REPORTS OF SCOTCH APPEALS
IN THE HOUSE OF LORDS.

MAY 8, 1851.

JOHN EDWARD GEILS, *Appellant*, *v.* MRS. FRANCES DICKENSON or GEILS, *Respondent*.

Appeal to House of Lords—Competency—Right to begin, Stats. 48 Geo. III. c. 151; 6 Geo. IV. c. 120—Husband and wife—Foreign divorce—Dilatory plea—*G., a domiciled Scotsman, sued his wife in England for restitution of conjugal rights, when she claimed and obtained a divorce* a mensâ et toro, *then the largest remedy allowed in England. She next sued him in Scotland for a divorce* a vinculo *founded on the same acts of adultery, when he set up the defence of* res judicata.

HELD *that G.'s plea was a peremptory and not a dilatory defence, and, therefore, on the Court of Session repelling it, he could appeal without leave of the Court, notwithstanding* 6 *Geo.* IV. C. 120, § 5.

HELD FURTHER, *that when a respondent presents a petition praying that the appellant's appeal be dismissed as incompetent, and the Appeal Committee orders that single point to be argued at the Bar, the respondent has the right to begin.*[1]

A Scotsman domiciled in Scotland married an Englishwoman in England. He immediately afterwards returned with his wife to Scotland, for the purpose of taking up a permanent residence there. A few years afterwards, the wife left her husband, and returned to England. The husband then proceeded against his wife, in the Arches Court of Canterbury, for restitution of conjugal rights. The wife appeared in the suit, and pleaded, in the form of a "responsive allegation," said by English counsel to be in law equivalent to a counter action of divorce, that she was entitled to divorce *a mensâ et toro*, on the ground of adultery and cruelty committed by the husband in Scotland. Decree of divorce *a mensâ et toro* having been pronounced in her favour in that suit, that being the largest remedy then available in England, she then brought an action in Scotland for the greater remedy of divorce *a vinculo matrimonii*, against which the husband pleaded in defence that she was barred therefrom by the remedy she had obtained in the English Court. The Court of Session repelled the defence.

After the date of that judgment, the husband presented an application to the Inner-House for leave to appeal to the House of Lords; but on the 22nd January, 1851, it was refused by the Court. He thereafter entered an appeal in the House of Lords, against the interlocutors of the Lord Ordinary and Inner-House, and the usual order was made on the respondent to answer. Instead of lodging answers, the respondent presented an application to the House of Lords, praying that the appeal should be dismissed as incompetent. The Appeal Committee ordered the parties to lodge cases on the objection, and directed it to be argued at the bar of the House of Lords by one counsel of a side.

The *respondent* maintained in her *printed case* that the appeal was incompetent. 1. Because the interlocutors appealed from are interlocutors repelling a preliminary or dilatory defence; and against such interlocutors no appeal to the House of Lords is competent, unless with express leave of the Court of Session, which leave has in this instance been refused.—Shand's Practice, pp. 317, 336. *Milne* v. *Gauld's Trustees*, 3 D. 345. *Smith* v. *Stoddart*, 12 D. 1185. *Laidlaw* v. *Dunlop*, 9 S. 579. 2. Because the appellant having litigated in the Court below on the footing of the defence, which has been repelled by the interlocutors appealed from, being a preliminary or dilatory defence, without any complaint or objection on his part to it being so treated, he is barred as by personal exception from now maintaining an appeal, which is competent only on the assumption that the said defence is not a preliminary or dilatory defence.

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[1] See previous report 13 D. 321; 23 Sc. Jur. 137; also later report in H. L., 25 Sc. Jur. 88, and *post* 30 Nov. 1852. S. C. 1 Macq. Ap. 36: 23 Sc. Jur. 435.

3. Because, subsequent to the defence in question being disposed of by the interlocutors appealed against, the appellant both took, and was also a party to, various proceedings in the cause in the Court below; whereby he has lost or perempted any right of appeal otherwise competent to him.

