The LORD CHANCELLOR said that if the rule of the law of Scotland was to be taken to be the same as the law of England, then it was well settled that in construing a will or testamentary writing it was not competent to refer to extrinsic circumstances, except merely for purposes of identifying persons or property dealt with; and he should be reluctant to think the rule of the law of Scotland could be different in a matter of this kind. Still there had been several cases, some as old as Lord Hardwicke's time, which showed it had been the practice in Scotland to take into account these extrinsic circumstances, and upon the whole he was disposed to agree with the conclusion indicated by his noble and learned friend.

LORD CHELMSFORD also concurred.

Affirmed with costs.

Counsel for the Appellant — Solicitor-General, Jessel, and Pearson, Q.C. Agents—Messrs Mackenzie & Kermack, W.S.; Messrs Loch & Maclaurin, Westminster.

Counsel for the Respondent — Lord Advocate (Young) and Asher. Agents—Messrs H. & H. Tod, W.S.; Messrs Valpy & Co., Westminster.

Tuesday, May 27.

GEORGE BARNET AND OTHERS *v.* ALEXANDER BARNET AND OTHERS.

Pedigree—Proof—Construction.

Held, affirming judgment of Second Division of Court of Session, that certain evidence was sufficient to support the pedigree of the respondent.

This was an appeal from a decision of the Second Division. Certain conjoined actions were raised relating to the succession of the late James Barnet, innkeeper, of Old Meldrum, and owner of the estate of Hillhead of Pitfodels. The heritable estate was worth about £350 a-year, and there was a sum of about £11,000 of personal estate. Mr Barnet left a trust disposition and settlement in favour of Alexander Burness, Esq., of Mastrick, Dr Paul of Banchory, and another, conveying to them his whole heritable and moveable estate, and directing them to dispose of the estate according to instructions which he would leave. He did not leave any instructions, and the result was that he died intestate. Various parties soon appeared, claiming propinquity to the truster, and the representatives of the Crown claimed the estate on the ground that he left no relatives. The whole of these parties were brought into the field by an action of multiplepoinding. Ultimately there were two parties. One set of relatives were headed by Alexander Barnet, and others, the respondents; a second party was headed by George Barnet, and others. The appellants' evidence at great length was taken, and the Lord Ordinary held that the evidence preponderated in favour of Alexander Barnet's party. The Second Division in substance affirmed this judgment; thereupon the present appeal was brought.

At advising:—

LORD CHANCELLOR—My Lords, in this case the appeal brought to your Lordships is upon a question of fact, upon which there have been two adverse judgments against the Appellants. Your Lordships, of course, are bound to entertain and to consider all appeals which the law permits to be brought to this House, but it is a principle upon which your Lordships, I believe, as well as other Courts, have acted, and rightly acted, to require very clear grounds to be given, or at least very satisfactory grounds to be shown for departing from the judgments of the Courts below, where they agree, as in this case two Courts do, upon that which is after all only a question of the effect of evidence with regard to a matter of fact. In this case the fact in question is of a kind which undoubtedly does not suggest, at least to my mind, the probability of making any exception to the application of that principle. When a pedigree has to be proved, going back for a considerable period of time, and the claimants are related rather remotely to the person whose estate they claim; there are many reasons for applying with some strictness the rules which, generally speaking, govern Courts in dealing either with questions of law or questions of fact. It is not a kind of case in which there should be any relaxation, I think, of principles which are generally found sound.

In this case the claim is by persons who have to trace back their pedigree through three successive earlier generations to the common ancestor of themselves, as they allege, and the person whose inheritance they claim. And it appears that there are in the part of the country where this question has arisen a very considerable number of persons of the name of Barnet (which is not in other parts of Scotland so common a name as it appears to be there), of various stocks or branches, if they come from one common origin, which is possible though not proved. Of those parties it appears that a not very small number were actually called in the process as being persons who had advanced, or were thought likely to advance, claims to this succession. Of those all have now retired from the controversy except the respondent, Alexander, who was successful in the Court below, and the present appellants, who were not the only persons claiming in the same right in which they claimed; for in the Court below they claimed concurrently with three other persons, named George, James, and Ann, who stood in an exactly equal degree of relationship, if their relationship be established, to the common ancestor, but who have retired from the controversy for reasons, I think it is suggested, which they may have found convenient for acquiescing in the decision, rather than because they acknowledge the soundness and justice of it. However that may be, they have acquiesced in the decision, whether in the soundness and justice of it, or not, and we have now to consider whether these persons who have appealed have made out their own case, because after all that is the thing which it is their business as appellants to do. Even if they had succeeded in throwing more doubt than in my judgment they have succeeded in throwing, upon the title of their opponents, who succeeded in the Court below, Alexander Barnet, and the others in the same position with him, still it will not necessarily follow from that, that they had established their right as appellants before your Lordships. Except so far as the destruction of the respondent's case would tend to establish their own, I apprehend that in strictness they have no right to come here to destroy their opponents' case they must come here to establish their own.

