1806.

WHYTE, &c. *v.* STEWART.

WILLIAM WHYTE, Portioner in ABERNETHY, and ANNE SHARP, Daughter of James Sharp, Weaver in Newburgh, deceased, the original Appellant in this cause, } *Appellants;*

JAMES STEWART, Carrier in Dunkeld, - *Respondent.*

House of Lords, 28th Feb. 1806.

REDUCTION OF SERVICE—PROPINQUITY.—Circumstances in which a service set aside.

This was a competition in regard to the succession of the deceased James Stewart, which rested chiefly on the facts adduced in proof, as to which of them was the nearest heir entitled to be served and to succeed to the deceased.

The service of the respondent, James Stwart, had been first expede; and so left no room, it was contended, for a second service in name of James Sharp; but James Sharp also served himself heir, and mutual actions of reduction were brought by the parties against each other, to set aside
Nov. 29, 1799. the one service as adverse to the other.

The Lords, of this date, pronounced this interlocutor:—"Having advised this petition, with additional petition for "James Stewart, and answers for James Sharp, sustain the "reasons of reduction in the action brought by James "Stewart; and reduce, decern, and declare accordingly; "repel the reasons of reduction in James Sharp's action, "assoilzies James Stewart therefrom, and decern."

The appellant preferred a reclaiming petition against this interlocutor, in which he admitted, that unless he could prove that he was the lawful heir of James Stewart, he could not challenge the respondent's service. He also seemed to admit that the proof he had brought was not only inconsistent with his service, *the degree of relationship* being altogether different; that several important links of the chain had been altogether omitted, and no evidence brought that James Stewart, in the island of Lewis, or his son and daughter, said to be the connecting links between the ancestors of the appellant and James Stewart, ever existed. But it was maintained, that the Court might nevertheless warrantably decide in favour of the appellant, on two grounds; 1st, An alleged general opinion or reputation, during James Stewart's life, and afterwards, that the appellant was his nearest and lawful heir; and, 2dly, The declarations of James Stewart himself

to the same effect. But, fully aware these arguments were quite untenable, he demanded a farther proof; and, by the permission of the Court, he put in a condescendence (of particulars) of the facts he expected to prove, and of the names and designations of the witnesses whom he meant to bring forward. But, besides the danger and novelty of admitting new and additional proofs, in a case so peculiarly situated, the circumstances appeared to be either immaterial to the issue, or such as the persons mentioned could not swear to from their proper knowledge. And answers having been put in to this petition, the Court refused to allow the petitioner a farther proof, and adhered to the interlocutor reclaimed against.

Nov. 18, 1800.

Against these interlocutors James Sharp brought an appeal to the House of Lords, and, dying during its dependence, Anne Sharp, his daughter, carried it on.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

N. B.—No Appellant's case printed.

For Respondents.—*R. Craigie, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

CARRON COMPANY, - - - - *Appellants;*
JOHN OGILVIE, Esq. of Gairdoch, - *Respondent.*

(*Et e contra.*)

House of Lords, 7th March 1806.

NAVIGABLE RIVERS—RIGHT OF TOWING OR TRACKING PATH—PRESCRIPTION—IMMEMORIAL USAGE—INTERRUPTION—ACQUIESCENCE—EXPENSE.—1. This was an interdict brought by the respondent, with a declarator brought by the appellants, to have it declared that the Carron, being a public navigable river, all His Majesty's lieges navigating this river, had a right to use the banks thereof, so far as necessary for the purpose of navigation, and that, past the memory of man, a tracking path had been used for towing the vessels on both sides of the Carron, and that mooring posts had been placed on these banks to serve the same purpose. The Court of Session, after proof taken, held that there was established a right of towing and tracking vessels on both banks of the Carron, with the exception of a part marked out, and which belonged to the respondent, as to which there seemed to have been.