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that the said interlocutor of the Lord Ordinary on the Bills of 27th Feb.. 1808, be also affirmed. And it is further ordered, That the said original and cross appeals be dismissed this House.

[The consideration of the appeal in the reduction and declarator was postponed until it was seen that Sir James Norcliffe Innes, in proceeding with his service, succeeded in proving his propinquity as nearest heir-male of Margaret, *third* daughter of Hary Lord Ker, and that Ladies Jane and Anna, and the heirs-male of their bodies respectivè, had failed. This having been done by Sir James, the House of Lords again resumed consideration of the reduction and declarator, and pronounced in it the following judgment.]

House of Lords, 8th June 1811.

Judgment in the action of Reduction.

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

For the Appellants, *Thos. Plumer, Wm. Adam, Mat. Ross, John Clerk, James Moncreiff.*

For the Respondents, *David Boyle, Sir Samuel Romilly, Ad. Rolland, Ro. Craigie, Archd. Cullen, W. Horne.*

[Fac. Coll. vol. xiii. p. 141, et M. 11220; Napier on Prescription, p. 219.]

MRS. JANET DURHAM, and ALEX. WEIR, her Husband, . . } *Appellants;*

MRS. SARAH DURHAM, and MAJOR WILLIAM SHILLINGLAW, her Husband, . } *Respondents.*

House of Lords, 5th March 1811.

SPECIAL SERVICE—HEIR OF LINE, OR HEIR OF PROVISION—LIMITED OR UNLIMITED TITLE—FALSA DEMONSTRATIO—PRESCRIPTION.—An estate was conveyed "to Jean Bruce (wife of Adolphus Durham) "in liferent, and Robert Durham, her eldest son, and the heirs "lawfully to be procreated of his body in fee; which failing, to "the other heirs, male or female, without division, procreated or to "be procreated betwixt the said Adolphus Durham and the said "Jean Bruce; which failing, to the other heirs male or female "without division," of the said Jean Bruce. Charter and infeft-

ment were obtained on this conveyance in 1702, in favour of Robert Durham, in these terms. He thereafter died without issue, male or female. His younger brother (the present party's grandfather) took out a special service, and was served nearest heir of line to his brother, and he having died, his son was served in same terms. Prescription had run upon the title so made up. By the death of Thomas, the last heir male, the succession opened to the heirs female *without division*, under the original conveyance. The appellant contended that the investiture having been conceived in favour of heirs of line, for seventy years, the limited title had been worked off by the unlimited title by force of prescription, and she had right to succeed as heir portioner, along with her sister. Held, that there were no *termini habiles* for prescription of the charter 1702, that charter being still extant and unlimited in its nature, and these retours of service to be construed as conformable thereto, and carrying the original unlimited title; and, therefore, whenever one has two unlimited titles in his person, he is supposed to possess on both.

The female parties in this case are sisters of the late Thomas Durham, Esq. of Boghead; and the question at issue between them is, Whether Mrs. Shillinglaw, the respondent, be entitled to succeed as sole heiress of provision to her said brother, in the lands of Foulshiells, or can only claim as heir portioner, with her sister, the appellant.

This question is made to depend on the titles upon which Foulshiells estate was held. The great-grandmother of the parties (Jean Bruce) married to Adolphus Durham, their great-grandfather, had acquired it by conveyance from her uterine brother, Thomas Hamilton, who, having no children of his own, conveyed in these terms, "Be it known to all "men by these presents, I Thomas Hamilton of Boghead, "heritable proprietor of the lands and others after mention-"ed, for the love and favour I bear to Jean Bruce, my sis-"ter uterine, spouse to Adolphus Durham, merchant in "Edinburgh; and a grateful sense of the goodwill and "kindness of the deceased David Bruce, merchant in Edin-"burgh; father to the said Jean, who did substitute me, "failing of her and Hugh Bruce, his children, in the disposi-"tion and assignation made and granted by him to them, "of his haill lands and estate, heritable and moveable, to "have sold, annailzied, and disponed, likeas I be these pre-"sents, with and under the reservations and conditions "after mentioned allenarly, and no otherwise, sell, annailzie, "and dispone from me and my heirs, to and in favour of the "said Jean Bruce in liferent, and Robert Durham, eldest

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" lawful son to the said Adolphus Durham, and to the " heirs lawfully to be procreate of his body in fee: *which* " *failing, to the other heirs, male or female, without division,* " *procreated or to be procreated betwixt the said Adolphus* " *Durham and the said Jean Bruce;* which failing, to the " other heirs, male or female, without division, to be law- " fully procreate of the body of the said Jean Bruce, in any " other marriage; which all failing, to my own nearest heirs " and assignees whatsoever, all and whole the lands of " Foulshiells."

