alleged forfeiture being retrospectively dated as from the 18th of April. This case, and the principles recognised in it, seem to me to determine another branch of the pursuer's argument, as raised in the 18th article of his condescendence. He says that the attainted party was incapable of taking by reason of the Act against Papists holding landed estate, 1700, c. 3. The matter was fully considered also, and it is clear, first, that Papacy is made by that statute an irritancy which must be declared, and that adherence to Popery after the adoption of the proceedings pointed out in the Act is necessary to exclude the Popish heir. That question was raised in the case that was brought by Mr Drummond of Lundin, the Protestant heir at the time, before the Court of Session. It was so brought and decided upon the footing of that interpretation of the Act, and upon principles which I think must commend themselves to every one. The decision is given in Elchies, and, in so far as it relates to that branch of it which refers to the application of the Statute 1700, c. 3, we have in No. 16, *voce* "Forfeiture," this statement of the view of the Court—"We thought that the succession is not by the Act of 1700 established in the Protestant heir, without either a service or some other legal act, to ascertain that the nearest heirs professed Popery, and the Protestant heir's own title; that till then the right of apparency remains with the Popish heir, who may possess and contract debts, and be charged to enter heir, yea, and may be served and infeft if nobody oppose, and therefore may forfeit; and the succession having on the 11th May 1746 devolved to John, we thought the estate became forfeited by his attainder, and therefore dismissed the claim."

A much more sweeping objection was stated, viz., that an heir-apparent's right is in itself limited, and that forfeiture cannot extend beyond the heir's interest, which is that of a temporary kind; and that although he has a right to continue an ancestor's possession during apparency, the estate will not be vested by any act of his unless under the operation of the statute, by which it is provided that a future

heir passing over one who has been in apparency for three years, shall have done deeds by which the estate is affected. At first sight, the admitted facts of the continuous possession of the Crown, and the vesting and restoring statutes, would seem practically to dispose of this contention; but it is alleged on the part of the pursuer that, although the rebel died in 1747, the possession may have continued with the Crown in ignorance of the fact of his death, and that the only interest which the statutes dealt with were those vested in the traitors. We have therefore to consider the law of the case. My opinion is, that the forfeiture of an heir-apparent,—meaning thereby an heir who by the death of his ancestor is entitled to serve as heir to the estate which had been possessed by that ancestor, who has a right to ingather the rents payable by the possessors, and to contract obligations capable of being enforced by creditors, and so to convey away the estates,—operates as a complete vesting of the Crown, not in the apparent heir's right measured by the extent to which his existing title confers that right, but in the estates themselves to which he is heir-apparent, and in reference to which he may expede a service by which he will be fully vested in the possession. The Crown's title to these estates requires nothing to complete it; it requires no reduction of the title of a traitor who has been infeft, and no service to one who has not been infeft. The mere completion of title is a question with which the Crown has little to do, because the Crown, by its paramount title to the lands granted, becomes, by the forfeiture of the rights which it has previously conferred, *eo ipso* reinvested in the right to these lands. No vesting act is necessary—nothing more than the act of forfeiture—to vest the Crown in the right. I think that our authorities are very direct and very clear as to the law of this matter. Referring to the period before the Union, we have the authority of Stair, Craig, and Dirleton. Lord Stair, iii. 3, 36, and 38, speaking of the Act 1584, c. 2, the object of which was to enable the Crown to avoid the consequences of a putting away of titles in order to defeat its rights, and by which possession of estates for five years was to be held as affording conclusive evidence, in a question with the Crown, of the actual right and title of the party who had been so in possession, says: "It is also declared in this statute that the forfeiture of the apparent heir carries therewith the right of the lands to which he might succeed, though he were never entered heir, nor infeft; whereof Craig mentions a case, *lib.* 2, *dieg.* 18, § 23, that the daughters of the Laird of Laisindrum were excluded from their succession to their goodsire because their father was forfeited, though he was never received nor infeft in these lands." And (38)—"But, whereas it hath been said that the apparent heir being forfeited, the King hath right to the heritage to which he might succeed; it may be questioned whether that may be extended to the apparent heir if he be forfeited during his predecessor's life, or if it be only in the case that the heir-apparent is forfeited after the death of his predecessor, where *de presenti* he may be heir." He appears to assume that the apparent heir, if not forfeited at the time of the succession, may forfeit to the effect of conferring the total right on the Crown, and he refers to the statute as confirmatory of that view. The statute does not, according to my reading of it, expressly make the declaration, in so many words, that Lord Stair points at; but it does contain a provision which necessarily implies the operation of the law as previously fixed, because it contemplates and provides for the case; in the first place, of the possession of the forfeited person as affecting the rights of the Crown in the estates which he has been five years in possession of, and then it contemplates the case of the Crown having right to these estates by reason of the treason of the nearest heirs, in which case it is said that the ancestor's possession shall count for the possession of that nearest heir whose lands are thereby affected by the forfeiture. I need scarcely refer to the special provisions of the Act, but that is its import; and it seems to me to recognise as an established principle of the law the fact of the forfeiture of estates by the nearest heir being a traitor, when he has vested in him a right of apparency. The case to which reference is made in Craig does not exactly meet the point with which we are dealing, and I think it is referred to by Craig without the sanction of his authority as approving of the decision, because the lands were forfeited by an heir-presumptive, not by an heir-apparent, in the lands of Lessendrum. The father was in possession, vested fully in the estate, and did not commit treason. The son committed treason, and the discussion on the point appears in the 2d and 3d books of Craig's work; and Craig states what seems to me to make clear his view on the subject, for he uses expressions which I think are conclusive as to his view of what the question would have been, and as to its being favourable to the right of the Crown had the party been in a position, not of heir-presumptive, which he was, but of heir-apparent, which he was not; and to that circumstance I think there is attributed in the view of Craig the materiality of the question which he raises for discussion. The next authority, in which I think the matter is very clearly laid down, is Dirleton in a case which he puts under the head "Forefaulture." It raises a question which we have not here, but in stating it he assumes as unquestionable the law as to the particular matter with which we are dealing. He says, "*Nam jure civili quod indigno aufertur fisco quæritur et jure nostro hæres apparens, majestatis damnatus, nedum sua sed bona hæreditaria et prædia quæ sua forent, si adita esset hæreditast, amittit, et ad fiscum transfert.*" So that we have authority that the heir-apparent, convicted of treason, forfeits not only his own property, but the lands which would have been his had he entered by service into the inheritance. These lands he forfeits, and transmits to the fisk. Finally, I refer to the authority of Baron Hume on that very subject. He says, "By the Scottish practice, the proper law of forfeiture (laying aside these consequences, which may perhaps attend the corruption of blood) attaches not only to such tenements wherein the defender is duly vested in form of law, but to those also whereof, *at the time of the forfeiture*, he is in the apparent title as heir, by the death of the predecessor, for the substantial right to these is in him." So that by the law of this country we have it that a party, under similar circumstances, forfeits the estates. We have not, and cannot have, any different law introduced in regard to England, because there the *additio hæreditatis* is not necessary to vest the fee *mortuus sasit vivum*, and therefore, if the laws are similar, the ancient law of Scotland must in that matter prevail.