Having said so much, I will first of all take the case which they make as against the respondents, for, in point of fact, the chief stress in argument has been laid upon the attack upon the respondents' case rather than on the establishment of their own. I do not mean to say that there is not, in some points of the evidence, such a connection between the two subjects as to make it a reasonable mode of endeavouring to advance their own case to attack the case of the respondents, and therefore I propose to call your Lordships' attention to what seems to me to be the true state of the evidence upon that subject.

My Lords, in the first place you will observe, with reference to what Mr Robertson said, both at the beginning and at the close of his able address to your Lordships, that it is undoubtedly true that a man who undertakes to establish his right to a succession of this kind must trace his pedigree back through all the steps to the common ancestor, but it is equally clear that the respondent has done so, subject only to a single question, which alone is really in controversy in that part of the case, that question being whether or no his ancestor John, called in the evidence the squarewright, is identical with John who is admitted on all hands to have been the son (I think the eldest son) of the second marriage of Thomas Barnet of the Log. The pedigree of the respondent is proved at every step if that point as to the identity of these two Johns is made out, and that is the real question which, so far as the respondents' title is concerned, your Lordships have to consider.

Now, coming to the evidence, I wish to make one observation, and one only, upon the nature of the evidence with which we have to deal here, and which is admissible by the law of Scotland. It is, I believe, perfectly true that the law of Scotland does admit hearsay evidence of statements of deceased persons as to some matters as to which their evidence would not be admitted in England. It is also undoubtedly true that our duty in a Scotch case is to decide according to the Scotch law, and to give such attention as may be due to all the evidence receivable by that law. But when it is admitted that the statements of deceased persons, though not related to the family, of any matters which in any reasonable sense would seem to have been within their knowledge, are receivable, whether they mention things which they knew themselves, or things which they had heard from other deceased persons of earlier generations than their own, when it is admitted that that evidence is not to be rejected as inadmissible, still the question of its value remains, and it is quite evident that its value, taken by itself, must be of the very slightest description; and that the more remote the period to which it relates, and the greater the number of links in the chain of hearsay during that period, the less and less at every step becomes its value. Therefore I apprehend that in a case of this kind, although that kind of evidence may sometimes be useful as corroborative, it is difficult to suppose a case in which it by itself would be satisfactory or sufficient. The law of England requires hearsay evidence of that kind to have proceeded from persons who, as members of the family, would have the means of knowing that which by family tradition would naturally, in the ordinary course of things, be correctly preserved in the memory of the family; and I cannot help thinking that in a Scotch case of this kind, depending upon evidence not of that character altogether, it must be very difficult, to say the least, to come to a satisfactory conclusion. But although evidence of that character may sometimes require support from anything extrinsic, there can be no doubt that the other kind of evidence is of more value when it is found in company with evidence of that character which would be admissible by the law of both countries.

How does the evidence stand then with regard to the case of the respondent and his title? There is a good deal of general evidence of reputation, which, for the reasons which I have given, I should put aside and ascribe very little value to, if there were no better evidence. But I will observe, with reference to that evidence of reputation, that there are two circumstances which appear to me to give, even to that portion of the respondent's evidence, more weight than I am disposed to give to similar evidence on the other side. The first of those two circumstances is, that at least three witnesses (there may be four—I have taken down the names of three, viz., Jean Sangster, Mrs Bruce, and Mrs Davidson) who, I think, were witnesses relied upon by the appellants themselves, seem to have been aware of the existence in the town of Old Meldrum of a near relationship, or a relationship at all events, between the innkeepers and the shoemaker, from whom the present respondent is descended. That reputation spoken of by them confirms and gives credit to the evidence of reputation spoken of by other witnesses, sometimes in stronger terms. And then that evidence, taken as a whole, is to be borne in mind with reference to this fact; that Old Meldrum is a small place, that the innkeeper was a considerable person there, and that it is hardly possible, if these witnesses speak the truth as to common reputation, that such a reputation, prevailing in such a place, could be unknown to the innkeepers themselves, and therefore it is probable that, in some way or other, they would have disclaimed the relationship if it had not really existed in fact.