In the disposition there was no procuratory of resignation of precept of sasine, whereby the disponee could not be infeft without considerable expense, he, after his sister was

Nov. 15, 1701. dead, executed a procuratory of resignation, proceeding upon the narrative of the omissions in his former settlement, whereby he conveyed his lands of Foulshiells in these terms: " in favour, and for new infeftments of the same, to " be made and granted to the said Robert Durham, and to " the heirs lawfully to be procreated of his body; which " failing, to the other heirs, *male and female, without divi-* " *sion, procreate betwixt the said Adolphus Durham and the* " *said Jane Bruce;* which also failing, to my own nearest " lawful heirs and assignees whatsoever."

By the law of Scotland, there being no succession through the mother, Jean Bruce, as sister *uterine* only to Mr. Hamilton, could never have succeeded to him, nor of course her children, so that the family of Adolphus Durham had right to the lands of Foulshiells by these deeds of Mr. Hamilton, and by these only.

In consequence of the procuratory of resignation, Robert

1702. Durham obtained a charter from the crown of these lands of Foulshiells, in which the destination is in these words:— " Dilecto nostro Roberto Durham filio legitimo natu maxi- " mo Adolphi Durham, mercatoris Burgen. Burgi de Edin. " procreat. inter illum et quond. Jeanam Bruce ejus spous- " am et sororem uterinam quond. Thomæ Hamilton de Bog- " head et hæredibus de ejus corpore legitime procreand. " quibus deficien. aliis hæredibus masculis seu fœmellis *sine* " *divisione* procreat. inter prædict. Adolphum Durham et " Jeanam Bruce. Quibus deficien. prædict. quond. Thomæ " Hamilton suis propinquioribus, et legitimis hæredibus et " assignatis quibuscunque hæreditario et irredimabiliter."

In virtue of this charter, Robert Durham was infeft.

Robert Durham died without issue, and without making

any alteration of this settlement of the estate. On that event, the succession devolved on Thomas Durham, his youngest brother, the claimant's grandfather, who made up titles to the lands by a *special* service in 1729. The weight attached to the respondent's construction of this service, from its being a special service, is of importance to be attended to, because it specially proceeds upon and enumerates the conveyances above set forth, and the terms thereof; but in the retour of this service the following words appeared, "Thomas Durham est legitimus et propinquior "*hæres lineæ* dict. quond. Roberti Durham sui fratris ger- "mani in omnibus et singulis," &c. This, it was alleged, was the mere erroneous character which the retour stamped on Thomas Durham by mistake, which being contrary to the titles adduced and specially referred to, was thereby corrected of itself.

1729.

This blunder in the service being discovered too late for detection, it was alleged that in taking sasine upon it, the word "lineæ" was omitted, and Thomas was infeft as "nearest and lawful heir," which, being a flexible term, can be explained in no other sense than to import heir of provision to his brother in the said lands.

Thomas Durham died soon thereafter, and was succeeded by his eldest son Robert, who, after possessing on apparency for several years, served himself *heir in special* to his father. He was served "propinquior et legitimus *hæres* "*lineæ* dicto quondam Thomæ Durham ejus patri," under which character it was alleged that he too was heir of provision. The retour, in like manner, specially mentions the charter 1702, and the destination of the succession therein.

1730.

1745.