The pursuer further pleads that the right of the heir-apparent, being limited by the fetters of the

entail which he sets out, there is no effectual transfer of the right to the lands. The answer is that no unregistered entail can prevail in a question with the Crown in forfeiture. According to our law anterior to the Act 1685, entails were unavailing to protect the interests of heirs of tailzie against the forfeiture of an heir in possession. The Act 1685 proves this, for it reserves the right of the Crown in forfeiture, and the Act 1690 was passed after the Revolution, to prevent the hardships of forfeiture; but while interests under entails were protected, the condition of protection was that the entail should be registered. The Act of Queen Anne, which introduced the treason law of England in Scotch forfeitures, was held to have abrogated the privilege of the Act 1690, and the case of *Gordon of Park* was decided according to the law of England as applied analogically to Scotch entails. The ratio of that judgment is to be found in the speech of Lord Hardwicke, and in the explanation of the judgment to be found in the letter of that eminent judge to Lord Kames, quoted in Craigie and Stewart. Lord Hardwicke, in giving judgment in the case of *Gordon of Park*, said, "I do not see how the attainder of the heir of tailzie in possession can be considered as equivalent to his death without issue. He is not a mere tenant for life; he is the fiar, the fee is in him, and our doctrine of remainders and reversions does not strictly apply,—so that, on a rigid construction of the 7 Anne, c. 21, on his attainder, there is room for contending that there ought to be an absolute forfeiture to the Crown of the entailed lands, to the entire extinction of the rights of all substitutes in the entail. But the milder interpretation of the Act will be to hold that the heir of tailzie has in him, and forfeits by his attainder, the same interest as tenant in tail in England—so that upon his attainder the Crown takes the lands during his lifetime, and while there exists issue who would take by descent through him, leaving other subjects in the entail unaffected;" and in the letter to Lord Kames, he says (1 Craigie and Stewart). "In this I felt the force of the difficulty arising from the difference between the nature of your strict Scotch entails with substitutions, and our English entails with remainders over, which you have so clearly explained, viz., that in the former every person called to the succession is considered as an heir, and has the fee in him; in the latter, the fee or estate in the land is broken and divided into distinct parts. But then I considered what was to be allowed as the consequence of this diversity between the two laws. Was a tenant in tail, although admitted to have an estate of inheritance descendible to his his issue, to forfeit only for his life? or was every tenant in tail, by reason of being invested in the ideal fee, to forfeit, not only for himself and his issue, but also for all the substitutes? Either of these would plainly destroy the equality in forfeiture professed to be established by the Legislature, and not only contradict the intent of the Act, but also the express words of the preamble. The knot lay here. To avoid forfeiting the whole fee—for as your law places that fee in every tenant in tail, and don't admit of a division of it into particular estates and remainders, there was more colour from legal reasoning to carry it to *that large extent*, than to make a man who had a fee in him to forfeit for his life only. But I could not satisfy my own mind that this *large extent* was either agreeable to the intention of the Legislature, or a just and equitable measure between the two nations." Now, if a man is in possession under a deed of entail which incapacitates the heir in possession from defeating his rights by a total reduction of all deeds done by way of alienation, or passing him over in the way of succession, that man comes into the position of the remainder man in England; although nominally he has no ideal fee in his person, yet he has such a right and interest as may be fairly assimilated to the position of the remainder man in England, who has a distinct fee. It would rather appear that the party in Scotland has a larger interest, for he has a right under a regularly registered and fettered entail; because, although when the recent law was fixed it would appear that there was inalienably in the remainderman a right which could not be disappointed, yet it does appear that the judges, manifestly to defeat the law of entail, allowed a remainder man's right to be absolutely destroyed by fine and recovery and other processes, although the fee existed in him ideally at the time the practice was introduced. The law of treason was not changed, and the remainder man kept his position, but the analogy goes to this, that the party who in Scotland stood in the position of having only a right to an estate which might be defeated by the onerous acts of the heir in possession, and a man in that situation could bring himself within the predicament in which his case would come within the operation of the Act, and justify the judgment, according to Lord Hardwick's view of it, and no higher authority on the law of forfeiture can exist. In that view it seems to me that the principle of the case is entirely against the recognition of the right under any other entail than one which is regularly completed by registration. This matter has formed the subject of determination in our own Courts. Lord Elchies refers to the case of *Kinloch*, in which one ground of judgment expressly was that the entail was not recorded; and Monboddo's report of that very case contains a passage which it may be important to read, with reference to the rights of the Crown as they were held by the Court to attach there in the case of heirs of entail and rights conferred by existing entails. The case is reported in 5 Brown's Sup. 787, and the result of it is thus stated—"The right therefore of the Crown by forfeitures is of this kind,—the King by the rebellion and attainder is an onerous creditor, *quia delinquendo contrahitur*,—therefore he is preferable to an heir of a marriage, a Protestant heir, an heir of entail declaring an irritancy after attainder, an heir of an entail not recorded, as in this case: but he is not considered a real creditor, therefore he is not preferable to personal creditors; nay, by the benignity of the Crown, all personal creditors that are onerous are prefered to him." Thus it seems to me, as the result of an examination of the matter, that the full right to this estate was in the Crown, vested in the Crown by the forfeiture of John Drummond; it legitimately operated a transfer of the entire right which was in the person of John Drummond the forfeited party, and consequently it left nothing in the *hæreditatis jacens* of James Drummond, the ancestor to whom the service was expede, which could pass by that service in connection with these lands in favour of the present pursuer. If I am right in that view, it is clear that the title, so far as it is vested upon the service, however good I assume that service to be, is one which cannot attach any interest in lands the whole interest in which passed to and became effectually vested in the Crown.