That brings me to the next and more important part of the evidence—that part, I mean, which relates to declarations made first of all by the innkeepers themselves, and next by the shoemaker—the two parties whose relationship has to be investigated; for the real question in this part of the case is What was the relationship, if any, between the innkeeper and the shoemaker, who lived in the same small town, and about whom there was this reputation? Now, it appears that there are four witnesses, Mr Den, Mr Andrew Reid, Mr Webster, and Mrs Adams (the daughter of the shoemaker) who speak directly of statements made to them by Alexander, the elder innkeeper, the father of the truster, in which he frequently in the hearing of those persons acknowledged the shoemaker to be his cousin—I do not think that in any part of the evidence as to statements by Alexander the precise degree of relationship is ascertained according to his statements further than by the use of the word "cousin." If, therefore, it stood there, it would be merely an acknowledgment of relationship, but it would not define the precise degree of relationship. There is also a similar declaration by James, the truster, himself, spoken of by the witness Forbes, at page 199, but that also does not go further than the word "cousin." And there is the evidence of Mrs Halley, of Helen the daughter of the innkeeper crying when taunted with her re-

lationship to these poorer persons, the shoemaker's family. That evidence appears to me, my Lords, to be important, and not less important on account of the reputation which existed in the place, because it is plainly a recognition of cousinship existing of some kind and in some degree, in circumstances in which those who recognised it do not appear to have been particularly proud of it, owing to their being removed into rather a higher position in the local society.

There is another fact, which one of these witnamed Den mentions, and which your Lordships will find is not mentioned by him only, for another witness whom I shall refer to presently speaks of the same thing; and that appears to me to go somewhat beyond the facts we have already arrived at—I do not appear to have got a correct reference to the part of the evidence of Den in which it occurs, but you will find it stated that two of the children of the shoemaker were named after the children of the innkeeper. The other witness who mentions that is Mrs Watson, whose evidence is at page 206. Mrs Watson says, between letter D and E, "I heard John say that he had called his oldest daughter Helen after his cousin's daughter, and that he had called his first son after his cousin up the town, Alexander the innkeeper," and though I do not seem to have taken down the reference correctly, I think your Lordships will find similar evidence in another portion of the testimony, and I think in the testimony of one of those persons who speak of declarations made to them by the truster himself, although not as far as I know, upon that particular point. Mrs Adams the shoemaker's daughter also speaks of a loan or loans of money made by the innkeeper to her father.

Having got so far, it certainly appears to me that we have laid a considerable foundation for giving credit to evidence of more precision, depending upon declarations by John the shoemaker himself as to the exact relationship between him and the truster. That such evidence is admissible by the law of England as well as by the law of Scotland is incontrovertible, and I apprehend that according to sound principles it is evidence entitled to great weight and attention, bearing in mind the facts we have already ascertained, namely, that there was a cousinship (whatever degree of cousinship it was) admitted by the innkeeper himself, a man in a superior rank in society, who did not feel that the shoemaker was in a position of equality with himself. When we have got that we have laid a foundation, not only for the admissibility, but for the credibility *prima facie*, of evidence from the other side—that is from the shoemaker—if that evidence tends to define the precise degree of the relationship, the existence of which is established. Moreover, the declarations, if you believe the witnesses (and there are not a few of them) of John the shoemaker were made long before there could be any reasonable expectation of any succession or inheritance coming to his family from the innkeeper, because it appears that Alexander had two children, that James the truster lived until quite recently, and that the shoemaker died long before James; therefore he had no reason whatever to suppose that he was giving evidence, so to say, by which his children or descendants at some future time would profit. It appears to me, therefore, that upon every principle the greatest credit is due to the declarations of John the shoemaker, which would tend to show what was the degree of the relationship, the existence of which Alexander himself acknowledged. Your Lordships will see that, in the circumstances I have mentioned, it is in the highest degree probable that John would make the most of the relationship, whilst Alexander the innkeeper would probably make the least of it. It does not appear that Alexander ever said anything inconsistent with what was said by John; but John was, not unnaturally, disposed to speak of it more frequently and more precisely than the wealthy man—the innkeeper—whose position was higher than Johns'.