Robert Durham having died, was succeeded by the claimant's brother Thomas Durham. He possessed the estate on apparency until 1798, when he served himself heir to his father in the lands of Foulshiells. This retour bears "Quod "dict. Thomas Durham est *unicus filius et propinquior et* "*legitimis hæres* dict. quond. Roberti Durham ejus patris "in terris et aliis mentionat. secundum retornatum specialis "servitii dict. quond. Roberti Durham, ut hæredis Thomæ "Durham patris sui inibi datam 6to die Augusti 1745, et "instrumentum sasinæ subsequen. super præceptum a can- "cellaria in ejus favorem datam 17 Octobris, et recordatam "in particulari registro sasinarum apud Edinburgh 2do die "Decembris 1745:" Thus declaring that his title thereto was the same as that of his father and grandfather.

1798.

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Mr. Durham died, of this date, unmarried, and without leaving any settlement of these estates. Whereupon the present question arose between his two sisters; the respondent, as his eldest sister, considering that, by virtue of the titles to the estate, she was entitled to the whole without division. She accordingly purchased a brieve from Chancery, to have herself served, which was resisted by her sister, and who likewise procured a brieve to be served heir portioner.

The competition in these brieves was carried by advocation to the Macers of the Court of Session, and the Judges of that Court appointed, in common form, two of their number to be Macers, who ordered the parties to state their claims in mutual memorials, and the Macers, on advising the memorials, took the cause to report to the Court; for which purpose they ordered the parties to prepare informations.

Nov. 24 and 25, 1802.

The Court thereafter pronounced this interlocutor: "Upon report of Lord Glenlee, and having advised the mutual informations for the parties, find that Mrs. Sarah Durham *alias* Shillinglaw, has the sole right to be served heir of provision to her brother, the deceased Thomas Graham, in the lands of Foulshiells, and in the superiority of the lands of Langrigg, but that she must pay a composition to her sister, Mrs. Janet Durham *alias* Weir, for her share of the said superiority of Langrigg, and remit to the Macers to proceed accordingly."*

* *24th November* 1802.

Opinions of the Judges:—

LORD MEADOWBANK said,—"The institute, Robert Durham, obtained the investiture in 1702, and there has been no new grant from the crown since that time. There have been a succession of retours of heirs of line, and these are now unchallengeable, but what they have carried is the investiture in 1702. There is no prescription here; because there is no investiture to be set up against the original one in 1702."

LORD HERMAND.—"I don't think it requires to go deep into the decisions to show that an infeftment, whether from the crown or the subject, will carry the subjects in terms thereof, and I don't see how we can get the better of prescription."

LORD PRESIDENT.—"I think that part of what Lord Meadowbank said is right. The valuable decision in Kilkerran, Bogle and Smith *v.* Gray, explains that an *unlimited* title with possession will work off a limited title. But where there are two *unlimited* titles,

Mor. 10803.

The superiority of Lanrigg stood in a different situation, and being of small importance, the judgment in regard to it was acquiesced in. 1811.

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On reclaiming petition by the appellants the Court adhered.* Dec. 14, 1802.

They presented a bill of suspension, but this was refused. Mar. 8, 1805.

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there can be no prescription, because there is nothing to lose or gain by prescription. The only limitation here is, that the succession shall go to heirs female without division, which I consider to be no limitation at all. And there is no other title opposed to it. The services don't appear to me to signify one button. I will admit them all to be good. What then? They have no limitations to work off. The original investiture still remains, because there is no other contradictory title to set up against it. Both the titles are *unlimited*, and none of them is lost by prescription. Any of the Durhams could have altered the destination at pleasure, and, of course, there was no freedom or immunity that they were to gain by prescription. It is otherwise when a man possesses under a tailzie. He is fettered, and may prescribe immunity."

Lord Meadowbank's Session Papers, vol. 68.

* *Advising*, 14*th December* 1802.

LORD PRESIDENT CAMPBELL said:—"The case of Cassillis was different from this, as it was a general service about which the doubts arose; but here it is a special service, and I therefore think that the services all referred to the original investiture 1702, and saved it from prescription. But, besides, I think the case of Bogle and Smith to be sound law, and to refer to every case where a man had two *unlimited* titles in his person. The man could not prescribe against himself,—but must have something to gain or lose by prescription. Here there was nothing to lose or gain. There were no fetters in this investiture, but it was competent to take up the one or the other, as the heir thought proper; and although the Durhams had served as heirs of line, it was still open to serve as heirs of provision." Mor. 10803.