The pursuer, in these circumstances, presents this alternative view to which I have adverted. He says that, if in the Crown, these lands were, by the Act of Parliament allowed to be restored only with a destination which should secure the succession to the heirs-male—the heirs of the ancient investiture—and he complains of the conveyance of these lands to Baron Perth as having been given improperly to him and his heirs general. The Lord Ordinary says, as applicable to this question —"The pursuer maintained that the estate was not lawfully forfeited by the attainder of Lord John Drummond, but the foundation of his claim, in so far as it is necessary at present to consider it, is his contention that the destination to heirs-male in the old investiture is a binding and subsisting destination, which was not set aside but given effect to by the Restoration Act, and which it was not in the power of the late Lord Perth or his daughter to alter. Such being the nature of the pursuer's case, he has libelled at least a *prima facie* title to sue the action." No doubt the pursuer has maintained that the destination to the heirs-male of investiture was imported into the Restoration Act, and he has said that the heirs intended to be favoured by Parliament were heirs of the old investiture. That is his construction of the statute; but the question is, is his construction of the Act of Parliament a good one? and if the construction upon which we are asked to pronounce a judgment in his favour be manifestly erroneous, I apprehend that the mere fact of a pursuer setting up such a construction as the basis of his case cannot confer any right or title which a right construction of the statute would negative. The defenders say that they are not to be compelled to exhibit their title-deeds, and make their charter-chest open to the scrutiny of all the world, unless on the motion of a party having a title to sue. The title here, independently of the service, is an alleged right conferred upon the heirs-male of the ancient investitures as to the destination in the deed allowed to be granted by the Crown. The defenders appeal to the Court to construe the statute in order to determine whether, in libelling that alleged right, the pursuer has given to it a true interpretation. I think this demand is perfectly legitimate, and that it should be considered at this stage. If the statute authorises a title to the estate to be given to Baron Perth and his heirs-general, the pursuer has no title under the statute; he has no ground of complaint; and the statute, not being reducible, must operate as an effectual bar to his success; because the Crown in that view would have rightly conveyed to his heirs-general—always assuming that the full and absolute right to the lands was in the Crown, and not a mere temporary and partial right. A title founded on a misconstruction of a public act does not warrant us to throw open to the party who misconstrues the charter-chest of the defenders. If there be a misconstruction, he cannot take such a title from it as to support a demand otherwise bad. We must look to the provisions of the Act of Parliament.

The statute proceeds on a general preamble of the services of the heirs and families of attainted persons or most of them, and of the expediency of disconnecting the estates and restoring them "to the heirs or families of the former owners." Section 10 provides—"And whereas the estate of Perth, which became forfeited by the attainder of John Drummond taking upon himself the stile or title of Lord John Drummond, brother to James Drummond, taking on himself the stile or title of Duke of Perth, stood devised before the forfeiture to heirs-male; and whereas the said John Drummond died without leaving lawful issue of his body, and it is not yet ascertained who is his nearest collateral heir-male." Now, there is a statement that the estate stood devised before the forfeiture to heirs-male. The party is to be discovered who holds that character, but there is to be a disposition given to the heir-male when he shall be ascertained—in other words, to the party afterwards Baron Perth, who would have been entitled to succeed according to the investi ture of the estates, and to the heirs and assigns of such heirs-male. There is first a question as to the exact copying or right printing of the Act. It is said that the word "heirs-male" must have been originally in the copy in the Parliament rolls, and that it occurs in a copy in the Privy Council. It appears in the Parliament rolls as "heir-male," and the letter "s" is said to have been erased. But whether we read it as heirs-male in the first case in which it occurs, or as heir-male, it seems to me to be quite clear, according to the intent and meaning of this provision, that the disposition is to be in favour of the party who shall prove himself to be the heir-male, and the heirs and assignees of such heir-male. Now, the question is, what is meant by the use of that expression "heirs and assignees of the heir-male." It must be admitted that the expression *heirs and assignees* is the ordinary mode of expressing a destination to the heirs-general of a party who is to receive a disposition. Undoubtedly the words are flexible, and there are conditions in which it is possible to read these apparently general words with a descriptive meaning. The conditions, so far as I know, which occur in which an interpretation of that kind has been admitted are;—first, when these appear in the previous investitures of the subject held by the party who has acquired an accessory right; and secondly, where the deed supplies such a meaning from the context.

