

sua natura, has become heritable destination because of its dedication by the tenant.

Now, this view is plausible, and the argument has some force. If a proprietor by annexing machinery to his own heritable property sends it with that property to his heir—so may not a tenant by annexing machinery to his lease, or to the subject of his lease, send such machinery with the lease to his heir? But I think there are conclusive answers. In the first place, if the destination or dedication by the tenant is all that can be relied on—and on this branch of the argument there can be nothing more—then the tenant's destination would be equally applicable to unfixed machinery as to the fixed. There would be no room for destination—the waggons and rolling stock are as much dedicated to the colliery as the rails are—and a locomotive may be as necessary for the successful working as a fixed engine. But no one presses destination this length, and yet if it is worth anything it must logically reach the whole plant.

Precisely the same argument would carry a whole farm stocking and implements to the heir along with the lease of an ordinary farm. But I need not say that such a claim has never been dreamt of.

The truth is that the destination of the tenant has really nothing whatever to do with the present case. And there is no room in the present case for the application of the principle, that a proprietor of moveable subjects may in a question as to his own succession make them heritable destination.

And this leads me to notice one of the specialties of the present case—that there is here no intestacy, no question of intestate succession, or of presumed will or implied destination by the deceased. Both Robert Brand senior and Robert Brand junior died *testate*. Robert Brand senior expressly conveyed every thing he had, heritable and moveable, to his trustees for behoof of his son, and his son Robert Brand junior expressly conveyed everything he had or could give to his trustees. The competing claimant Alexander Brand and his trustees can only claim as heir-at-law what was not carried by Robert Brand junior's deed. Implied destination must always yield to expressed will, and a thing heritable at *sua natura*, but merely *destinatione*, will not go to the heir if the absolute proprietor expressly says it shall not go to his heir but to his trustees. Now this is the case here. The destination or implied wills of Robert Brand senior or of Robert Brand junior are out of the question, for we have the express will of both of them, and both exclude the competing claimant Alexander Brand. Accordingly, if the element of destination must be laid out of view, as I think it must, and if the machinery in question is not heritable *sua natura*, then it must be held as moveable *quoad omnia*, and the property of the trustees of Robert Brand junior.

Still farther, and upon the same specialty which I have now pointed out, I am of opinion that, even if it should be held that the fixed machinery was heritable on a question as to the tenant's intestate succession, still it was effectually carried by the trust-deed of Robert Brand junior.

No doubt Robert Brand junior died in minority, and a minor cannot *mortis causa* convey his heritable estate; but this only applies to proper heritage, that is, to subjects heritable *sua natura*. It does not extend to what is heritable merely *destinatione*; for example, to take a well-known case—loose stones intended for a building in progress,

and brought to and laid down on the ground beside it, but not yet built into it, are heritable *destinatione* if the proprietor dies while his building lies unfinished. But this is a mere presumption, and if the proprietor had expressly bequeathed the loose stones to his executor or to a third party, his heir-at-law could not claim them—presumption must yield to fact.

Robert Brand junior, though a minor, might have separated the fixed machinery in question and sold it or carried it elsewhere, (I mean apart from the provision of his father's trust) and if so, I think he could bequeath it by testament. He has actually done so to the claimants his trustees. If this last view is sound, it would by itself suffice for the determination of the case. But while I go upon both grounds, I prefer to rest my judgment mainly upon general doctrine, which I think is fixed by *Fisher v. Dixon*, that a mere tenant's trade fixtures in an ordinary case are moveable *quoad* succession and descend to his executors.

I am of opinion, therefore, that the second finding of the Lord Ordinary should be recalled, and that the whole machinery in use at the colliery, whether fixed or unfixed, should be held to be moveable, and belong to the trustees of the late Robert Brand junior.

As under the agreement between the claimants the machinery is to be taken by Alexander Brand's trustees and only its value paid to Robert Brand junior's trustees, if the parties are agreed as to the value and as to the amount of profits and of rents the case may now be exhausted.

The other Judges concurred.

The Court recalled the second finding of Lord Shand's interlocutor, and held that all the machinery therein referred to was moveable in a question as to the tenant's succession; *quoad ultra*, they adhered, finding Alexander Brand's trustees liable in expenses.

Counsel for the Trustees of Robert Brand junior—Dean of Faculty (Clark), Q.C., and Readman. Agent—E. Mill, S.S.C.

