

Friday, December 16.

FIRST DIVISION.

EARL OF LAUDERDALE v.
WEDDERBURN.

*Process—Diligence—Recovery of Documents
—Claim to a Dignity—Proof of Pedigree
—Recovery of Documents Relating to a
Dignity and Pedigree not being Titles to
Lands.*

In an action concluding for declarator that the pursuer had the only right to the hereditary office of the King's Standard-bearer for Scotland, it appeared from statements on record that the claim of the defender to the office rested on the alleged propinquity of the defender to an ancestor in the 15th century. A proof having been allowed, the defender craved a diligence for the recovery of documents in the hands of the pursuer relating to (1) the office of standard-bearer, and (2) the pedigree of the defender.

The specification of documents called for having been amended so as to exclude all documents affecting the title of the pursuer to lands, the Court granted the diligence.

Frederick Henry, Earl of Lauderdale brought an action against Henry Scrymgeour Wedderburn of Wedderburn, residing at Birkhill in the county of Fife, and against the Rev. Ronald Cameron Scrymgeour, Sibton Vicarage, Gosford, in the county of Suffolk, concluding for declarator that he, the pursuer, had the only good and undoubted right to the hereditary office of the King's standard or banner-bearer for Scotland, or office of carrying the royal ensign, with all honours, dignities, lands, fees, duties, customs, and immunities whatsoever pertaining to the said office.

Henry Scrymgeour Wedderburn was the only comparing defender.

In the record the defender founded, *inter alia*, on a Great Seal Charter, dated 2nd September 1458, in which James Scrymgeour was named as *Vexillator domini nostri regis*.

On 13th December 1902 the Lord Ordinary (KYLACHY) repelled certain preliminary pleas of the defender; and on 1st July 1903 he held that the pursuer had stated a case which was *prima facie* relevant, and inasmuch as the defender's title to contest the declarator rested entirely upon a bare averment of alleged propinquity to John, Earl of Dundee, before further answer sisted process to give him an opportunity of establishing by appropriate service that he was heir-male of the said Earl.

The defender having failed to satisfy the Lord Ordinary by appropriate service that he was the heir-male of the said Earl of Dundee the Lord Ordinary granted decree in favour of the pursuer as craved.

The defender having reclaimed, the First Division, on 29th November 1904, pronounced an interlocutor as follows:—"The Lords having considered the reclaiming

note for the defender against the interlocutor of Lord Kyllachy, dated 4th December 1903, and heard counsel for the parties, recal said interlocutor, as also the interlocutor of 1st July 1903: Adhere to the Lord Ordinary's interlocutor of 13th December 1902, and counsel for both parties having declined to renounce probation, allow the parties a proof of their respective averments, and to the pursuer a conjunct probation, said proof to proceed before Lord Adam on a day to be afterwards fixed."

Thereafter the defender moved the Court for a diligence to recover the documents set forth in the following specification:—" (1) *All muniments or evidents of title or other documents relating to heritable offices, lands, baronies, teinds, patronages, and other heritages which formerly belonged to members of the Scrymgeour family, or otherwise to persons of the name of Scrymgeour, and all family papers of the Scrymgeour family, or otherwise of persons of the name of Scrymgeour, which muniments, papers, and other documents above mentioned fell into the hands of the pursuer's authors at or after the death of John, Earl of Dundee, in 1668, or otherwise, are now in the hands of the pursuer or others on his behalf.* 2. *Without prejudice to the said generality—* (1) All charters, dispositions, conveyances, patents, gifts, presentations, assignments, warrants, signatures, procuratories and instruments of resignation, precepts and instruments of clare constat, and of sasine, of or relating to heritable offices, lands, baronies, teinds, patronages and other heritages belonging to or possessed by the Scrymgeours, Constables of Dundee, or by other members of the Scrymgeour family, or otherwise by persons of the name of Scrymgeour. (2) All general and special services and retours of the Scrymgeours, Constables of Dundee, or other members of the Scrymgeour family, or otherwise of persons of the name of Scrymgeour. (3) All wadsets, contracts, bonds, and other obligations, and reversions, renunciations, and discharges thereof: All charges, letters of horning, inhibitions and other diligences: All appraisings and adjudications: All rentals, tacks, and leases, and all petitions, summonses, interlocutors, and decrees to which the Scrymgeours, Constables of Dundee, or other members of the Scrymgeour family, or otherwise persons of the name of Scrymgeour, were parties, which were granted or pronounced in favour of or which were directed or pronounced against the said Scrymgeours, Constables of Dundee, or others of the name of Scrymgeour. (4) All tailzies, settlements, wills, testaments, letters, memoranda, or other documents of or relating to Scrymgeours, Constables of Dundee, or others of the Scrymgeour family, or otherwise of or relating to persons of the name of Scrymgeour [all which charters and other documents enumerated in the foregoing being those] which fell into the hands of the pursuer's authors at or after the death of John, Earl of Dundee, in 1668, or otherwise are now in the hands of the pursuer or others on his behalf [and which are not

the titles of any lands now possessed by the pursuer].”