The *appellant* in his *printed case* referred to Regiam Majestatem, ch. 11. Balfour's Prac. p. 343, c. 1. Stair, 4, 39, 13. *et seq.* and appendix, 56; More's Ed. p. 792. Forbes' Inst. part IV. B. 1, c. 2, t. 1. Bankton, 4, 25, 25. Erskine, 4, 1, 66. Bell's Dict. of the Law of Scotland, p. 273, *voce* "Defences." Russell's Form of Process, p. 53. Darling's Prac. vol. i. p. 197. Shand's Prac. vol. i. p. 317. *Warrender* v. *Warrender*, 2 Sh. & Macl., 154; and see Appendix, p. 2.

Anderson, for appellant, was about to begin the argument,—

The Lord Advocate, for respondent, claimed to do so, on the ground, that as the House was not sitting to hear the merits of the appeal, but merely to dispose of a preliminary objection to its competency, the party making the objection was entitled to be heard first in support of it.

Mr. Anderson referred to the case of *Campbell* v. *Campbell*, 1 M'L. & Rob. 387, and said that the result of this hearing might be to dismiss the appeal.

[LORD CHANCELLOR.—In *Bald* v. *Kerr*, 3 S. & Macl. 47, the party objecting was heard first. There are other cases to the same effect—though certainly that of *Campbell* v. *Campbell* is the other way. When a question involving the merits is likely to occur, there may be some difficulty; but as the Appeal Committee in this instance expressly restricted the hearing to the competency, and directed the argument to be confined to the one point, as to the character of the plea involved in the appeal, I think the respondent is entitled to begin.]

Lord Advocate.—The ground of objection here depends on the construction to be given to the statute 6 Geo. IV. c. 120, which in a great measure regulates the procedure in cases of appeal from interlocutory judgments of the Court of Session. It is necessary to consider the circumstances out of which the cause arose. The appellant, a landed proprietor in Scotland, married an English lady of property, and while they were on a visit in England, she left him. He thereupon instituted a suit in the Court of Arches for the restitution of his conjugal rights, and she was advised, rightly or wrongly, to plead various acts of adultery on his part, and to conclude for a separation *a mensâ et toro.* In this course she was successful.

[LORD CHANCELLOR.—How successful? Is the form of the responsive allegation set forth in any of the documents before the Court? Do they shew she prayed substantively for a divorce?]

The documents before the Court do not contain the proceedings in the Court of Arches, but the fact was so. The important point is, however, that she was forced into the English Court, and had no alternative, as she was advised, but to plead as she did. But notwithstanding this involuntary step, it was competent for her to take the benefit of her husband's domicile, which was Scotland, and to raise her action in the Court there. The case of *Alison* v. *Catley*, 1 D. 1025, differs from this, as there was a want of *bona fides* there, and no judgment had been pronounced in the suit at the time the action was brought in Scotland. The husband in that case chose the appropriate remedy in the first instance.

[LORD CHANCELLOR.—Supposing that Mrs. Geils had herself originally petitioned for divorce, and had obtained it, you say that would make a difference?]

Yes; Scotland was the contemplated domicile of the marriage.

[LORD CHANCELLOR.—That is more a question on the merits of the appeal.]

It is doubtful if a separation from bed and board, obtained in a Scotch Court, would have been any answer to this action. The course which the Lord Ordinary took was, to call for proof of the proceedings in the English Court, and to order the opinion of English counsel to be taken for the information of the Court in Scotland, and after this was done, he repelled the preliminary defence, and the Inner House adhered to his interlocutor. It was then that the appellant, having been refused leave to appeal against that decision, thought of taking advantage of the position in which he stood.

[LORD CHANCELLOR.—There is no necessity for going into the conduct of the parties below; the sole point here is, whether, in point of law, the plea adjudicated upon is to be considered as a dilatory or a peremptory defence.]

It is difficult to define what is a dilatory and what a peremptory plea, as there are many which partake of the nature of both. According to § 5 of 6 Geo. IV. c. 120, it seems the Lord Ordinary's duty to decide whether the defence set up is of the one character or of the other. It is obvious, that unless this be a dilatory plea, he had no power to deal with it in the way pointed out by that section. But it is the everyday practice of the Courts in Scotland to treat such pleas as preliminary defences. Thus, in questions of title, if there was a plea denying the legitimacy of the pursuer, that would be disposed of in the first instance before the defences on the merits came to be entertained.