Now we have got at least seven witnesses who prove statements by John, the greater part of which are certainly unequivocal, as to the degree of relationship. Mrs Halley's evidence (at page 72) is very clear and very full, if you believe it, as to the relationship. It is not quite so clear to me that she is to be taken as giving satisfactory evidence of statements made by John of first cousinship, though she says that that is what she understood. The word cousin seems to be the word of which she speaks, and therefore I do not place so much stress upon her evidence as defining the exact relationship, as upon the evidence which was more distinctly given by some other witnesses. But then Mrs Taggart, a member of the family, the shoemaker's daughter, is most distinct and explicit, and, if you believe her, as I think your Lordships will, there can be no question whatever that the exact degree of relationship was defined by the statement of her father, because she says at page 153, that she remembers when a girl asking her father "what relation James Barnet was to me" (that is the second innkeeper's son) "my father replied, 'Ye stupid thing! aren't ye second cousins?' He called me 'stupid thing' because I did not know that James Barnet was my second cousin, seeing that his father was his (my father's) cousin. I considered by this that Alexander Barnet, the innkeeper, was my father's first cousin." But that is not all. Thomas Duthie, at page 170 and page 173, speaks of the relationship, and says that John Barnet said that they were "brither's bairns." And Mrs Duthie, at page 177, speaks of him as having declared that he was first cousin to Alexander, and speaks of him as having spoken of Alexander's father as uncle. And, my Lords, Mrs Duthie is an important witness, unless you suppose that what she says is entirely untrue, because she states that upon the night of the death of old James, John Barnet, the shoemaker, behaved as a nephew might have been expected to behave. At page 177 she says "Alexander's father was the uncle of John the shoemaker. I remember of old James Barnet's death" (that was Alexander's father) "I remember of John Barnet the shoemaker coming to my father's house on the night of old James Barnet's death. On that night John Barnet spoke of old James Barnet as his uncle. When he was coming into my father's house my mother thought it was my father coming home from his society, but when she saw he was John Barnet, she asked 'where have you been at this time o' nicht, John?' He said 'I am just come from seeing my uncle.' He said he did not think his uncle 'would set o'er till morning,' that he would be dead ere morning. He was dead before morning." That evidence is as satisfactory, if it is believed, as any evidence can possibly be. It is quite consistent with the statement of Thomas Duthie, who also mentions gifts of clothes and other things as having proceeded

from the richer man to the poorer. Begg, another witness, whose evidence is at page 182, says that John the shoemaker spoke of himself and Alexander as "brother's bairns," and said that their fathers were brothers. Mrs Watson spoke, in the passage to which I have referred your Lordships already, of the conduct of the children of the innkeeper, and she mentions what was said upon his deathbed by John the shoemaker, which is a statement that would gain, I think, some additional weight from the solemnity of the occasion upon which it was made. At page 208 she is asked a question with regard to the cousin in Turriff about whom he spoke on his deathbed. The Turriff part of the pedigree may be kept distinct. On page 207 she mentions a conversation between John Barnet of Turriff and the widow of the shoemaker in which "John Barnet from Turriff looked at the widow and said 'Fa's nearest noo, Kirsty?' she said 'I dinna ken: my husband's deed, and I will be none the better of it.'" Therefore there is a considerable mass of evidence, which comes from persons competent to give evidence, which defines the relationship, and the fact of the relationship is proved to have been acknowledged by Alexander and James themselves.

My Lords, there is a fact, independently of all that evidence, which seems to me to be not unworthy of mention, and that is the burial of John the shoemaker in Forgue Churchyard, alongside of the burial-place of the two children of James, the father of the innkeeper. That, at all events, although not conclusive as to the relationship, yet, taken in connection with the evidence which is given as to the custom of the country upon the subject, and the other evidence, it appears to me to be worthy of some attention as corroboration. Lord Benholme has noticed that even Miss Innes, a witness called for the appellants, at page 35, mentions traditions (and she is a competent witness as to the traditions) to this effect—She had heard that there were three brothers, that one went to Forgue, one to Keith, and one to Huntly for a short time, and then to Old Meldrum. Now, it is quite certain from the evidence, if any attention is to be paid to that, that the one who went to Huntly and afterwards to Old Meldrum was not James the father of the innkeeper, because he is traced very clearly indeed by the evidence of Den, of Mrs Lamb, and of Helen Webster, and also I may say by the inscription upon the tombstone, and it appears clearly from the evidence that he was at Aucheninna in the parish of Inverkeithney until a period later than 1772, when his youngest child was baptised, and that he was described as being of the Boat of Inverkeithney in 1788 and 1796 upon the tombstone of two of his children. The evidence of Mrs Lamb and of Helen Webster also is all to the effect that James came to Old Meldrum from the Boat of Inverkeithney. He cannot therefore be the one who went to Huntly for a short time and then to Old Meldrum. The evidence applicable to the squarewright is the evidence of Stewart and the evidence of Craw, who clearly and unmistakeably trace him first to Forgue, then to Huntly, and then trace the shoemaker, the squarewright's son, from Huntly to Old Meldrum; so that there is a correspondence in the facts as applicable to that branch of the family with the tradition to which Miss Innes referred, if attention is to be given to any of her traditions.