It covers an accessory right, and it is held that, though taken in general terms, it is not to detract from the effect of the disposition or holding of the principal subject for which the acquisition has been apparently made as an accessory—teinds, for example, to the possession of land. There is no such case here. The reference to the prior investiture is made only for the purpose of discovering the first individual to take, and restoration is not to be made to heirs-male, but to the party who is heir-male, and who shall show himself to be so, and to *his heirs and assignees.* There is no principal and accessory in the question, and there is nothing to meet the only other case in which I think there has been such a construction given, and that is where, in putting the various parts of a particular instrument together, and construing the use of the expressions of one by the expressions occurring in other portions of the same instrument, a restricted meaning may be attached to the words. There is no such thing here. If we can form any judgment from the similar grants contained in the Act of Parliament, they are all to heirs-general, and heirs and assignees. I am not therefore able to say that the parties who made out the grant in conformity with the view of the statute, intending the grant to be one to the disponee and his heirs-general, did otherwise than right in construing the statute under which these deeds were framed. There is no objection made

to the position of the then Baron Perth as not being entitled to the character which he then assumed. It is quite clear, according to the statement of the present pursuer himself, that at that period he held exactly the position which entitled him, as heir-male of the old investitures, to receive a grant under the Restoration Act from the Crown. The question is as to the future destination to be introduced in the deed; and I find nothing to fetter the destination, or limit it in any other form than as one to heirs and assignees, that is, heirs general. It is not disputed that Lord Perth stood in the position of heir-male-general of John, the attainted person at the time—he belonged to the branch of the family descended from the Earl of Melfort. He obtained decree against a pretender to the title in 1788, and he is, according to the pursuer himself, the party to take in preference to any heir of the branch to which he belongs. The question is, whether the titles should have been completed with a destination to heirs-general or to heirs-male. I cannot hesitate to read the statutes as pointed to the former. Thus, if the lands were truly in the Crown, there was no right vested in the heirs-male of the Crown disponee to insist on the conveyances with destinations limited to them; and if the words "heirs and assigns" are to receive their usual construction—their right construction in this case—the heirs-general, not the heirs-male, of Baron Perth had the right conferred on them; and thus the case of the pursuer fails. The result of the opinion which I have formed is, that we should refuse to order production of the defender's titles, and dismiss the action.

LORD COWAN—After the elaborate judgment which your Lordship has pronounced, I am very unwilling to detain the Court with many observations. At the same time, the importance of the matter at issue, and the novelty in modern times of many of the principles involved in the discussion, must be my excuse for shortly going over the points which arise in the case.

The title on which the pursuer libels his right to insist in this action is, decree of general service as "nearest and lawful heir-male in general to the deceased James Drummond of Perth, who took on himself the style and title of third Duke of Perth." This James Drummond, it is admitted, was never married, and died intestate in 1746. He had been infeft in the fee of the Perth estates while yet a pupil, under reservation of his father's liferent, in 1713; and in 1731, some years after his father's death, he expede a Crown-charter of resignation and *novodamus* in favour of himself and his heirs-male; but on this charter no infeftment seems to have been expede.

The Lord Ordinary in his note has stated that his service is conclusive evidence that the pursuer possesses the character which he claims, and that this can be redargued only by reduction. In this remark I entirely concur. But it does not follow that the action in which the pursuer now insists in virtue of that title must be sustained. There may be no estate to be taken up by the heir-male of James, third Duke of Perth, upon the pursuer's own statement of the grounds on which he insists for decree, as concluded for in the summons. And supposing upon that statement, it clearly appears that the estates of the Perth family, now claimed by the heir-male of James, third Duke, have irrecoverably passed away from those heirs-male,—it must follow that the action should be dismissed as irrelevant on the face of it. This is the ground taken by the defenders in the recent argument. And that there are other grounds of defence, which cannot be entertained at this stage of the proceedings, is no bar to those defences being considered which go to exclude the action altogether.

The pursuer justly contended, and the Lord Ordinary has recognised the principle in terms which do not admit of exception, that when an action of reduction is met by the preliminary defence of *title to exclude*,—the plea cannot be entertained in the general case without production by the defender of the titles on which the defence is maintained. And had this been a discussion solely relating to that defence, no objection could be stated to the views on which the Lord Ordinary's interlocutor proceeds. But the defence pressed on this Court is not of that nature at all. No doubt if well-founded, the pleas contended for must result in the exclusion of the action without further procedure. There may be such ground for irrelevancy on the face of the summons and record as to demonstrate that the demand by the pursuer, under the title which he libels, cannot and ought not to be entertained. That such a defence may be competently stated at this stage, and, if well-founded, lead to the dismissal of the action *in limine*,—is fully recognised in the opinions of this Division of the Court in the recent case of *St Leonard's College, St Andrews*, which was referred to in the debate. It is therefore for inquiry whether the defenders have shown that, under the admittedly subsisting titles to the estates, no claim to them can be legitimately advanced by the pursuer, under the character in which he sues.

The estates were certainly vested in James, the third Duke, at the period of his death in 1746, under titles which contained a destination to him and his heirs-male. I think it must be held that, under the open Crown-charter of 1731 he held the superiority, and that under his infeftment in 1713, he was feudally vested with the *dominium utile* of the estates, and having died unmarried the right to the estates descended to his brother, Lord John Drummond, as his heir-male, and vested in him as heir-apparent from the moment of his brother's death in May 1746. His attainder became operative in the month of July following, and he died in 1747.