[LORD CHANCELLOR.—But what distinction could there be, in such a case of title, between the merits and such a preliminary defence? If the pursuer be not legitimate, the case is at an end. That plea goes to the merits.]

The Courts, nevertheless, are in the constant habit of so dealing with such defences, and many of those go much more into the merits than the present, which is more in the nature of a personal bar. Thus, the question of jurisdiction is more of a peremptory than of a dilatory defence, and yet it may be nothing but the latter in the case of a foreigner, who has been arrested *jurisdictionis fundandæ causâ*, and pleads that the arrestment was improperly laid on. So in all questions involving points of process or formality. A suit pending in another Court may be a dilatory defence, while a plea of *res judicata* is a peremptory one.

[LORD CHANCELLOR.—That is what the other side will say here.]

But this is not a question of law, so much as of procedure in the Courts below. The term at best is of a flexible nature, and it often depends on the course followed, whether a plea turns out to be dilatory or peremptory. Here, the pleas were expressly pleaded as dilatory, and so treated all along.

[LORD CHANCELLOR.—What shews that? How would you have raised your pleas, if you intended to treat them as other than dilatory?]

I admit there would have been no change in the form. It is not the practice now to separate the dilatory from the peremptory defences, except in actions of reduction. At all events, the appellant has taken the judgment of the Court on them as dilatory, and because that judgment is against him, he turns round and contends that they are peremptory.

[LORD CHANCELLOR.—What would be the effect of sustaining this preliminary defence?]

It would be a bar of the action.

[LORD CHANCELLOR.—Then why call it a preliminary defence? How is it treated in the books? Shew me where it is held discretionary in the Court, and not a matter of strict law, to consider such a defence as one or the other of these kinds of plea?]

Stair, B. iv. t. 39, § 13, describes dilatory pleas, but his definition is more confined to objections on executions, which are dealt with at once without probation; whereas now, under the statute, the Lord Ordinary is empowered to take proof, and it is the common practice to do so. In *Milne* v. *Gauld's Trustees*, 3 D. 345, the defence was dealt with by the Lord Ordinary as a preliminary one, and yet, if it had been sustained, it would have been a bar of the action. The same may be said of *Smith* v. *Stoddart*, 12 D. 1185. In *Laidlaw* v. *Dunlop*, 9 S. 579, it was held, that a plea in the nature of a bar should have been stated and disposed of as a preliminary defence.

Anderson for appellant.—We may assume here that the plea is good and well grounded, and that the respondent obtained the sentence of the Court of Arches regularly; but we have nothing to do with the conduct of the parties, as the record is not made up on that point. Our sole business is to consider, whether this is a dilatory or a peremptory defence. If we look to the substance and common sense of the plea, it is tantamount to saying—"You have got already all the redress you are entitled to—you are not to come to the Scottish Court merely because it happens to provide a more ample redress than what you have obtained in the English Court." There are only two sections of the act 6 Geo. IV. c. 120, which deal with this matter—the 5th and 6th—the latter being merely explanatory of the former. We do not find that the statute defines what it considers a dilatory defence. It was obviously unnecessary to do so, for the distinction is well known in the law of Scotland. The duty of the Lord Ordinary is merely *in initio* to see that all is right, and he is to single out what of the defence goes merely to the form. Now, the present plea is not a failure to do anything formal; it is this—You have got satisfaction. It is in the nature of *res judicata*. Suppose the Lord Ordinary had sustained the defence, he must have assoilzied the pursuer. The authorities nowhere mention such a plea as this as included among the dilatory. The form of process before the Lords annexed to Reg. Maj. c. 11 and 12, does not include it in the enumeration given. Nor does it come within the description given by the leading institutional writers—Balfour's Prac. c. 1, p. 343. Stair, B. iv. t. 39, § 13. Forbes' Inst. part IV. B. 1, c. 2, t. 1. Bankton, 4, 25, 25. Erskine, 4, 1, 66. Bell's Dict. *voce* "Defences." Russell's Form of Process, p. 53. 1 Darling's Prac. 197. 1 Shand, 317. In *Warrender* v. *Warrender*, 2 Sh. & M'L. 154, a similar plea was treated as preliminary by the Court below, and, on appeal, the House found the defences not to be dilatory. So in *Clyne's Trustees* v. *Clyne*, M'L. & Rob. 72, this House, on appeal, held, that what had been treated by the Court below as preliminary defences, went to the merits. Now, we deny having treated the plea as dilatory in the Court of Session, and it is quite immaterial whether the Court so treated it or not. It is clear that the plea itself goes to the whole case: If it were sustained, there would be nothing left to adjudicate upon. Even if it were held to be a preliminary defence, it does not follow that it is a dilatory one; for though all dilatory pleas are preliminary, yet all preliminary pleas are not dilatory. A very good example of a dilatory plea is where an executor's title to sue is objected to for want of probate. The action is merely suspended till probate is obtained; but when the title of an heir-at-law is objected to for illegitimacy, this goes to cut off the action altogether, *perimit causam*. So, if a set-off is pleaded, this is a defence on the merits. Suppose, instead of a set-off, a cross action was brought, it would resemble the present case.

