essence as regards interest involved in it extremely small, because, as Lord Young has pointed out, this is a very simple and inexpensive petition, and can be renewed, because any judgment pronounced here dismissing the petition is practically dismissing it *in hoc statu*, for it is perfectly open to raise it again at any time the present petitioners may think fit, if the Court in England holds that it has no jurisdiction. I have therefore come to the conclusion that, as the majority of your Lordships are in favour of dismissing the petition, I shall not dissent from but concur in that being done.

The Court dismissed the petition.

Counsel for the Petitioners—C. S. Dickson—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Ure—Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, March 8.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ARTHUR *v.* LINDSAY AND OTHERS.

Process — Amendment of Record — Jury Trial.

In an action of damages for slander brought against several defenders, the Lord Ordinary, on 27th February 1895, approved of issues for trial of the cause. The pursuer thereafter gave notice for trial at the Spring Sittings of the First Division, and on 8th March he applied to the Division for diligence to recover documents. At the hearing of this application two of the defenders moved the Court to grant them leave to amend their record by adding a plea of incompetency. The Court *refused* this motion as incompetent, in respect that the interlocutor of the Lord Ordinary appointing issues for trial of the cause had become final, no reclaiming-note having been presented against it.

Diligence — Diligence for Recovery of Criminal Precognitions—Opposition by Lord Advocate—Public Interest.

The pursuer in an action of damages for slander against a procurator-fiscal averred that he had maliciously inserted false and calumnious statements in the precognitions in a criminal case, and had shown them to other persons, and applied for a diligence to recover these precognitions, and other documents connected with the case. The Lord Advocate having opposed the application on the general ground that the production of such documents was contrary to the public interest, the Court (*dub.* Lord Kinnear) *refused* to grant the diligence.

This was an action of damages for slander at the instance of Dr Hugh Arthur, Fruitfield, Airdrie, against Alexander Deuchar Lindsay, Procurator-Fiscal, Airdrie, William Glasgow Jameson, writer, Airdrie, and Robert Shanks, wood merchant, Airdrie.

The pursuer averred against Lindsay, *inter alia*, that he had inserted in the pursuer's precognition in a criminal case which had been instituted against Mrs Bell, the matron of Airdrie Fever Hospital, certain statements which had not been made upon any information supplied by him, and which were entirely devoid of truth. These statements were introduced for the purpose of reflecting blame upon the pursuer's professional conduct. The pursuer further averred that the Procurator-Fiscal had maliciously and without probable cause inserted false statements in the precognitions of other witnesses; that he had in breach of his duty shown them to the defender Jameson and others, and that he had maliciously and without probable cause transmitted them to the Crown office with a view to a criminal charge being made against the pursuer. He averred that the other defenders had slandered him upon various occasions condescended on.

The defender Lindsay averred that the precognitions contained an accurate record of the statements made by the witnesses; and further, that the defender Jameson was his depute, so that anything said to him with reference to the criminal case was confidential and privileged.

Issues were proposed by the pursuer, and counter-issues by the defenders, and on 27th February 1895 the Lord Ordinary (STORMONTH-DARLING) pronounced an interlocutor holding the issues and counter-issues as adjusted and settled, and appointing them to be the issues and counter-issues for the trial of the cause.

Notice for trial at the Spring Sittings of the First Division was subsequently given by the pursuer.

On March 8th 1895, the case having appeared in the Single Bills on a motion for diligence by the pursuer, the defenders Jameson and Shanks craved leave to amend the record by adding a plea of incompetency. This was opposed by the pursuer, who argued—This plea could not be taken now, only fourteen days before the trial, but must be held to have been waived. The plea of incompetency was one that might be waived, and they were therefore barred from putting it forward now.

Argued for the defenders—By sec. 29 of the Court of Session Act 1868 the Court might at any time allow an amendment, and owing to the very complicated nature of the case and number of issues this plea ought to be admitted now.