LORD ARMADALE.—"I do not think that prescription in the statute 1617 applied at all to questions among heirs; but only to questions between a man and his heirs, and third parties; and I also think on that account the case of Bogle to be good law."

LORD MEADOWBANK.—"I think prescription does not apply in the case of retours and precepts from the Chancery, with infeftment thereon, when *the original charter is extant*. This is precisely conform to the words of the act 1617, which requires only a connection

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. The only investiture or title upon which the appellant's grandfather and brother held the estate of Foulshiells, was in favour of *heirs of line*, and therefore it necessarily descended to *heirs of line*, and the appellant, in that character, had just the same right to take up this estate, as to take up the other property which belonged to her brother, and to which she has been allowed to succeed without contest. 2. The appellant's right to succeed as heir of line, in virtue of the investitures of her predecessors in that character, is completely secured against the claim of the respondents, and of all others, by the express terms of the statute 1617, c. 12, which has most justly been considered as one of the most valuable enactments in the statute law of Scotland, not only as quieting the minds of the lieges against all dormant claims, whether upon the part of the crown or others, but also as curing all defects which might have originally taken place in framing the title or investiture, but which cannot be challenged after the period of 40 years. 3. It is said by the respondents, that where two rights are in the same person, and both of them are unlimited, prescription cannot be pleaded by the heirs of the one right against the heirs of the other; and the case of Bogle *v.* Gray, 30th June 1752 is founded on as supporting this doctrine; but there is several answers to this, 1st, Although every one whose title is challenged may found on every right in his person, whether feudal or personal, so as to defeat the plea of the person attempting to evict his right, yet, according to strict feudal principles, the possession must be imputed to, and prescription can only be pleaded upon the title secured by infeftment for 40 years. 2d. It was utterly impossible to ascribe the possession, in the present case, to any other title than to the investiture as heirs of line. The appellant's grandfather, father, and brother, never having any other title whatever in their per-

Mor. 10803.

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of these sasines forty years when the original charter is not extant. When it is not extant, *the presumption is, that these renovations are in terms thereof.* But there is no reason for presumption where it is extant; and the original charter here being extant, I think there were no *termini habiles* for the prescription of it, because all these renovations must be considered to be renewals of it."

Lord Meadowbank's Session Papers.

sons than as heirs of line, and as there was not even a personal right vested in them under the deed 1699, this right was not transmissible to their heirs through them, and there could be no competition of these rights. 3d. The consequences of the judgment pronounced by the Court of Session are most dangerous. It may not only have the effect of rendering useless the valuable statute of prescription, but of disturbing the rights and properties of almost all the families in the kingdom who have enjoyed landed estates for any length of time, and it is directly opposed to every principle hitherto established in the law of Scotland. For, supposing a destination could be discovered which had remained latent and unknown for centuries to heirs male, and that the estate had been possessed for all that period by regular and feudal investitures to heirs of line, nevertheless if this decision be affirmed, the heir male, or any other heirs under these old and latent destinations, which may have been neglected for centuries, may now come forward and take the estate from the heirs of line, perhaps the daughters of the last proprietor, who were the heirs of investiture. In regard to the original destination here, it is evident that the words " to the other heirs, male or female, without division," extended only to the *immediate children* of Adolphus Durham and Jean Bruce, and not to their descendants, and therefore that the exclusion of heirs portioners could not be extended any further.

Pleaded for the Respondents.—1. In the title to the estate, Mr. Hamilton conveyed it to the heirs of his body, which failing, *to the other heirs*, male or female, *without division*, of Adolphus Durham and Jean Bruce. Females are therefore called to succeed without division, which clearly excludes heirs portioners. In the first place, it is a direct line of succession that is established by the deed, viz. a succession in favour of heirs male; and there being no room in it for heirs of conquest, the succession must naturally devolve to the eldest heir male, one after another. But heirs male and female without division are coupled together in the same sentence; so that the plain meaning of the testator was, that the eldest heir female should be preferred, in case of the succession opening to females, in the same way as the eldest heir male (if there had been heirs male) would have had the preference.