I think therefore, my Lords, that if there be nothing to the contrary, your Lordships will be of opinion that the case of the respondents is clearly proved and established. What is there to the contrary? Absolutely nothing whatever, except what Mrs Duncan says at page 73 about Margaret, the supposed sister of John when living at Huntly, and a certain theory constructed upon that out of what I may call the Knockorth Registers. It is very true that a number of the entries in the earlier part, I think, of the last century are produced of the baptisms of children of a certain John Barnet, living at a place called Knockorth, in the parish of Marnock; and amongst those children, at dates which I shall not trouble your Lordships by mentioning further than by saying that they are possible dates and fit in with the pedigree on the other side, we find a Jean, a Margaret, and a George. Certainly such names are found there, but there have been 77 witnesses examined in this case for the appellants, for the Crown, and for the respondents, and in no part of the evidence of any one of them is there a single word about this Knockorth family, though there is a great deal about a great number of Barnets of various places. Now, are your Lordships gravely asked to take up this kind of theory, which Counsel construct out of extracts from unexplained registers, and to suppose that if it were really the truth, the person about whom so much evidence is given, namely, John the squarewright, had a sister Margaret; that John and that Margaret had a brother George (I may remark that the Knockorth Registers are made to serve a double duty, and George who is mentioned in them is also made to take his place in the Turriff branch); that all these persons were the same people who were baptised as the children of John Barnet of Knockorth? Supposing you had no evidence to connect them with Knockorth or with those registers, it appears to me to be a most unreasonable thing to ask. Therefore I think we must throw that aside as nothing more than an ingenious suggestion of Counsel.

What remains then? A single witness of the name of Mrs Duncan speaks of a person whom she believes to have been called Margaret Barnet, and who, according to her evidence, was living with the squarewright when he lived at Huntly, and was called his sister both by the squarewright and by the squarewright's wife. My Lords, if we are entitled to place complete reliance in that respect upon the evidence of that single witness, there are clearly many ways in which that may be reconciled with the position in the pedigree of the squarewright, as established by the evidence of the respondents. In the first place, although I do not say that it is to my mind a most probable theory, it is perfectly possible that there might have been a sister who has not been traced by those who made out these pedigrees. Supposing that that is not a theory which ought to be adopted, are we to take it as established by such evidence of so remote a recollection as that of which this witness speaks, that it is certainly the fact that that woman's name was Margaret Barnet, and that she was a legitimate sister, not of the wife of George, but of George himself. We know absolutely nothing whatever of her, except from this old woman's recollection of her at that remote period of time—a recollection your Lordships must remember not coming entirely pure and unaffected by the conversation about these matters which always takes place amongst witnesses of this class.

Beyond that single witness' recollection, there is nothing, unless, indeed, we are to give serious weight to the suggestion that because some one remembered that an old woman died in John Barnet's house, therefore it was Margaret Barnet, a sister whose existence is omitted from this pedigree. The argument comes to nothing more than this, that there is a circumstance which, if you trust an old woman's recollection, and if you assume that she is speaking, not of what she concluded, but of what she heard from competent sources, we are unable at this distance of time thoroughly to explain. But is that to be considered a conclusive answer to the evidence I have already mentioned, tending to show from competent sources both the fact of the relationship and the degree of the relationship between the innkeeper and the shoemaker? That is the only answer attempted to be given to the respondents' case.

Then it is said, But granted that the respondents' case is true, the appellant may possibly be entitled to come in as standing in a similar degree of relationship. What is the evidence of this? I venture to say, my Lords, that the only part of it which is entitled to the smallest *prima facie* weight, that is the only part which exceeds that kind of loose tradition of which I spoke at the outset, is the evidence given by Mrs Henry, upon which so much reliance was put by the Counsel at the bar. And I cannot but think that that evidence, even before we come to examine it, is open to the observation that no very great reliance can be placed upon it. For the appellant and the Crown were certainly not particularly great friends in this litigation. There was therefore an absence of reasonable probability that they concerted together the witnesses who were to be called, and the order in which they were to be called, and, as a matter of fact, the appellant (who does not allege that he did not know of this Mrs Henry, or of the evidence, whatever it was, that she was capable of giving) closed the whole of his proof without calling this particular witness, whom he now relies upon as being the one witness upon whose evidence the credit of his whole case is to depend. He left that witness to be called by the Crown, so that if the Crown had not called that witness he would have deliberately foregone the benefit of that testimony. I cannot myself but think, my Lords, that there was some better reason for his not calling Mrs Henry than the Counsel have suggested, and that such better reason was that some information which he had received as to what Mrs Henry was to say was not so favourable to him as what she did say in the end, or that he had good reasons of his own for not placing very great reliance upon her testimony.