Now, (1) if the attainder carried the fee of the estates to the Crown not less effectually than if Lord John had completed his feudal title; and (2) if it be the fact that the Crown and the parties on whom the right to the estate was conferred have ever since had undisputed possession of the estates on unexceptionable titles, no right can be held to have remained in the *hereditas jacens* of James, the third Duke. For on that supposition the Crown and its disponees have absorbed all right and title to the estates, which in that view must be held to have been irrevocably carried by his attainder away from the male heirs of the original destination altogether. Consequently, the pursuer's general service to James must be thereby rendered inept for the purpose, to serve which it is founded on as a title to sue this action.

The three propositions which the defenders must establish in order to succeed in having the pursuer's action dismissed at this stage are thus:

(1) That the fee of the estates was carried to the Crown by the attainder of Lord John Drummond, although he was never infeft in the lands.

(2) That the right thus acquired by the Crown

was the absolute fee of the estates, and not merely a liferent interest which terminated on the death of Lord John, in 1747,—as it would have been had the alleged entail of the estates, by the Lord Chancellor of Scotland in 1687, been a deed containing all the requisites of a strict tailzie, and been duly recorded in the Register of Entails.

(3) That by the Act of Restoration in 1784 the estates were not restored to heirs-male in terms of the original destination of the tailzie, but were habilely granted—on condition of payment by the disponee of the large sum of money stipulated to be paid (£52,000 and upwards)—to the then heir-male of Lord John Drummond, and to his heirs and assignees generally.

1. On the first point there really exists no doubt regarding the law of Scotland, if that law is to be gathered, as it must be, from institutional writers, and from decisions of the Court. An apparent-heir committing treason, and being attainted after the succession has opened to him, occupies a different position from an heir apparent whose ancestor is still alive at the date of the treason and attainder, and to whom the succession opens thereafter. It is to this last case alone that some of the authorities refer as admitting of dubiety. The case of an heir to whom the succession has opened, and who is possessing on apparency at the date of his forfeiture, is entirely different. The right to take up the estate being in him, it falls to the Crown by his forfeiture, as certainly as if his feudal title had been completed, and merges in the Crown, without infeftment, by virtue of its pre-eminent title as Lord Superior of the whole feudal estates of the kingdom. Dirleton well states the principle of distinction between the two cases which I have put. In stating his *ratio dubitandi* on the question whether, when the heir has committed treason in the lifetime of his kinsman, the defunct's estate will fall to the King or go to the next heir—he says that an apparent heir in possession of an estate, and having *hæreditas delata* before he commit treason, the same should fall to the King, "seeing he was *hæres habitu*, and had *jus radicatum* in his person before his treason" (p. 76). Stair, again, treats the subject at length (3, 3, 37),—the only doubt expressed by him being in reference to the case of a succession opening to an apparent heir after his treason and attainder. To the other authorities it is needless for me to refer, as they have been already fully noticed. I may only notice Baron Hume, the latest writer on this branch of the law, who, in his Criminal Law, vol. i, p. 548, thus writes, "By (*reads*)." And, as regards the decisions of the Court, there is not one that throws any doubt on the general question. Indeed, the decisions referred to in the argument in reference to the Perth estates themselves, all proceed upon the footing of Lord John Drummond's attainder having carried to the Crown the fee of the estates to which he had succeeded as heir-apparent.

An attempt was made to show that, as Lord John's treason was committed before the death of his brother, the case is to be dealt with as within the class of cases on which doubts have been expressed by the authorities. But I cannot so view the question. For, although the battle of Culloden occurred before the death of his brother James, the Act of Attainder declared that the parties therein named, including the two brothers, might avoid the attainder by surrendering themselves on or before the 12th of July 1746, and it was only in the event of their not doing so that they should stand attainted as from and after the 18th of April 1746. Now, as his brother James died in the month of May 1746, and it has been decided by the Court that the attainder did not affect him—the right of succession opened at that date to Lord John; and he was thus in possession of the estates on apparency when the attainder declared by the Act took effect, in consequence of his not surrendering before the 12th of July 1746. Hence, the estate which was in his person as heir-apparent fell to the Crown, and this forfeiture could not be evaded by his not surrendering before that date, notwithstanding that the attainder was declared to operate *retro* as from 18th April 1746. On the same principle, as the Court held that James when he died in May was unattainted, his brother Lord John, to whom the succession opened at that date, necessarily became vested with the right of apparency when still unaffected by the attainder. Accordingly, as appears from the decisions and notes of Lord Elchies, this very question was considered and determined by the Court, see Elchies' Notes, p. 149, *voce* "Forfeiture." His reasoning is quite satisfactory; and it is upon that footing that the lands were seised by the Crown and have been possessed ever since.

I cannot take any other view of what passed in the House of Lords in affirming, on 30th April 1751, the judgment of this Court in the case of *Drummond of Logiealmond*, than that it was clearly recognised as a fact, that these estates were in Lord John Drummond legally, as heir-apparent, when the attainder took effect, and consequently that they became vested in the Crown. I may refer also to a case which occurred in 1760, *Duke of Athole* v. *His Majesty's Advocate*, D. 4766, where the Crown's right to these estates was clearly viewed as good and valid to the effect of ousting a demand under the Clan Act by the Duke of Athole. I am not sure that the force of that judgment was fully appreciated when it was noticed at the debate. The Duke of Athole, who was subject-superior of certain of the estates belonging to the Perth family, came forward in 1760 and claimed from the Barons of Exchequer these estates as vesting in him under the provisions of the Clan Act. The Lord Advocate of the day did not specially refer to the right declared as in the Crown to Lord John's estate in 1751, but what he said was this:—"The terms of the Clan Act, which alone gave estates of this kind to the subject-superior, don't apply to the circumstances of this case, because the traitor never, in point of fact, was your vassal in terms of the Act; Lord James, who was never attainted, was not your vassal when he died in May; Lord John could never be your vassal, because by the Act of Attainder, which took effect as from April, your right as superior was destroyed under the Clan Act." The Crown was thus again successful in maintaining that the estates had been forfeited by the treason and attainder of Lord John.