2. It being indisputable that the succession is given to one female without division, the spirit of the law of Scot-

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land necessarily leads to the preference of Mrs. Shillinglaw. Even in the case where the common law takes effect, and divides the succession among heirs portioners, the eldest is allowed a preference. She gets a title of honour, the principal mansion-house and garden, and any superiorities that may have belonged to the predecessor; and the very reason assigned for this by Mrs. Weir and her husband, viz. that these particulars cannnot be divided, and that superiors cannot be multiplied, showed the preference given to eldest heir female, who gets all those rights that will not bear division, and of course, where a whole estate is given to an heir female without division, the legal interpretation is, that the eldest must be preferred. Nor is there any reason for supposing, as is contended for by the appellants, that the exclusion of heirs portioners was confined to the heirs of Adolphus Durham and Jean Bruce, because, if he had any dislike to any of them he could have excluded them altogether, and not left it to the contingency of whether the second, third, or fourth daughter succeeded, on failure of elder sisters. His object seems to have been, to transmit his estate *entire* to his successor, and to let it go by the same destination by which he held his paternal estate. For, by the ancient charters of the estate, it appeared that heirs portioners had been excluded, the heir female being called *without division.*

But the appellants say, even supposing all this were true, yet as the estate has been held upon titles of those who were served as heir of line, and infeft as heir of line, for a period of seventy years, the previous investitures are completely done away with, and the right is thus secured by the positive prescription secured by the statute 1617, c. 12. But this proceeds upon the mistaken supposition that Robert Durham's service of 1729 was a mere service as heir of line. It was a service as heir of provision as well as of heir of line. It is a proposition confirmed by repeated decisions, that if, in a special service, there appears on the face of the retour, conclusive evidence of the character in which an heir serves, or must necessarily serve, it is quite enough to enable him to take every subject destined to an heir of that particular description, just as much as if he had specified the particular denomination. In regard to general services, perhaps it may be different. But no difficulty can occur in special service, because the claimant does not set forth any general character, but positively avows his intentions to

serve himself heir to the lands specified in his claim, so that it is reasonable to presume that he wishes to assume that character. Accordingly, in the present retour, he expressly claimed to be served as in right to the following titles: 1. To a charter in favour of Hugh Watt and his son Robert, and their heirs and assignees, dated 24th May 1677. 2. To a charter from the crown in favour of Thomas Hamilton of Boghead, 5th Dec. 1679. And lastly, To a charter from the crown, dated 24th March 1702, in favour "of Robert "Durham of Foulshiells, *brother german of the claimant* "Thomas Durham, therein designed eldest lawful son of "Adolphus Durham, merchant burgess of Edinburgh, pro- "created between him and the deceased Jean Bruce, his "spouse, sister uterine of the said Thomas Hamilton, "Boghead, and the heirs of his body, *whom failing*, the "other heirs, male or female, without division, procreated "between the said Adolphus Durham and Jean Bruce." Thus the words "heir of line" contain merely a *falsa demonstratio*. It was clear that the Inquest saw his true character of heir of provision set forth in the deeds; and their meaning of necessity was, that being thus *brother german* and HEIR OF LINE to his brother Robert, he was *therefore* his *heir of provision* in the lands specially claimed. The decisions support the conclusion that the service so taken is not inconsistent with a service as heir of provision. In Livingston *v.* Menzies, 22d Jan. 1706, it was found that a general retour as *heir of line*, carried right to a provision in a contract of marriage in favours of heirs male, both characters coinciding in the same person, although nothing appeared in the service as to the terms of the contract. In Dalhousie *v.* Lord and Lady Hawley, 13th Nov. 1712, the Earl of Dalhousie, in 1646, made a settlement of his estate in favour of George Lord Ramsay, his son, and the heirs male of his body; whom failing, to his own heirs male whatsoever; by virtue whereof Lord George was infeft in 1647. William Earl of Dalhousie, the eldest son of Lord George, expede a service in 1647, and was infeft "*tanquam legitimus et pro-* "*pinquior haeres to his father.*" To this Earl William another Earl, his cousin german, being served heir male in 1711, pursued a reduction improbation against Lady Hawley and Earl William's only child, and heir of line of all rights and titles to the estates in her person, founded upon the supposed defect in her father's service. "The Court, however, "found that Earl William being eldest son, and thereby

Forbes' Coll. p. 74. Mor. 14007.