Now, what is it that Mrs Henry does say? Her evidence is at page 81. She was the daughter of a person named George Barnet and a woman named Elspeth Gall. Her father appears by other evidence to have been somebody's illegitimate son, and also to have lost his hand by some accident with a pistol. I think upon the whole that the construction of all the evidence is that the hand was lost, or at all events seriously injured, by an accident with a pistol. He was a gardener. We know him therefore as a gardener who had lost his hand by an accident with a pistol, and whose name was George, and who was the father of this lady. The point it is desired to establish is that he was an illegitimate son of one of the sons of Thomas Barnet of Log; and a statement of his at page 83 constitutes really the foundation of the appellants' case. He said that "his grandfather was in the Log, and that one of his uncles was George Barnet, who went to Cairney; and as to the other, I don't know if he remained in the Log, but the son was him that kept the Meldrum Inn." Your Lordships see, looking at the pedigree, that he must have been, according to that statement, either the son of John, the son of Thomas of the Log, or the son of James, the others being all accounted for,—George having gone to Cairney, and the one who went to Old Meldrum being James, the eldest.

Now, what appears to be the witness' knowledge of this grandfather of hers? Does she know her grandfather's name? No. It is most extraordinary that she should have heard so much all about the uncle George who went to Cairney and all the rest, but never have heard even the name of her grandfather. But so she says—"I don't recollect of him telling me the name of his father. He never mentioned his name that I recollect. He told me that his father was in Aberdeen, and was pressed to the war when he was ten years of age or thereabouts." Further, my Lords, she says she knew nothing about his being illegitimate. It is strange that she did not know that: She goes on to say that her father "was intimate with James Barnet, the son of the old man"—that is James the elder landlord—that she herself had been many times at the inn in Old Meldrum—that she was often treated there just as a passenger, and "paid her way," being looked on as a friend. Is it conceivable, if that was so, that she should never have heard of her grandfather's name, and, having heard nothing about the bar sinister, should not have taken the full benefit of the relationship, and claimed it when she was there? But she did nothing of the kind.

But the evidence of her sister, Mrs Petrie, does not go even so far as that. She speaks of "relations in the Log" and so forth, without in any way attempting to define what would be the degree of the relationship. The evidence of Winton, who is said to have been a son of Janet Florence, who is alleged to have had an illegitimate son called George Barnet, does not even go so far as either. The only other witness who speaks of this illegitimate gardener is George Barnet, one of the claimants, and it is very remarkable that in his evidence he says he thinks the illegitimate man's name was not George, but William, and yet, according to his story, he was one of his nearest relations, and knew him personally. The same witness thinks that his own grandfather's name was Alexander, which, again, is inconsistent with the place he assumes in the pedigree. Taking all this evidence together, I cannot think, my Lords, that it is evidence of any weight whatever. And I have to add, that all these persons know of only three brothers—they do not give themselves the benefit of the choice between John and James—they have never heard of more than three brothers. All of them drop either John or the second James out of the pedigree. The theory of Mr Anderson is, that the father of this illegitimate gardener was John. That of course would be absolutely inconsistent with what was proved by the respondent about John—as to where he was, who he was, and what he was, and his family. Therefore I cannot possibly believe the theory that John was his father; and the conclusion I come to is, that no reliance whatever is to be placed upon the state-

ment that he made that representation which is upon page 82, or, if he did, that it was true, or that he was in a position to entitle what he said upon the subject to be taken as evidence.