At advising—

LORD PRESIDENT—The motion before us is for leave to amend the record by stating on behalf of the second and third defenders a plea to the competency of the action. I

have great sympathy with the somewhat late opinion these two defenders have come to form as to the requirements of their position; but I find myself precluded by the terms of the interlocutor of February 27th. That interlocutor has not been reclaimed against, and so far as this Court is concerned, is a final interlocutor; and by it the Lord Ordinary has approved of issues and counter-issues, and has appointed the trial to proceed on them. Now, I do not think that we should be justified in allowing an amendment which is inconsistent with a final interlocutor. Indeed, if we consider how the case would fall to be worked out, the conclusion I have reached becomes more apparent. Either we ourselves would require to consider the plea of incompetency, and if we sustained it, would have to throw out a case which has been sent to trial by an interlocutor which was not reclaimed against; or we should send the case back to the Lord Ordinary in order that he might consider a plea, the sustaining of which would be directly inconsistent with his own interlocutor. My opinion therefore is, that the plea has been presented too late, and must be rejected.

LORD ADAM—I am of the same opinion. The effect of the notice is to bring the case before us. But the case is not before us on a reclaiming-note, when we could have considered all the interlocutors of the Lord Ordinary, including the one appointing a trial and fixing the issues. We are bound to deal with that interlocutor as final, and I therefore agree with your Lordship in refusing the motion to amend.

LORD M'LAREN—In my opinion we have power to allow any amendment here, even a plea of incompetency, but I doubt whether we could give consideration to such a plea at this stage, for there is no reclaiming-note before us against the interlocutor of the Lord Ordinary fixing issues and ordering a trial. I think therefore that under the circumstances it would not serve any useful end to exercise our power of allowing this amendment.

LORD KINNEAR concurred.

The Court refused to allow the amendment.

The same defenders applied to the Court to have the action divided and the cases against them tried separately, but the application was refused on the same grounds as the motion for leave to amend.

The pursuer sought to recover in his diligence (3) "the statement or precognition of Mrs Stallard, and generally all statements and precognitions taken by the defender, or anyone on his behalf, relative to the burning case of the girl Stallard, referred to on record, and all reports, memoranda, and other documents made to or by the defender Lindsay relative to the said case, including all reports thereanent made by him to Crown Counsel." He also sought to recover in articles 11 and 12 further precognitions and "reports and memoranda made to or by the defender Lindsay relative to Mrs Bell's case," and correspondence between him and the Crown Office, and books kept by him as procurator-fiscal. By article 6 he asked for precognitions, reports, &c., prepared for or by the burgh prosecutor relative to said matters.

The Lord Advocate opposed the production of these documents, on the ground that their production would be contrary to the public interest.

Argued for pursuer — If the diligence were not granted, the plea of public policy would be allowed to defeat a private right, and there was a limit to the extent to which that would be permitted—Dickson on Evidence, secs. 1654 and 1655; *Harper* v. *Robinson & Forbes*, January 8, 1821, 2 Mur. 383; *Little* v. *Smith*, February 17, 1847, 9 D. 737; *Hill* v. *Fletcher*, July 17, 1847, 10 D. 37, where the Court allowed an indictment prepared in a prosecution which had been subsequently abandoned to be produced—*Henderson* v. *Robertson*, January 20, 1853, 15 D. 292, where the Court allowed written information given by the defender to the procurator-fiscal to be recovered, malice being averred. In *Donald* v. *Hart*, July 6, 1844, 6 D. 1255, Lord Justice-Clerk Hope stated that when malice was averred as to the precognition the Court might be disposed to order its production. Malice was averred here, and therefore the precognitions, &c., ought to be produced. It was not even said by the Lord Advocate that the public interest would be prejudiced in this case.

Argued for the Lord Advocate—There were three classes of documents demanded. The first consisted of the precognitions, and they had only once been produced, viz., in the early case of *Harper* v. *Robinson*. In *Little* v. *Smith* Lord Cockburn expressed an opinion against the propriety of such production. No case here had been made out for allowing it—*Craig* v. *Marjoribanks*, March 13, 1823, 3 Mur. 341, showed it was incompetent to ask a witness whether a precognition contained a fair statement of his evidence. The second class of documents, viz., reports, &c., made to or by the procurator-fiscal had never been granted under a diligence—*Hill* v. *Fletcher*, *supra*—And the third class, viz., letters and communications passing between the Crown Office and procurator-fiscal were so strictly confidential that they had never before been even demanded.

