subject of inquiry after his death within eighteen months of his compromise? I think it is not necessary for me to pursue this line of observation. One of the learned Judges I think has not exaggerated the state of facts when he points out the number of deaths that have intervened, and the impossibility at this distance of time of disentangling what could have been very easily disentangled and ascertained if an earlier investigation had taken place.

I do not propose to differentiate Mr Watt's case from the case of Mr Bain, although to some extent there is a difference between them. All I shall say about either of them is, that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done. I think I should expect some evidence to be produced contradicting that state of things rather than insist on evidence in its support at this distance of time, and with the loss of evidence that undoubtedly has occurred from the delay that has taken place. I should be content to rest my judgment on the language of the Lord Ordinary himself, in which, on both occasions, he has pointed out, I think with great force and accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here, that is to say, they have lain by upon their supposed rights all this time during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time when both the opportunities of explanation have gone by and when witnesses have passed away.

Under these circumstances I move your Lordships that both these appeals be allowed, that the judgment of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN—I concur. I think the judgment of the Lord Ordinary is perfectly sound, and I think it ought to be restored,

LORD DAVEY—I also agree.

The case has been so copiously considered in the Court of Session in the numerous judgments, to which I have given my best attention, that I think I should not be justified in saying more than that I agree with Lord Kyllachy, Lord Young, and Lord Moncreiff.

I only wish to add this, that in coming to this conclusion I am not treating *mora* or delay as a plea-in-law. I do not think it is a plea-in-law, but I think the lapse of time is a circumstance which ought to be taken into account and ought largely to influence our estimate of and the conclusion we come to upon the facts of the case.

LORD JAMES OF HEREFORD—I also concur.

LORD ROBERTSON—I entirely agree in the general principles stated by the Lord Chancellor as applicable to an action of this nature, brought after this lapse of time. For a more detailed examination of the facts of the case I would refer to the judgment of Lord Kyllachy in each case, entirely concurring, as I do, with all that his Lordship has said.

Interlocutors appealed from reversed with costs.

Counsel for the Pursuers and Respondents — Clyde, K.C. — Leadbetter—F. C. Thomson. Agents—J. & D. Smith Clark, W.S., Edinburgh—Arthur E. Baker, London.

Counsel for Bain's Trustees, Defenders and Appellants—Haldane, K.C.—Ure, K.C. —Tait. Agents—Davidson & Syme, W.S., Edinburgh—J. & J. Galletly, S.S.C., Edinburgh—Faithful & Owen, Westminster.

Counsel for Phillips' Trustees, Defenders and Appellants—Haldane, K.C.—Ure, K.C. —Hunter. Agents—J. & J. Ross, W.S., Edinburgh—Renshaw, Kekewich, & Smith, London.

Friday, July 28.

(Before the Lord Chancellor (Halsbury) and Lords James of Hereford and Robertson.)

M'EWAN *v.* WATSON.

(In the Court of Session November 18, 1904, reported *ante*, p. 213, and 7 F. 72.)

Reparation—Slander—Privilege—Privilege of Witness—Privilege in Precognition.

Held (*rev.* the judgment of the Second Division) that the privilege which protects a witness for statements made by him in the witness-box protects him also for statements made in precognition.

This case is reported *ante ut supra.*

There was taken with it another case, *Jones* v. *Watson,* arising out of the same facts, raised by James Jones, the father of the female pursuer in the first case, Mrs Jessie Prentice Jones or M'Ewan, against the same defender, Sir Patrick Heron Watson, Kt.

The defender appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—When one examines these two appeals I think it is impossible to say that any different question arises in the one from that which arises in the other. The same judgment is applicable to both.

When one examines with care the different allegations made in the condescendences and the answers I do not think any question arises as to the confidential nature of the employment between patient and medical man. I do not propose to express any opinion upon what would be the legal determination of that question if it arose. It may be that it raises very serious and

difficult questions, and I certainly am not disposed to express an opinion either way in respect of questions which upon other grounds have no difficulty at all in their solution. The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a court of justice it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House, it has been decided that the privilege of a witness—the immunity from responsibility in an action when evidence has been given by him in a court of justice—is too well established now to be shaken. Practically, I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.

But then comes the question which, so far as I know, has been raised for the first time in this case. The ingenious suggestion has been made that although it is true that a witness is protected from an action in respect of evidence actually given in a court of justice, yet no such protection exists in respect of his attendance before the solicitor at what is called apparently in Scotch law his precognition—what we call the interview between the intended witness and the solicitor who takes from him what we call the proof—that is to say, reduces to writing the evidence which the witness is about to give. One very serious element of difficulty which those who insist upon such a liability have to meet is manifest, namely, that in the whole course of the diligent inquiry that the learned counsel on both sides have made into this matter they have not found that any such liability has ever been sought to be established before. So far as I know personally in my experience no such question has ever arisen. The learned Judges who have allowed these issues have done so apparently for the first time in this case.