Mor. 5241.

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"both *heir male* and of *line* to Earl George, and served "*legitimus et propinquior haeres* to him in lands, wherein "Earl George was infeft to himself, and his heirs male ought "to be understood as served in the terms of Earl George's "infeftment, and therefore repelled the objection, and sus-"tained the process." This is a decision expressly in point in favour of the respondents. In Bell *v.* Carruthers, June 1749, the service had taken place in the wrong character, Jane Bell having been served heir of provision instead of heir of line, yet the Court found that Jane Bell so served, although in that erroneous character, was entitled to take up the provision as heir of line, because the service itself showed that she was actually the person called. Other decisions, down to Graham *v.* Durham, 31st Jan. 1798, were referred to. In this last case, an objection was stated to the progress of titles, That although the same were settled by marriage contract upon David Muirhead, and the heirs of his marriage with Mrs. Jean Scott, yet the precept of *clare constat*, by which Alexander Muirhead, the son of that marriage, had made up his titles to the lands so provided, bore only that "he was near-"est and lawful heir of his father," and did not expressly bear that he was heir of provision, though it recited the contract of marriage, and that this was the investiture under which the lands were held. The objection was repelled. This was a case of *falsa demonstratio*, and of the same nature with the present. Orr *v.* Orr, Nov. 1798, and Blane *v.* Earl of Cassillis, 1807, were also founded on.

Mor. 14016.

Mor. 15118.

Graham *v.* Durham. Jan. 31, 1798. Mor. 15118.

Unreported, ante p. 1.

2. But the respondents contend, even supposing these were not good services as heirs of provision, still they would be entitled to take as heir of provision under the old investitures. 3. And, in pleading this last ground, the positive prescription now set up to fortify the services and infeftments taken as heirs of line, would not avail, because she has a right to ascribe her right to the best of any two titles that may be in her person. The object of the statute 1617, c. 12, regarding the positive prescription, obviously was to secure a person and his family, *who have the title thereby re-quired*, from all challenge and inquietude at the instance of strangers claiming the estate from them; but not by any means to prevent the succession going according to the established investiture, or to prevent that investiture, or even a separate personal deed from taking place. But even if prescription had run on the services and infeftments taken

as heir of line, these services, as they refer specially to the rights by which the claimant claims, as heir of provision, the service as heir of line must be qualified by the rights upon which it proceeds, which is that of heir of provision, and therefore held to comprehend a service as heir of provision. Consequently, the prescription pleaded upon these can only go to confirm the respondents' right, and not undo it. In Smith and Bogle *v.* Gray, Kilk. 30th June 1752, a case of this nature was decided, where a party possessed for about 60 years upon retours and infeftments in their favour as *heirs of line*, and yet a *simple destination*, executed by their father, which had lain dormant for nearly 80 years, was found to be effectual to carry the estate from the heir of line to the heirs substituted in that deed. So that the appellants' plea on the ground of prescription cannot avail in this case. Voce Prescription.

After hearing counsel, it was

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

For the Appellants, *John Clerk, David Cathcart.*

For the Respondents, *Wm. Adam, Sir Samuel Romilly, J. Wolfe Murray.*

THOMAS CADELL and WILLIAM DAVIES, Booksellers in London; and WILLIAM CREECH Bookseller in Edinburgh, . . } *Appellants;*

JAMES ROBERTSON, Printer in Edinburgh, *Respondent.*

House of Lords, 16th July 1811.

LITERARY PROPERTY—COPYRIGHT — PROTECTION BOTH BY THE ACT AND AT COMMON LAW.—This was the case of an interdict and action of damages brought by the appellants, in right to the copyright of the Works of Burns the Poet, which, after the publication of Dr. Currie's edition, had been pirated and published by the respondent. The book had not been entered at Stationers' Hall, and the Court of Session held, that the only protection lay in the statutory penalties; and if the book was not entered in Stationers' Hall, no action was competent at common law for indemnification or protection. In the House of Lords, this judgment was reversed by a special declaration, stating that, though the work was not so registered, yet that the parties had, for the term specified in the statute, a right vested in them, entitling them to maintain a suit for damages, and also to interdict in case of the violation of