At advising—

LORD PRESIDENT—The Lord Advocate has appeared by counsel to object to the diligence asked by the pursuer being granted, and we have to attend to the responsible statement made by his representative. His Lordship objects to allow the precognitions to be produced, on the ground that to do so would be an infringement of that confidentiality which enables the effectual prosecution of crime in this country. I readily grant that in the present case the precognitions are relevant to the issues to be tried. They are even of a

high materiality, and it may be that the want of them will be prejudicial or even fatal to the pursuer's claim. But it is undoubted that private rights must sometimes yield to the requirements of general public policy, and it seems to me that the essential confidentiality of communication passing between a procurator-fiscal and the head of the Criminal Department in Scotland is a paramount consideration. I do not say that there would be anything illegal in the production of such documents, because the Lord Advocate, as head of the Department, might, in the exercise of his discretion, conceive that the general administration of public justice might in some highly exceptional circumstances not be prejudiced by the production. The Lord Advocate is the judge of that. But in the present case the Lord Advocate comes forward to object on the ground of this sound general rule and principle founded in the public interest, and I see nothing to show that in the present case that rule should give way. It has been said that in a statement made for the Crown in the case of *Donald* v. *Hart*, 6 D. 1255, it was admitted that the general rule might yield to some great and overwhelming necessity. These are very large and very general words, and I do not think that an ordinary action of damages for defamation of character in which a procurator-fiscal is defender is such a case as is there described. I have shown, I hope, that I realise the evil which is done to the pursuer's case by the enforcement of the general rule and the consequent loss to him of the precognitions, but at the same time I think that this is just one of those instances in which private rights have to yield to the general rule upon which the successful prosecution of crime so largely depends. I am for sustaining the objection made by the Lord Advocate, and refusing the diligence.

Lord Adam—I am of the same opinion. The Lord Advocate has appeared by counsel, and states that it is contrary to public policy that the production of these documents should be ordered. He has not stated, and is not bound to state, any particular reason why they should not be produced. The necessary operation of all these general rules is that sometimes they work injustice in individual cases, and I agree that it is very probable that here considerable injury, perhaps fatal injury, may be inflicted in the case of some of the issues which have to be tried. But that is a consequence which might be predicted of many cases arising in similar circumstances. Hardship to the individual must yield when in competition with injury to the public interest. I also agree that the possible injury to the pursuer here is not, and cannot be, a great and overwhelming necessity, and that his case does not therefore fall within the exception said to have been stated for the Crown in the case of *Donald* v. *Hart*, 6 D. 1255, whatever that may mean.

Lord M'Laren—Two points in this case seem to me to be settled beyond dispute. The first is that according to the present law and practice in the official investigation of crimes, precognitions taken under the authority of the Lord Advocate, and reported to him or his depute, are confidential, and unless under very exceptional circumstances cannot be obtained for the purposes of evidence in a cause. The second point is, that the confidentiality is personal to the head of the criminal department; his consent would remove any difficulty; and therefore it cannot be said that in such cases there would be a wrong without a remedy.

It may be presumed that the Lord Advocate has obtained all the necessary information to enable him to judge whether this is a case in which it is proper for him to give up these precognitions to a pursuer in a civil action. He has before him information which the Court cannot get, for we have only the statements made by counsel at the Bar in accordance with their instructions. No doubt the Court has always maintained its power to make such an order in cases of emergency, some of which are figured in the judicial opinions referred to at the debate, but this is qualified by the fact that no authority has been found where the jurisdiction was in fact exercised, and it is most unlikely that, while the criminal administration remains as at present, the Court ever will exercise this super-eminent power.

In the circumstances there is no reason for doubting that the objection of the Crown Office is well founded, and if it were to be got over by the mere averment of malice against a procurator-fiscal, anyone wishing to harass the Crown officials might get access to these confidential documents simply by averring malice; and this would certainly be prejudicial to the public interest.

Lord Kinnear—It is quite clear that the procurator-fiscal has no personal right or privilege enabling him to resist a diligence for recovery of the precognition, because the case is, first, that the statements complained of were inserted maliciously, and without probable cause, and, secondly, that the precognition was shown to persons who were not concerned in the preparation or trial of the case. These considerations are sufficient to displace the defence of privilege in so far as personal to the procurator-fiscal. But the Lord Advocate objects that production of the precognitions would be injurious to the public service. Now, I must own I have some doubt whether this is not a case in which the production should be ordered, since the Lord Advocate's objection is founded on the general considerations of public policy which may be applicable to the great majority of cases, but take no account of the exceptional circumstances of the present case. But I am not prepared to say that the discretion of the Lord Advocate should be overruled, when your Lordships are all of opinion that it has been rightly exercised. I do not, therefore, dissent from the judgment.