It appears to me that the privilege which surrounds the evidence actually given in a court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of the proceedings in courts of justice, when what is intended to be stated in a court of justice is narrated to them, that is, to the solicitor or Writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply, that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." If that could be done, the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything, I may have an action brought against me to-morrow if I do, therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

The hardship to which I refer is this — that although when a witness does give evidence which is wilfully false you can indict him for perjury; on the other hand, if he makes the same statement not upon oath to a person taking down the evidence he is prepared to give, it seems to be very difficult to devise anything that would bring him to justice for that false statement. The answer, of course, dealing with it as a matter of convenience and indeed of necessity for the administration of justice, I suppose is this—unless he does give evidence in a court of justice, in which case he can be indicted for perjury if his evidence is wilfully false, nobody knows anything about it—it slumbers, I suppose, in the office of the solicitor, and nobody hears or cares anything about it. Practically I think that would be the answer. But whether that would be a good answer or not, what seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all, and that there is that protection established is, as I have already said, beyond all possibility of doubt.

The reason why I think that this is the only question that arises is this. It is true that the gentleman sued is an eminent medical man, and that there is a mixture of the points both in the condescendence and in the answers which has rather tended to confusion, but if one comes to look with care at the different forms of procedure one sees that everything that passed—everything that is alleged to have passed—passed between the defender and those who were engaged in the legal business. The communication complained of is no communication to strangers—to persons outside the litigation. The commu-

nication, such as it is, was made to the counsel and to the solicitor who were taking down the evidence. Under those circumstances it seems to me that it comes within the whole mischief of the supposed liability of a witness for what he has stated. I do not care whether he is what is called a volunteer or not, if he is a person engaged in the administration of justice, on whichever side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth it matters not on whose behalf he is called as a witness—in respect of what he swears as a witness he is protected. That cannot be denied, and when he is being examined for the purpose of being a witness, he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness-box, would be worth nothing.

Under those circumstances it appears to me that there is but one point in this case, namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed, and I move accordingly.

LORD JAMES OF HEREFORD—I concur in the result which has been arrived at, and for the reasons which have been expressed by my noble and learned friend on the Woolsack.

LORD ROBERTSON concurred.

Interlocutor appealed from reversed with costs.

Counsel for the Pursuer and Respondent—Haldane, K.C.—C. D. Murray. Agents—Drummond & Reid, W.S., Edinburgh—Neish, Howell, & Haldane, London.

Counsel for the Defender and Appellant Campbell, K.C.—Younger, K.C.—Agents—J. P. Watson, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Friday, August 4.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, James of Hereford, Robertson, and Dunedin.)

LORD ADVOCATE *v.* EARL OF MORAY'S TRUSTEES.

(*Ante*, February 2, 1904, 41 S.L.R. 267, and 6 F. 347.)

Revenue—Estate-Duty—Entail—"Person having a Limited Interest"—Heir of Entail in Possession—Estate-Duty Paid by Heir of Entail in Possession, but not Charged by Him on the Estate—Liability of Executors of a Deceased Heir of Entail for Estate-Duty on Instalments of Estate-Duty Paid by Him—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 9 (6).

The Finance Act 1894 by section 9 (5) makes provision that the person required to pay the estate-duty in respect of any property shall have power to raise the amount of such duty by the sale or mortgage of or a terminable charge on the property or any part thereof. Section 9 (6) enacts—"A person having a limited interest in any property, who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

Held 1st (approving the judgment of the First Division in *Laurie*, February 22, 1898, 25 R. 636, 35 S.L.R. 496) that an heir of entail in possession is "a person having a limited interest" in the estate in the sense of the statute; and 2nd (*diss.* Lord Robertson—*rev.* judgment of the First Division) that the executors of a deceased heir of entail are liable for estate-duty upon instalments of estate-duty paid by him, although no steps had been taken by him to perfect the charge on the estate, the instalments forming by force of the statute, and without any such steps being taken, a charge upon the estate transmissible by him and carried to them.

Opinion (*per* Lord Dunedin) that the charge upon the entailed estate formed by the instalments of estate-duty paid by the heir of entail in possession could be perfected by his executors by means of adjudication.

Statute—Interpretation—Application of Imperial Statute to Scotland—Imperial Statute Conceived in Terms Inappropriate to Scotland.

Observations on the application to Scotland of an imperial statute conceived in terms inappropriate to Scotland.

The case is reported *ante ut supra.*

The Lord Advocate (pursuer) appealed.

At delivering judgment—

LORD CHANCELLOR—This case turns upon the 6th sub-section of section 9 of the Finance Act 1894. As I understand it, the question is whether a sum of £37,740 which had been paid by the late Earl of Moray in respect of estate-duty formed a transmissible interest so that the Crown could claim duty upon it.

Two questions of a very different character appear to me to arise—one is whether the heir of entail, as the Earl was, is a limited owner within the meaning of the 6th sub-section. I do not think it necessary to discuss that question at length, inasmuch as I understand that that point has been decided in Scotland, and I see no reason to question the propriety of the decision.

The other question appears to arise in respect of the appropriateness of the mode and manner by which the statute is to be effective in Scotland. Now, to my mind the objection is of a character that would apparently displace the authority of the Legislature in respect of the technology of