Counsel for Alexander Brand's Trustees—Solicitor-General (Watson), Q.C., and Mackintosh. Agent—A. Morrison, S.S.C.

[R., Clerk.]

Thursday, December 3.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

MATHIESON v. GIBSON, *et e contra*.

Property—Servitude—Possession.

A raised an action of declarator against B, the next proprietor, to have it found that a certain strip of ground between two walls where the properties adjoined was his exclusively by title and prescriptive possession, and that it was unburdened by servitude. The defenders for upwards of 40 years enjoyed an eavesdrop, and their buildings also had a row of windows looking into the said strip.

Held that the defenders had failed in the circumstances to prove any exclusive title or exclusive possession.

Observed that the eavesdrop formed a strong item of evidence of property in the defenders in absence of other proof.

These were conjoined actions raised by John Anderson Mathieson and others against William Walker Gibson, *et e contra*.

The Lord Ordinary, by interlocutor of 25th July 1874, found that the pursuers in the action of declarator had failed to prove that the stripe of ground in question was their exclusive property, and *separatim*, that they had also failed to prove that the stripe of ground was unburdened by any right of servitude pertaining to the defenders. His Lordship therefore, in the action of declarator, assolized the defenders, and in the action of suspension at the instance of William Walker Gibson and others, recalled the interim interdict already granted, and in place thereof, interdicted the respondents from building upon the said stripe of ground above mentioned any other or different buildings than the buttresses now existing upon it. Further, he ordained the respondents to take down a piece of new wall they had erected, and to restore the stripe of ground to the same condition in which it was prior to the erection of the said new wall. The particulars are fully set forth in the Note to this interlocutor, which was as follows:—

“*Note*.—These conjoined actions of declarator and of interdict relate to a stripe of ground about 2 feet wide and 175 long, situated between the west or south-west wall of Messrs Gibson & Walker's granaries, and a wall belonging to or claimed by the proprietors and tenants of the Bonnington Chemical Works, which wall runs parallel with the wall of Messrs Gibson & Walker's granaries.

“Into this very narrow space or stripe of ground the whole western windows or openings of Messrs Gibson & Walker's granaries look, said windows or openings being 73 in number, and by means of these windows the granaries are ventilated from the west. In order to this ventilation it is essential that this stripe of ground be kept open and unbuild upon. The water from the roof of the granaries is carried away by roans which project into this space, and by conducting pipes which are in this space, and are led down the west face of the granary wall, and which connecting pipes open into drains which are constructed partly in the space in dispute, and are led thence under the granaries and in an easterly direction. The scarcements or foundation of the granary wall also projects into the space or stripe in dispute, so that the west granary wall really rests partly upon the space or stripe of ground now in dispute. These circumstances will be again adverted to, but it is proper to keep them in view at the outset.

“The Bonnington Chemical Company have recently proposed to build, and have actually commenced to build, a wall on the stripe of ground now in question, which wall is close to and abuts upon the west face of the granary wall. The effect of this wall, if completed, would be entirely to close up the whole 73 windows or openings in the granary wall, and to destroy the ventilation of the granary from that side. It would also interfere with, or at all events would enclose and cover the roans, conducting pipes, drains, and scarcements connected with the granary wall, and the question really is, Have the proprietors and tenants of the Bonnington Chemical Company right to do this? In other words, Are the proprietors of the Bonnington Chemical Company absolute and unlimited proprietors of the stripe of ground in question, so as to enable them to build it over or do what they like with it, without

regard to the injury which they may thereby inflict on Messrs Gibson & Walker, the proprietors of the granary?

“It may not affect very materially or very deeply the merits of the question between the parties, but it is not altogether irrelevant to observe that the proposed operations of the Bonnington Chemical Company, in building a new wall close to the granary, while it will be very injurious to the granary, perhaps ruinous to it, will not appreciably benefit the Chemical Company or their works. It will cost a good deal of money, but it is no way necessary for the works of the Chemical Company. The existing wall, which leaves a space of two feet between it and the granary, answers every purpose of the Chemical Works; and it rather appears that the proposal to block up the whole 73 windows of the granary, while it may possibly be legal, is at least an act *in emulationem vicini*. It will damage the suspenders, but it will not materially benefit the respondents. The real explanation of it is, that the parties are on bad terms with each other,—see the cross-examination of the respondent Dr Ronalds. Without resting much on this circumstance, it may perhaps *in dubio* turn the scale. It is the Chemical Company who are changing the *status quo*; and, doing so emulously, it lies upon them clearly or sufficiently to instruct their right to do so. The Lord Ordinary thinks they have failed to discharge this onus, and he has therefore declined to affirm the conclusions of their declarator, and he has granted in part, but not wholly, the prayer of the suspender's note of suspension and interdict.