2. The second proposition does not admit of doubt, assuming the fact that the entail was unrecorded. A clear and succinct view of the law as to this matter is given by Mr Sandford in his work on Entails. Prior to the union of the kingdoms, it was expressly enacted by the Statute 1690 that heirs of entail should not be prejudged by the forfeiture of their predecessor, where the entail contained prohibitory and irritant clauses, and was duly recorded in terms of the Act 1685. The protection applied only to that case, and the deed of

tailzie, unless recorded, had no effect against the Crown any more than against creditors. The reason was, that estates not so protected (*i.e.*, in terms of the Act 1685), were liable to be affected by the debts and deeds of the heirs, aud were consequently carried by his forfeiture to the Crown. Upon the Union the treason law of England was made applicable to Scotland, and as the Act of 1690 was repealed by the Act of Anne, the protection given to heirs of entail, when the entail was complete and duly recorded, was in danger of being lost because of the difference between the laws of the two countries in relation to heirs-substitute or remainder men. The inequality was perceived and rectified by the judgment of the House of Lords in the case of *Gordon of Park*. Still, however, it is indispensable that the entail should be duly recorded as well as complete in all its fencing clauses. The cases referred to by Mr Sandford put this beyond doubt, particularly the cases of *Kinloch* and of *Hay*. And this being the law, the effect of Lord John's forfeiture to carry the fee of the estates to the Crown can only be elided by disputing the fact on which it is based, and accordingly it was contended that no evidence existed to support the assertion that the entail was not duly recorded. But this cannot be taken from the pursuer in the absence of any averment in the record that the deed was registered in terms of the Act 1685.

The Register of Entails is a public document, and had the deed been recorded as enjoined by the Act 1685, it was capable of being instantly verified had the fact been that the deed was in the register. But no allegation to that effect is made, and it must be assumed that it was an unrecorded deed. Had it been otherwise, having regard to the litigation that has taken place in reference to these estates, it is not conceivable that the right of the Crown should have been left undisputed for so long a period as since 1747. And, besides this ground of objection to the entail, it is alleged, and not disputed, that the restrictions were not directed against the disponee, who afterwards executed a new deed leaving out all restrictions under which the estates were possessed till 1746. This is the deed of 28th August 1713 by James Lord Drummond, reserving his own liferent in favour of his eldest son James, then in pupilarity, and the heirs-male of his body, whom failing, to his other heirs-male whatsoever. This is the deed referred to in Article 7 of the record.

3. There remains the third proposition, viz., that the Act of Restoration 1784, cannot be held to affect the question favourably for the pursuer. The Act is "to enable his Majesty to grant to the heirs of former proprietors, upon certain terms and conditions, the forfeited estates in Scotland," and the 10th section relates particularly to the Perth estates. It sets forth that these estates became forfeited by the attainder of Lord John Drummond, and stood devised before the forfeiture to heirs-male. Then it is set forth that Lord John had died without issue, and that it was not yet ascertained who was his nearest collateral heir-male. It is then declared to be lawful for his Majesty to dispone the estates "to the heir-male of the said John Drummond, who would have been entitled to succeed by the investitures of the said estate had it not been forfeited, and to the heirs and assigns of such heir-male." Acting under this statutory authority, the estates were conveyed by the Crown, as narrated in the record, to Captain James Drummond, his heirs and assignees, in 1785; and under his completed title he continued to possess the estates till his death in 1860. He also completed titles about the same period to the portions of the estates held from subject-superiors. This Captain Drummond was created a British Peer in 1797, and died, leaving an only child, the late lady Willoughby d'Eresby, by whom the estates were possessed till her death, in 1865, in virtue of the titles referred to in the record. Supposing the Crown had right to give over the estates, as they did in 1785, to Captain Drummond and his heirs and assignees generally, there would seem to be an end of the claim advanced in this action. And that such power was possessed by the Crown depends upon the answer to be returned to the first two propositions which I have stated. If I am right in answering them in the affirmative, then the estates did vest in the Crown in fee-simple, and were so held at the date of the Act of Restoration in 1784. And when by that Act power was conferred on his Majesty to dispone the estates to the heir of the family at the time, his heirs and assigns—in other words, in fee-simple,—this was no innovation upon the existing state of the titles at the date. It was a gift to the heir of the family and his heirs-general, and not a revival of the original destination to heirs-male. Hence, the effort of the pursuer to construe the Act as empowering the Crown to give the estates only to heirs-male,—in which case the title completed by the heir-general, *i.e.*, the late Lady Willoughby, as it might have been contended, required the aid of prescription for its validity. Had the case so stood, the course which the Lord Ordinary has followed might have been the right one, for the plea of prescription could not have been satisfactorily disposed of without satisfying the production. But no such course can be necessary, assuming the Act of Restoration to admit of no other construction than that which it received in 1785, when the estates were conveyed by the Crown to the then heir-male of the family and his heirs-general. The case must be judged of on the same footing as if the estates had still been in the Crown under the forfeiture of Lord John in 1747—that is, in fee-simple—and in the Crown disponee as continuing that fee-simple title till now.

On these grounds, I have arrived at the opinion that the pursuer under his general service to James third Earl of Perth has stated no relevant case on which he can rest his claim in this action. There is, in truth, no estate in the *hæreditas jacens* of James third Duke of Perth, according to the pursuer's own statement in the record, which can be taken up by his heir-male in general,—at least, no right to those estates which are vested in the defenders, and of which it is the professed object of this action to deprive them.