Then comes the supposed corroborative evidence of Miss Innes and Mrs Stephen, who tell the story of the stone. My Lords, with regard to Miss Innes, the Counsel have really felt a difficulty of reconciling what she says with the rest of the evidence, independently of the fact that she was a person who was born I think in 1808 or 1809, (certainly in the course of this century) and cannot carry her personal knowledge very far back. What she says, instead of confirming, on the whole tends in many points to contradict the statements of the other witnesses. Therefore her evidence helps the appellants very little indeed, even assuming that the loose traditions and impressions of which she speaks ought properly to be regarded as traditions at all. If any attention is to be paid to what she says, I must say for my own part, comparing what she says about the log and the log houses with what is said by Mrs Stephen and by Mrs Thomson, the conclusion that I should come to, would be the same as the conclusion came to by Lord Benholme, which Mr Robertson strongly insisted was erroneous, namely that there were at some period two distinct Log Houses. At all events she most positively says so at page 35. She says, "When I was a child the ferry was higher up the river, at a place called the Cobble House, a little further north than Inverkeithney. Log House is on the opposite side of the river from the Cobble House; it is on the Auchinhamper side of the river. The river makes a bend at the Log Haughs, and there is an island there. The Log House is close to the angle where the river makes that bend; but that is not the house Tom Barnet was in. His house was about 200 yards above that place, where there is an ash tree. The original steading was there in the olden times." My Lords, I do not at all propose to detain your Lordships by investigating minutely that question. All I say is, that if this lady's tradition is to be attended to, she speaks undoubtedly of a change in the position of the Log House, between the older and the later period. With regard to the legend about the stone, she says at page 38, "there is a legend in the country" about a stone coming down the hill of Log, and striking the house there, and she heard it in her youth, "It was one of these stories that nurserymaids tell for some purpose or other. It was called the Elf stone. There was an old woman who used to live there, who was considered a witch. The stone was said to have been brought there by the fairies, and of course if you sat on it, it gave you a knowledge of your future life." One really is not very much surprised to find a stone of that sort doing duty in a great number of ways, and when you find that that stone is made the principal link of connection between Thomas of the Log and the present appellant, I cannot but think it is a very weak one.

The story which is relied upon to establish that connection is the one told by Mrs Stephen, the daughter of Stewart of Birkenburn, as a tradition which she had heard from her father. If you are to rely upon her story at all you must take it as you find it; and her tradition—repeated three times over with the greatest distinctness—is, that the accident of the stone rolling down the hill, if accident it can be called, happened when Thomas Barnet was in the log house, that is, when the grandfather of the person of whom she speaks, who would be Thomas Barnet, was there, and not at a later period, although another witness, Simpson, makes it clear that, according to his story, if it happened at all, it happened later when Morrison was there. Mrs Stephen puts the story in this shape; her father, who, according to her evidence must have been fourteen years old—for he was born in 1740, and this happened in 1754, when Thomas Barnet was at Log, at which time George, who is said to have been with him, and to have helped him in rolling the stone down the hill, was only four years old, or not quite so much I think. The effect of the story, as she says it was told her, was, that they were schoolfellows.—I am not sure that I am entitled to say that she says that they were schoolfellows, but it comes very near to that. This is the passage of her evidence at page 26. After saying that her father attended the parish school of Inverkeithney, she says—"I have heard my father tell a story about a stone on the hill of Inverkeithney. There is a hill called the Log Hill; it is a planted hill. There is a small croft at the foot of the hill with a cottage upon it. Some boys, along with my father, slackened a stone, rolled it down the hill, and it knocked in the corner of a house. I have heard that the stone knocked a pot off the fire, but as to that I know nothing. I did not know anything of the story myself. I just heard my father repeat it as a ploy in which he had been engaged. I do not believe my father ever told it to me personally alone. I never recollect of hearing my father say that he knew George Barnet's father, but I have heard my father say George Barnet's father was one of the boys who were along with him at the ploy with the stone." Certainly I should understand the tradition which this lady heard as being that, when her father was a boy, whether he was at the time in the parish school of Inverkeithney or not, other boys along with him, of whom George Barnet's father was one, once slackened a stone, and rolled it down the hill, whether by accident or for mischief I cannot undertake to say. I should infer from this that a number of boys were companions together, if not schoolfellows, her father being one and George Barnet's father being another. And then in five or six places she repeats that there was a Barnet at that time living at the Log House, and that George's father was that man Barnet's son. If that were true, it would follow that this must have taken place when that George was a mere infant under four years of age. Your Lordships may think that that is a mistake, and not anything else; but you have to consider how far it is probable that a man who was at least ten years older than George Barnet should have been playing with him as a boy of four years old, or that he should have been taking part with a number of boys in rolling the stone down the hill, according to the form in which the story is given. To say the least of it, a story coming in so loose and so unsatisfactory a manner, and so connected with vague traditions about the stone, which Mr Simpson says was preserved in the house, cannot have very much weight. And Mrs Thomson clearly speaks of the house of which Miss Innes speaks, as having been erected later in 1786. Therefore, my Lords, looking at all the evidence, and the shape in which that evidence comes before your Lordships, it appears to me to be of no weight at all in support of the appellant's case.