“The leading action is of course the action of declarator at the instance of the proprietors and tenants of the Bonnington Chemical Company, and although the suspension was first in Court, the Lord Ordinary will in this note call the proprietors and tenants of the Chemical Company, pursuers, and Messrs Gibson & Walker, defenders.

“A long proof has been led, tracing, as far as can be done, the history and the possession of the properties of the pursuers and defenders. The title-deeds and a number of plans have been recovered, and both parties have endeavoured to fix and show what is the true boundary between their respective properties. But although the question of boundary, that is, the question what is the true boundary between the properties? is most material, the Lord Ordinary is not called upon to decide it under the present actions. It is enough for the conclusions of both actions if the pursuers fail to instruct that they are the exclusive proprietors of the stripe of two feet, or if it shall appear that the defenders have a right of servitude over these two feet which would prevent building. Accordingly, the pleas of the parties divide themselves into pleas regarding property and pleas regarding servitude. It will answer the defenders' purpose, and be sufficient for their success, at least to a great degree, if they can establish a servitude of eavesdrop, or of air and light.

“On a review of the whole evidence of the cause, including title-deeds, plans, and oral testimony, the Lord Ordinary is of opinion—*first*, That the pursuers have failed sufficiently to instruct that they are the exclusive and absolute proprietors of the stripe of ground in question. It may be common property, or it may be the property of the defenders—it is enough that the pursuers have failed to show that it is exclusively theirs; *Second*, The

Lord Ordinary thinks that even if the stripe in question were held to be the property of the pursuers, the defenders have sufficiently instructed a servitude of eavesdrop, and a servitude of light and air over the same. Avoiding all details, the Lord Ordinary will, in as few words as possible, indicate the grounds on which he has come to the above conclusion. He cannot say he has done so without hesitation or difficulty, for he feels, as often happens in reference to stripes of ground situated like the present, and where possession has been very equivocal, that there is great room for difference of opinion.

"(1) The titles of the respective subjects throw no light whatever on the question. The ground of both parties was formerly agricultural, and the old descriptions, which are quite general, have been retained. The properties at the points now in dispute are simply bounded by each other, and this of course refers to the state of possession.

"(2) Nor can much assistance be obtained from the plans produced. None of these plans are very old, and the older plans, indeed all the plans, show or indicate an interval or space between the buildings which ultimately came to stand upon the pursuers' property, and those which ultimately came to stand upon the defenders' property. This space left unbuild upon varied slightly in shape and extent from time to time, but it was never covered over, and, at least to the extent of the two feet now in question, it was never built upon at all. For some reason or other it was always left open between the properties. This is an important fact, and it goes at least some way in the present controversy.

"(3) The earliest trace we have in evidence of an actual fence, which might have a claim to be regarded as fixing the boundary between the properties, is the old hedge spoken to by the older witnesses, and which seems to have stood somewhere in the line or about the line of the defenders' present granary wall. The pursuers contend that this hedge was the march between the properties. They maintain that the line of boundary must have been the centre of the stems of the thorn bushes composing the hedge, and they submit it to be proved sufficiently that this line of boundary coincides with the west face of the defenders' granary wall. In short, the pursuers say that the defender's authors must be held to have built up to the extreme verge of their property, and that they must be held to have taken the chance of having their lights or air openings built up at the pleasure or even at the caprice of the pursuers.

"The pursuers' contention is not without force. There is always a presumption for a boundary being in a straight line, and the witnesses speak of the hedge as being in a line with the east wall of the pursuers' barrelling-house, which wall, whether mutual or not, is undoubtedly a boundary wall.

"But really the hedge, even if its exact position were now known, does not go far to solve the present dispute. It was an old hedge of some considerable size, and may fairly be taken to stretch two feet on either side of its central stems. Now if the hedge were the exclusive property of the defenders authors, and even if they built up to its central line, which is not proved, this would still give them two feet outside their wall, which would be enough for the present dispute. It is quite possible, and indeed very often happens, that a proprietor, especially a proprietor requiring numerous windows and air-holes, takes care to build a few feet within his property.