The Court sustained the objection stated for the Lord Advocate to the specification annexed to said notice of motion for pursuer, and in terms thereof deleted articles 3, 11, and 12, and from the words 'also all' on 6th line of article 9 to the end of the article.

Counsel for the Pursuer—Salvesen—Clyde. Agents—Drummond & Reid.

Counsel for the Defender Lindsay—Comrie Thomson—Younger. Counsel for the Defenders Jameson and Shanks—Guthrie—C. K. Mackenzie—Glegg. Agents—Menzies, Bruce Low, & Menzies.

Counsel for the Lord Advocate—Strachan.

Saturday, March 9.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROSS *v.* ROSS.

Compensation—Liquid and Illiquid Claims—Tutor and Ward—Retention.

A widow, who had acted for ten years as sole tutor and curator to her only son, brought an action against him, after he had attained majority, for payment of £2000 as arrears of annuities due to her out of the rents of heritable estates, in which he had succeeded his father. The defender admitted the sum sued for to be due, but pleaded compensation, on the ground that the pursuer owed him a far larger sum in respect (1) of the balance due by her of her intromissions, as tutor and curator and as an individual, with his property during his minority; (2) of the legitim due to him out of his father's moveable estate, of which the whole had been left to her; and (3) of the rents of farms belonging to the defender and occupied by the pursuer, for which no rent had been paid since the defender came of age. The defender explained that he had raised an action of count and reckoning against the pursuer, concluding for payment of £70,000 as the balance of her intromissions as his tutor and curator, and that he had also raised an action against her for payment of £30,000 as legitim. It appeared that in the accounts which the pursuer had lodged in the action of count and reckoning considerable sums were entered as expended, for which she stated that she had no vouchers; that in the course of her administration she had let various farms upon the estate to herself; and that in the action by her son for legitim she claimed a right to set off the capitalised value of the annuities, for the arrears of which she now sued.

The Lord Ordinary (Stormonth Darling) gave decree as craved, but the Court, in the special circumstances of the case, without recalling the Lord Ordinary's interlocutor, *superseded* consideration of the case until the other actions should be disposed of—*Munro* v. *Macdougall's Executors*, March 30, 1866, 4 Macph. 687, *followed*.

The late Sir Charles Ross, Bart., of Balnagown, Ross-shire, who died 26th July 1883, left his widow, in addition to her rights under a contract of marriage and certain bonds of provision, his whole moveable estate, and she acted as sole tutor and curator to their only child, Sir Charles H. A. F. Lockhart Ross, Bart., who attained majority on 4th April 1893.

In June 1894 Lady Ross raised an action against her son for payment of £2000 as arrears of annuities provided to her either by her antenuptial contract of marriage or by bonds of provision out of the rents of the entailed and other estates in which the defender had succeeded his father. The defender did not dispute that this sum was due, but explained "that the pursuer is liable to pay the defender a far larger sum than that sued for in respect (1) of the balance due by her of her intromissions, as the defender's sole tutor and curator and as an individual, with the defender's property during his minority; (2) of the legitim due to him out of his father's moveable estate; (3) of the rents of farms belonging to the defender and occupied by the pursuer, for which no rent has been paid since the defender came of age. For the amount due under these headings reference is made to the defender's statement of facts."

In his statement of facts the defender stated —"(Stat. 1) The defender attained majority on 4th April 1893, his father having died on 26th July 1883. Between said dates the pursuer acted as his sole tutor and curator, and managed the whole estates. During the course of her management the pursuer entered into possession of various farms upon the estate, and herself fixed the rents which she was to pay in respect of her occupation. (Stat. 2) The defender has been obliged to raise an action of count, reckoning, and payment against the pursuer concluding for a sum of £70,000 as the balance of her intromissions, as sole tutor and curator foresaid, and as an individual. Various questions fall to be determined in said action, including, *inter alia*, the sufficiency of the rents so fixed by the pursuer. (Stat. 3) The defender had also been obliged to raise an action against the pursuer for the legitim due to him out of his father's moveable estate. Said estate amounted to about £60,000, and the legitim fund is one-half of said sum. . . . (Stat. 4) Since the defender's coming of age the pursuer has continued to occupy the majority of the farms occupied by her during her curatorship." . . . He further stated that, even if the rents fixed by the pursuer herself were taken, arrears amounting to more than the sum now sued for were due to the defender for the farms occupied by pursuer for the period since he came of age.