The specification was amended at the bar by the deletion of those words which are printed *supra* in italics, and by the insertion of those words which are printed *supra* within square brackets.

The pursuer objected to the granting of the diligence, and argued that the defender should not be allowed to ransack the pursuer's title-chest for the purpose of making out his case—*Ersk. Inst. iv, I, 52; Hamilton v. Douglas*, November 28, 1761, M. 3969. In any event the call was far too wide. It was not a call for documents particularly described or even for a particular set of documents for a specified purpose—*Richardson v. Fleming*, March 12, 1867, 5 Macph. 586; *Lovat v. Fraser*, 19 December 1840, F.C.

Argued for the defender—The pursuer had called on the defender to prove his pedigree. At the same time the pursuer, as the defender averred, had previously obtained possession of the defender's charters and family papers—the ordinary sources of proof of a pedigree. There was accordingly a special case stated by the defender justifying the claim made in the specification. The rules that applied as to the recovery of documents in cases when the matter in dispute was a title to lands were inapplicable in the case of a claim to a dignity. The documents called for by the defender in the specification were not title-deeds to the pursuer's lands but historical documents, whose existence was known from the report of the Historical Manuscripts Commission.

LORD PRESIDENT—We have heard a full and anxious argument in this case, and undoubtedly it is a case of great peculiarity. It is right to keep in view that the call is not made to support a claim to lands but to a dignity. I could understand that a person in peaceable possession of lands would be well entitled to say—“I will not be deprived of my estates except by someone who can at least aver a better title without ransacking my charter chest to enable him to do so.” But considerations of that kind are not of the same weight in the case of a claim to a dignity. It has also to be observed that many things are proper evidence in a claim to a dignity which would not be evidence in a claim to lands. I am in favour of granting the specification as it stands subject to the restrictions made at the bar by Mr Johnston. Beyond the general objections to the granting of this diligence with which I have dealt I did not understand that there was any particular objection to any special item of the specification.

LORD ADAM—This is certainly a peculiar case, and the documents now called for are called for simply as historical documents. Mr Johnston is willing to amend his specification so that it includes no documents which can affect the title of Lord Lauderdale to land now possessed by him. The documents are wanted for two purposes—(1) In so far as they refer to the office of

Standard-Bearer, and (2) in order that he may obtain information as to his own pedigree. It is the latter point that is more special. If the case were one of recent pedigree there might be difficulty. But it appears from statements on record that Mr Johnston's client in order to establish his right has to go back to an ancestor in the fifteenth century, and for this purpose it is clear that he may very legitimately have recourse to all available historical documents. It is not usual to grant diligence before the closing of the record. But there are certainly cases in which a party has a claim to recover documents to enable him to close the record. Here it is said that these are documents which on the face of them belong to the Scrymgeour family, pursuer's ancestors, and necessary to prove his descent. I think he is entitled to recover them.

LORD M'LAREN—I agree that the diligence should be granted. I think with your Lordships that nothing that we do in this case can affect the rules or throw any doubt on the practice with regard to access to titles in cases of proper competition as to heritable rights, where in general a party will not be allowed to make an examination of his opponent's charter-chest, but only to call for specified writings or deeds. Here no documents are asked for falling within the category of titles to any heritable property belonging to Lord Lauderdale. What are asked for are in fact historical documents. It is said, however, that this specification is not sufficiently limited, but it appears to me that it has this very specific limitation, viz., that the name Scrymgeour appears in every article of it, and this shows quite clearly that no such documents are asked for as would bring this specification under the rules affecting the recovery of the adverse party's title-deeds, as in the case of competing briefs. It is also to be noticed that if Mr Scrymgeour Wedderburn fails to make out his pedigree his whole case fails, while Lord Lauderdale does not assert any prior independent title to himself, but rests his case entirely on the failure of heirs-male of the Scrymgeour family. I would not have said so much on a question of granting a diligence had it not been that in this case the granting of the diligence is a matter of great importance to the parties and raises a question of principle.

LORD KINNEAR concurred.

The Court granted a diligence in terms of the specification as amended.

Counsel for the Pursuer—Campbell, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—H. Johnston, K.C.—Stevenson—Hunter. Agents—Wm. Duncan & Co., S.S.C.