Lord Benholme—In this case my opinion concurs with those that I have heard. I must say that I have seldom heard any judgment with such interest and such benefit as that which your Lordship has pronounced in this case,—so masterly, so learned, so closely suiting the exigencies of this case, and yet so concise; and I would not venture to say anything except that I have reason to think an important authority was, by inadvertence, omitted by your Lordship upon one point of this case. It is on the subject of the forfeiture of entailed estates, and the point to be made is this, that by the law of Scotland no entailed estate can be saved from forfeiture that has not been recorded

in the Register of Tailzies. Now Baron Hume, at p. 538, in treating of offences against the State, gives a short account of the law of treason in consequence of the Act of Union, whereby the law of England was brought in to modify, if not to constitute, the law of Scotland. He says that "in England all estates of inheritance had been made liable to forfeiture by statute, in virtue of which the traitor forfeits for himself and his heirs; but, on the other side, according to the notion of an English entail with remainders over as they are termed, the estate or fee is held to be broken into portions, whereof that which belongs to the remainder man, or, as we should name him, the substitute heir called by description, is distinct from the interest of the present tenant in or possessor of the estate and his heirs, and appertains to him in his own proper and original though eventual right, and cannot therefore be forfeited by the treason of any other person. In pursuance, therefore, of the statute of Anne, which was to bring the forfeitures and punishments of treason as near as may be to an agreement throughout the United Kingdoms, the substitute heir has been held to be a remainder-man."—(That is to say, the heir of entail who takes after the heirs of the body of the forfeited person; because the entail is now supposed to be broken down into parts.)—"The judgment of the House of Lords upon that matter in the case of *Gordon* of Park was, that the estate forfeited for the life of Sir William Gordon, the traitor and present tenant, and during the life of his issue-male, called as such to the succession by the tailzie; and that on extinction of these it would revert from the Crown to the next substitute (or remainder man), Captain John Gordon, as called by the tailzie, failing Sir William's issue-male, under the description of heir-male of the body of Sir James Gordon, the entailer. That is to say, the interest of this next order or class of substitutes was to be viewed as a new acquisition, or separate estate from that of the offender and his issue-male. Even this limitation of the forfeiture does, however, only apply in the case of such tailzies as are duly completed by entry on record, in terms of the Statute 1685. For this circumstance is an indispensable qualification for taking the estate out of the case of a fee-simple, which, as the possessor may effectually alienate or encumber by his deed, so must it absolutely and entirely forfeit by his crime. Judgment was given to that effect in the Court of Session, on the claim of James Kinloch, January 10, 1751." I read this because I believe that probably your Lordship would have read it had you adverted to it. On the whole matter, I quite agree with what has been said by both your Lordships.

Lord Neaves—I concur in the opinions that have been delivered, and shall shortly state the grounds on which I do so. On 11th May 1746 James Drummond, titular Duke of Perth, died at sea without issue. He was vested at his death with rights to the Perth estates, resting partly on feudal and partly on personal titles. James Drummond was never finally attainted. Except for the proceedings at the instance of the Crown, to be afterwards mentioned, no title of any kind was ever made up to James Drummond until the pursuer served heir in general to him; and I shall assume that that general service was good in itself, and that it would carry any right or property that had remained in his *hæreditas jacens*. The question is Whether any right or property did remain there? James Drummond was succeeded by his brother John Drummond, who at 11th May 1846 had not yet been attainted, but who afterwards became so on his final failure to surrender to justice on 12th July 1846. But, in the meantime, I hold that James' succession had opened to John, and that the rights thereby acquired were not divested by his ultimate attainder, even although it had some retrospective effects. John Drummond never served or made up any title to James, and all that he succeeded to was a right of apparency. But, on his ultimate attainder, I hold that the fee of the estate in which he was the apparent heir was thereby confiscated to the Crown. This is laid down by our highest authorities, and seems indeed to be either enacted or inferred by the Act 1584, c. 2. But it is also deducible by the principles applicable. Confiscation is a mode of transferring property to the Crown. The Crown needs no title, no adjudication in its favour according to usual feudal forms. Its own supereminent title is sufficient if its rights take effect. Its rights, in consequence of the commission of treason and consequent attainder, are to have transferred to it every right belonging to or competent to the delinquent. If the delinquent is an apparent heir, it is not to be supposed that the Crown is limited to these fruits or benefits only which the apparency confers. It stands as favourably as the creditor or disponee of an apparent heir would do. Now, it is certain that the creditor or disponee of an apparent heir is not limited to his rights of apparency. If he will not enter, he can be charged to do so; and the charge will enable the creditor or claimant to adjudge the estate as if he was entered. The same I take to be the case with the Crown where there is an attainder. If this be so, the Crown, by the attainder of John Drummond, became vested with the Perth estates as effectually as if he had received and obeyed a charge to enter to his brother James. He is to be held as entered, and the Crown's right by confiscation or *adjudication*, which it truly is, became as complete as forms could have made it. Supposing the estate to have been in John Drummond in fee-simple, it would thus be clear that all other rights were at an end, and that these estates were neither in the *hereditas jacens* of James, nor subject to any *jus crediti* of subsequent heirs. It is said, however, that there was an entail. The answer to that, is, that it is not said to have been recorded; and as I hold the Crown's right to be onerous *ex delicto*, I think an unrecorded entail inoperative against it. The authorities that have been referred to are conclusive also on that subject. Whatever modifications may have been introduced by English Acts, an heir-substitute of entail never can be protected more effectually than he would have been under the Act 1690, which made it imperative that the entail should be recorded in the register of tailzies. That alone can restrain the powers of alienation of the party in possession; and his powers of alienation are truly exercised when he commits that treason which entitles the Crown to take up its right. This appears to me to decide the case. There is nothing now in the *hæreditas jacens* of James which the pursuer could take up. On his own showing he is excluded, unless indeed,—and this is the only other point that needs to be noticed,—the Act of Restoration does something in his favour that he did not possess before. Now, I am clearly of opinion that that Act of Restoration does nothing in his favour. The first heir-male was no doubt in the power of the Crown to choose,