"(4) It is proved that the defenders always had windows or openings into the stripe in question, and enjoyed light and air therefrom. It is quite true that in the ordinary case this circumstance would have little weight, for a servitude of light and air cannot be acquired by mere possession. It is a negative servitude, and in such servitudes the proprietor of the alleged servient tenement can never be burdened merely because he has not chosen to build on his property. But the circumstances of the present case are very peculiar, for the pursuer's authors, actually building upon their property, have always *ex proposito* and carefully left a small space between their buildings and has been done for far more than the prescriptive period; and no reason can be given why a space was always left, excepting this, that the pursuers' authors had no right to build upon and cover it up.

"Besides, it is not a mere question of servitude. It is also a question of property; and in the absence of all positive proof it is an element in determining of boundary that the pursuers and their authors have always left the stripe in question open and unbuild upon. It is not difficult to presume that what has always been left open during many successive changes has been so left open because of contract, and because there was no right to cover it over.

"(5) The proof as to possession of the stripe in dispute, or of the somewhat wide stripe of a wedge shape, which existed before the erection of the wall of 1856, is conflicting. The truth seems to be, that except being left as an open space there was really very little possession at all. Rubbish accumulated in the space as rubbish will always accumulate on any enclosed but unoccupied ground, and there is evidence that both parties and their authors used to keep old barrels or similar things there. At one time also it is plain enough that there was an entry into the space from the premises of the defenders, although the history of this entry is left in great obscurity.

"(6) It is completely proved that for far more than 40 years the defenders and their authors have enjoyed an eavesdrop into the stripe or space in dispute. The first building on the defenders' property was a range of malt barns, which stood on the same ground now occupied by the defenders' granaries. It is abundantly proved that these old malt barns had an eavesdrop into the space in question, besides having their windows opening into it.

"Now, apart altogether from servitude, this eavesdrop is an assertion of property on the part of the defenders. When the old hedge was taken away there could have been no servitude of eavesdrop, and the fact that the eavesdrop of the malt barns which succeeded the hedge fell into the space in question, seems pretty conclusive that the malt barns were not built close up to the limit of the defenders' property. The fact of the eavesdrop is a proof not of servitude but of actual property in the defenders. In the absence of evidence pointing to servitude, eavesdrop is a proof of property. See *Scoullar v. Pollock*, 24th January 1832, 10 S. 210 (1st ed., p. 241), and other cases.

"(7) The same assertion and presumption of property arises from the fact that the defenders have always, and for far more than 40 years, had the scarcement—that is the foundation-stone of their property—projecting into the space in question, although of course below the surface. It is proved that the scarcements of the defenders' existing granary project into the space in dispute, and al-

though there is no direct evidence as to the scarcements of the old malt-barn wall, yet, as that wall was exactly replaced by the granary wall, and as it must have had scarcements of some kind, possession by scarcements seems established. There can be no stronger assertion or proof of property and possession than when a man lays his foundation-stones upon the ground in dispute. It was expressly held by the House of Lords in *Gillespie v. Russell* that the scarcements and foundations are proper parts of a house, so that when mining is allowed a certain distance from a house, the distance must be measured from the most projecting part of the foundation-stones.

"The formation of roans, outside conducting pipes, and drains all over or actually in the space in dispute, points to the same result, and this whether these be regarded as an exercise of the right of property or of servitude. It is in the first aspect that they seem to the Lord Ordinary to have most importance. He thinks that all these things must be held to have been done by the defenders within their own property.

"(8) But even on the question of servitude, the Lord Ordinary thinks the defenders' case sufficiently established.

"It seems clear that the defenders have enjoyed the right of eavesdrop for more than forty years. The pursuers' only answer to this part of the case was that the defenders' right of eavesdrop had been challenged in the correspondence which took place between the agents in 1867, and this correspondence was referred to as 'interrupting' prescription. The Lord Ordinary cannot so regard it. Even if the challenge had been much more distinct than it was, it was not followed up in any way whatever. It did not interrupt the defenders' enjoyment and possession, nor could it stop the course of prescription. A challenge not followed up, for example in right of way cases, where the public openly disregard the challenge and continue to use the road in spite of it, is often a very strong point not in favour of the challenger but against him. So here a threatened interruption not carried out strengthens the defenders' case.