I do not think I ought to occupy your Lordships' time by going into any detailed examination of the Turriff case; but I cannot help observing that there are six witnesses who speak of the relationship and the degree of relationship between the innkeepers and the Turriff family with the greatest explicitness, and three of them are witnesses for the appellant. They are Mrs Bruce, Mrs Morrison, who says that the innkeeper and "the old man in Turriff were first cousins," and Mrs Halley, who says the same; and three others, Gillespie, Mrs Pratt, and Mrs Adams. Against that there is nothing but the point which has been so much laboured about the Ecclesiastical censure in 1764 of George, who undoubtedly was connected with the Turriff family; the George who was the son of Thomas Barnet of Log having been baptised in 1750. My Lords, that has been regarded by the Court below as throwing sufficient doubt upon that part of the pedigree to prevent the Court below from expressing the opinion that the relationship of the Turriff branch was made out. It is not necessary, if your Lordships take the same view as I do, for your Lordships to say more upon that part of the case than this—that the whole effect of the evidence upon that point is certainly not sufficient either to discredit the direct evidence in favour of the respondents, or to accredit the evidence in favour of the appellants. That being so, it is not necessary for your Lordships to suggest a solution of the difficulty as to the censure in 1764 of a person who was only baptised in 1750, although, if your Lordships had to consider it, I do not apprehend that it is quite clear that you ought to assume the impossibility at that time of a baptism having been deferred so as to get rid of that difficulty, and remove the impediment, which it otherwise might have been, to a belief in the apparently consistent evidence of a considerable number of witnesses, some of them, as I have said, called by the appellants themselves.

Upon the whole, I advise your Lordships that the appeal should be dismissed.

Upon the subject of costs one word ought to be said. I do not know what might have been your Lordships' decision if this case had come before you as a Court of first instance with regard to the payment of costs by the present appellants. It is possible that you might have been inclined to take a lenient view of the matter. But the Court below, acting I suppose in accordance with the rules upon which they usually act with regard to costs, did, in point of fact, order the costs to be paid, not only by these parties, but by others who have not appealed, and as to whom therefore we could not now alter the order which has been made. Under these circumstances, considering the discretion which every Court has in reference to costs which are not absolutely regulated by principles of law, I do not think it would be judicious for your Lordships, whatever your feeling might have been if you had been Judges of the first instance, to alter the interlocutor in that respect.

LORD CHELMSFORD—My Lords, my noble and learned friend has gone so fully into this case that, agreeing with him as I do entirely in the conclusions at which he has arrived, I do not think I ought to trespass upon your Lordships' time by going over the ground again. I may observe that this being an appeal upon a question of fact, it would not have been sufficient far the appellants to have raised a doubt in your Lordships' minds as to whether the decision in the Court below was right. In order to obtain a reversal of that decision it was necessary for them to prove satisfactorily and conclusively that the decision was wrong. Now, the title of Alexander, and of course the title of his sisters, the other respondents, as the next of kin, appears to me to be satisfactorily established. On the other hand, the evidence in support of the case of the appellants is so meagre and, to say the best of it, so obscure and uncertain, that I must necessarily arrive at the same conclusion to which Lord Neaves came when he said it was a case not proven.

LORD COLONSAY—I have nothing to add to what has been said by my noble and learned friends. I quite agree.

LORD CAIRNS—My Lords, I also concur in the order which is proposed to be made, and the reasoning by which it has been supported by my noble and learned friend on the woolsack. It has appeared to me throughout the case that, as regards the title of the respondents, their pedigree was made out with reasonable clearness. The evidence in support of their pedigree, considering that it was the evidence, not of documents, but of witnesses, is perhaps as clear as in a case of this kind you might expect it to be. As regards the evidence upon which the appellants would establish their case, it appears to me to be evidence upon which it would be impossible to act. If it is analysed it really is reduced to this,—that except what conclusions are attempted to be drawn from the story about the stone which rolled down the hill, as to which I entirely agree with what my noble and learned friend upon the woolsack has said; and with the exception of the statement, repeated by a female witness, who was brought forward by the Crown, as to what she says she heard from her father, there is no evidence whatever which could even have the appearance of supporting the case of the appellants. As regards the statement of that witness, I will not repeat what has been said about it so often. It is evidence upon which I think it would be impossible for your Lordships to act. It appears to me that the appellants have entirely failed to make out their case, as they have also to impeach the evidence of the respondents.

Counsel for Appellants—Anderson, Q.C., and Robertson. Agents—W. G. Roy, S.S.C., and R. M. Gloag, Westminster.

Counsel for Respondents — Cotton, Q.C., and M'Naughton. Agents—T. J. Gordon, W.S., and Wm. Robertson, Westminster.

HIGH COURT OF JUSTICIARY.

Wednesday, June 4.

NISBET *v.* CAMERON.

Appeal—24 Geo. II. c. 40 (Tippling Act)—Admission.

In an action in the Small Debt Court, the defender admitted a certain proportion of the debt for spirits, &c., and the Sheriff gave at