but nothing is said in the Act as to the entail, or as to a renewal of the old destination. The Crown was not bound to convey the estate under any limitation: and the pursuer is not entitled to complain of that which he admits they have done. Supposing it were the case that the Crown could have shown there was some claim of that kind, I very greatly doubt whether the present action is one that could have tested that. The service to James in that case would have been wholly inept, because it is not to James he would serve. There is nothing to take up in James. It would have needed to have been some very special thing that the Crown did wrong, and that they should have conveyed in some very peculiar manner, that would have given this party a *jus crediti*. Now, that is scarcely the nature of the present action. The present action is by the party interested as James' heir,—a very good title if he were right on the merits that James had still an interest in the estate; and that it was to some extent a reversion, or otherwise in the *hæreditas jacens*. But if his title is, not that he is the heir of James, but that he is the heir-male of John, or that he is the heir-male of the last Earl of Perth who got the estate, and was the institute under the deed that the Crown should have exercised, that is a totally different ground of action, and seems to me to be one of very great doubt. The Crown was not bound to carry out this, so far as I can see. If they gave it to the wrong man, it is a very doubtful thing whether this pursuer could complain—in this form at least—whatever appeal he might have had to the Crown to recall this conveyance. But that the Crown did not entail it is a matter which this action does not appear to me to be well calculated to raise; but if it be raised, the proposition that under the Act of Restoration the Crown was bound to execute a tailzied destination in favour of this party, with a *jus crediti*, and I suppose to record that new entail, for it would need to be a new entail, is a proposition that cannot be maintained in my opinion upon the Act of Restoration. In this way, the case comes to this point that the pursuer's *prima facie* title and interest are, by his own statements and the admitted facts of the case, extinguished and destroyed, so that he has no title and interest remaining, and any objections to the subsequent titles are irrelevant. His service to James Drummond is unavailing, and he has no right either to succeed to the late Baron Perth, or to exclude the present possessors on any ground. There are other grounds pleaded against the pursuer, but these are what I propose to sustain as being quite sufficient for the purpose. I concur in the view, that where it is quite clear that a party has not a good title and interest to succeed, and is by his own statement excluded, the defender is entitled to protect himself against the exhibition of his charter-chest to a party who has no right to look into it.

LORD JUSTICE-CLERK—We shall pronounce judgment accordingly.

SHAND—Your Lordships will sustain the 8th and 10th pleas. Will your Lordships pronounce special findings?

LORD COWAN—There are 33 pleas in law—23 for the pursuer, and 10 for the defenders; and the only one that seems to apply to the case is the defenders' 10th.

LORD JUSTICE-CLERK—We shall frame a finding.

SHAND—With reference to what fell from your Lordship, I think it right to say that there is no admission on record that the present pursuer, though he holds the service, has connected himself by relationship with James Drummond. We did not dispute that, for the sake of argument.

LORD JUSTICE-CLERK—I thought the Solicitor-General admitted it absolutely.

SHAND—It was assumed for the purposes of the argument, because we do not feel that we could raise the question, except in a reduction of the service; but I merely mention it lest there should be any expression in your Lordship's opinion that might bear that meaning.

LORD COWAN—Surely in this discussion we are entitled to hold that he does possess that character—the service standing.

LORD JUSTICE-CLERK—I thought it had been admitted.

Agents for Pursuer—J. & J. Turnbull, W.S.
Agents for Defenders—Dundas & Wilson, C.S.

Tuesday, February 16.

OUTER HOUSE.

(Before Lord Manor,)

MACPHERSON & OTHERS *v.* RICHMOND.

Partnership—Misconduct of Partner—Judicial Dissolution—Judicial Factor. Held (*per* LORD MANOR) and acquiesced in, that one of the members of a partnership having, in violation of the contract of copartnery, so grossly misconducted himself as to destroy his co-partners' confidence in him, they were entitled to have the estates of the company judicially wound up. Judicial factor accordingly appointed for that purpose.

This was a petition for the appointment of a judicial factor on the estates of Richmond, Struthers, & Company, Cabinetmakers, Upholsterers and Warehousemen in Glasgow, and was brought by three of the partners of that firm. It was directed against, and was opposed by, Mr Robert Richmond, the remaining partner of the firm. After setting forth the various contributions to the capital of the firm by the several members; the distribution of profits and losses; and the several amounts which the partners were entitled to draw in anticipation of profits, the petition proceeds thus:—

"That notwithstanding the provisions of the contract of copartnery recited, and the fact that the petitioners contributed their full stipulated shares of capital in the Company, the said Robert Richmond commenced in the year 1863, and has continued, to draw from the concern sums greatly exceeding the amount which he was entitled to draw under the provisions of the contract. An abstract of the accounts of the four partners respectively, showing overdrafts by Mr Richmond, as at 5th September 1867, to the extent of £1019, 2s. 4d., is herewith produced and referred to. These overdrafts have very seriously prejudiced the Company in their financial arrangements.

"For some time prior to the last-mentioned date, the petitioners repeatedly and anxiously remonstrated with the respondent Mr Richmond upon the impropriety of his conduct in thus withdrawing his capital from the concern, in breach of the contract of copartnery, and to the serious prejudice of the interests of the firm, but without effect; and on or about that day the petitioners Mr Macpherson and Mr Struthers gave notice to the petitioner Mr Rennie, who acted as cashier,