"The same remarks apply with even greater force to the enjoyment of the space in dispute for scarcements and for drains. It may be true that mere servitude, assuming the defenders' right to be no higher than servitude, might not give them the whole space in dispute, but only nine inches or so, certainly not more than a foot. But even this would be enough to destroy the pursuers' case, which is, that they are entitled to build up the defenders' 73 windows, without leaving a straw breadth.

"(9) There is a separate point, not without weight, in the defenders' favour, and that is presumed contract,—a contract to leave to the defenders the space in question for light and air. This comes out very strongly from the mere fact that in 1856, when the pursuers built their existing wall, they built it two feet away from the wall of the defenders. No doubt Dr Ronalds says this was done merely from good neighbourhood, but there is no other evidence of this, and the existence of contract or obligation is a likelier supposition. If the pursuers had attempted in 1856 to build the wall where they are now proposing to build it, the present question would have then arisen, and clearer evidence might have been got then as to the rights of parties. It is not unfair to hold the pursuers' act in 1856 as a virtual acknowledgment of the defenders' right. Apart from the legal question, the

pursuers should be as neighbourly now as they say they were in 1856.

"On the whole, while admitting the difficulty and intricacy of the case, the Lord Ordinary holds that the pursuers have failed to establish their right in the narrow stripe in question.

"In reference to the interdict, however, the Lord Ordinary thinks that its prayer is too broad. He is not prepared to affirm that the defenders have any right to the wall built by the pursuers in 1856. The pursuers built that wall at their own hands and at their own expense. They seem to have yielded to a request of the defenders not to make it higher, but there is no evidence that the defenders have any right of property therein. The Lord Ordinary is not prepared to interdict the pursuers from taking down that wall if they think proper. They built it at their own hands in 1856, they may take it down at their own hands in 1874. As the defenders have been substantially successful they seem entitled to expenses."

Mr Mathieson reclaimed.

At advising—

LORD JUSTICE-CLERK—My Lords, we have in the summons in the action of declarator, which is here conjoined with the process of suspension and interdict, conclusions in the first place for an exclusive right of property, and secondly for declarator that such exclusive right is unburdened by servitude. Now, if the right of property be not proved, it of course becomes unnecessary for the Court to go into the question of servitude at all.

On the question as to exclusive right of property I may observe that—(1) The titles afford no assistance in the determination of the point. (2) There is no other writing of the nature of a contract between the superior and the proprietor, or between two conterminous proprietors. The plans partake not of this character, and there is no evidence whatever adduced of right to these imaginary boundaries. (3) Were there any proof of formerly-existing physical boundaries, this might throw some light on the matter. But is this so? Certainly the hedge would have been important in settling the question if it were clear in what line that hedge formerly ran, and that it had been regarded as a mutual boundary. That, however, is not clear, and here also the pursuer has failed. (4) Lastly, I would notice the question of actual possession. Undoubtedly there has been some possession, but not of an exclusive nature; and as to whether it has been a possession of right or of tolerance it is not necessary to decide, for the fact remains that it has not been exclusive. In 1856 pursuer built the existing wall which certainly extended so far but not up to the granary wall—it was two feet back from that. The buttresses certainly do occupy part of the space, but there is here an ambiguity as to the possession, because the witnesses state that these buttresses were necessary for the support of the wall which would otherwise have fallen against the granary and injured it. Accordingly, this reduces the matter as regards the buttresses merely into an acquiescence; there is no yielding of property. The eavesdrop which it is clearly proved that the defenders have enjoyed for more than 40 years, is a much stronger exercise of the right of property. The granary windows are at least a strong evidence of the understanding of the proprietor.

My Lords, it is not in my opinion necessary to go any further. The correspondence would not have interrupted prescription. I am for adhering on the ques-

tion of property, and I would assolzie the defender from the conclusions of the action of declarator.

LORD NEAVES—I think it is important in this case to observe how the question arose. The pursuers were not contented to stand upon the possessory rights which they allege, but they raised an action of declarator, and practically say, "you must find in favour of somebody, and you must decide in my favour." No further issue was raised than the exclusive title of the pursuers or their exclusive possession. I cannot see any possession here save one of a mixed character, and it is quite possible that this may have followed upon some old arrangement by conterminous owners for their mutual convenience and benefit. It would have been most injudicious on the part of the defenders had they prohibited the erection of the buttresses.

LORD ORMIDALE concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against, and, in place thereof, find that the pursuers in the action of declarator have failed to prove that the space described in the summons, lying between the western and south-western wall of the granary, or range of granaries, erected on the defenders' property, and the wall erected parallel to the said granary wall, and at a distance of about two feet therefrom, is the exclusive property of the pursuers in the said declarator: Therefore, in the said action assolzie the defenders from the whole conclusions of the action, and decern; and in the action of suspension and interdict at the instance of William Walker Gibson and others, being the other of the present conjoined actions,—Recal the interim interdict already granted, and in place thereof, and of new, interdict, prohibit, and discharge the respondents in the said process of suspension and interdict from building upon the said space above mentioned any other or different buildings than the portion of stone wall and the brick buttresses which were erected upon the said space or part thereof prior to the recent operations of the said respondents complained of in the said suspension and interdict, and decern; further, decern and ordain the respondents in the said process of suspension and interdict to take down and remove a portion of new wall which the said respondents have recently erected upon a portion of the said space, which new wall is close to and abuts upon the wall of the suspenders' granary, and which closes up certain windows or openings in the said granary; and decern and ordain the said respondents to restore the said space to the same condition in which it was prior to the erection of the said new wall now ordered to be removed: *Quoad ultra* refuse the prayer of the note of suspension and interdict, and decern: Find the defenders in the action of declarator, and the suspenders in the action of suspension and interdict, entitled to expenses in both actions and in the conjoined actions," &c.

Counsel for Pursuers (Reclaimers)—Solicitor-General (Watson), Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Clark), Q.C., Asher, and G. Watson. Agents—Morton, Neilson, & Smart, W.S.

[J., Clerk.

Tuesday, December 8.

FIRST DIVISION.

LARKIN V. M'GRADY.

Lunatic—Cognition of Insanity—Title to Sue.

Held that a person who was cousin-german of the lunatic, and immediate younger brother of the nearest agnate, had a good title to sue out a brieve of insanity.

Lunatic—Cognition of Insanity—Act of Sederunt, 3d December 1868, § 6.

In a cognition of insanity in which the pursuer and claimant was not the nearest agnate, the Jury delivered a verdict in which they cognosed in terms of the brieve, found that the pursuer was not nearest agnate, nor the heir-at-law or next of kin of the respondents, and that A was the nearest agnate, and was of lawful age. *Held* that this was not one of those cases in which, in terms of the provisions of section 6 of the Act of Sederunt of 3d December 1868, no other verdict than one of Not Proven could be returned.

This was a Bill of Exceptions in a cognition of insanity in which Edward Larkin was pursuer, and Edward M'Grady was respondent. The Bill of Exceptions was in the following terms:—

"Whereas a brieve from Chancery, dated the 23d day of September in the year 1874, was presented to the Lord President of the Court of Session, commanding him in the Queen's name to inquire whether the said Edward M'Grady, respondent, is insane, who is his nearest agnate, and whether such agnate is of lawful age:

"And whereas, on 20th October in the year 1874 the Lord President appointed the said Edward Larkin, pursuer and claimant, who claimed the office of curator, to lodge his claim to the said office within eight days, and the said Edward M'Grady, or other party claiming to appear as respondent, to lodge answers, if so advised, within eight days thereafter:

"And whereas, at Edinburgh, on Monday the 23d day of November in the year 1864, before the Right Honourable the Lord President of the Court of Session, the said brieve came to be tried by a special jury; on which day came there as well the said claimant as the said respondent by their respective counsel and agents; and the jurors being called, also came and were then and there in due manner empannelled and sworn to try the said brieve.

"And upon the trial of the said brieve, the counsel for the claimant having in his opening address to the jury admitted that the claimant is not the nearest male agnate, but only the younger brother of the nearest male agnate, and that he is neither the heir nor one of the next of kin:

Counsel for the respondent contended—

"(1.) That the claimant had no title to purchase the brieve, and the jury ought therefore to be discharged, or directed to find a verdict of not proven;

"(2.) In respect of the above admission, and of the provision of section 6th of the Act of Sederunt, 3d December 1868, no other verdict than one of not proven could be returned.

"The Lord President allowed the trial to proceed, reserving the effect of the above objections for the consideration of the Court.