[LORD CHANCELLOR.—Suppose a case where interest is allowed in Scotland, and not here, and

the party had brought his action here, could he afterwards go to the Scottish Court to recover the interest? There was a case, *Arnott* v. *Redfern*, 3 Bing. 353, where the Admiralty Court of Scotland had given judgment with interest, and in an action here on that judgment, it was held at *Nisi Prius*, that as the contract was made in England to be executed in Scotland, it ought to be regulated by English law, and, therefore, that interest could not be recovered here, merely because it was given by the decree in Scotland. That went, of course, by the *lex loci contractus*.]

A responsive allegation in the Court of Arches is nothing else than a cross claim. It is like a cross bill filed in the Court of Chancery, where a decision is made on both causes. Or, suppose an action brought in England, and a set-off is pleaded, and judgment goes for the defendant, who afterwards brings an action in Scotland for the sum included in the set-off, would not the plea of a judgment in England be a peremptory defence to the action brought in Scotland? Such a case would resemble the present.

[LORD CHANCELLOR.—Except that there you suppose entire satisfaction.]

It is, however, immaterial whether it was a good claim on her part or not; it is enough that it was a peremptory defence to plead that the claim and remedy had been exhausted. The case cited on the other side, of *Milne's Trustees*, does not shew that the defence was dilatory there, but merely that it was competent to raise the question at that stage. The same is true of *Smith* v. *Stoddart*. As the defence here, therefore, is not a dilatory defence, the appellant has a perfect right to appeal to this House, there being no statute which takes away this privilege.

Lord Advocate in reply.—From the way in which this argument has been put, the effect would be to reverse the long-settled usage of the Courts in Scotland, and to make entirely null any judgment proceeding on a preliminary defence. By his own argument, the appellant has no right to be here; for, if the plea be dilatory, he has not obtained leave of the Judges to appeal; and if it be peremptory, the cause cannot be decided upon the merits, because the record is not made up, and the only real question will come to be as to the truth of the plea of adultery, which has not been entered upon by the Courts below. According to § 5 of the statute, the Lord Ordinary has acted regularly.

[LORD CHANCELLOR.—That section seems to exclude all but dilatory defences.]

Preliminary defences in Scotland are used synonymously with dilatory defences. There is no distinction between them—at least as far as practice goes. As to the authorities quoted on the other side, the Reg. Maj. is looked on with suspicion in Scotland. Balfour is a better authority, but he treats an objection to title as a dilatory defence, while Forbes states it as a peremptory one.

[LORD CHANCELLOR.—The objection to the title is an ambiguous expression; it may mean that the title is bad, or that it is badly pleaded—two very different things. That you have no title, is as peremptory a plea as can be used. With this explanation, perhaps, the authorities may be quite consistent.]

Erskine does not treat of the question of title. The true and only deduction, however, from all the authorities, is merely that the terms are flexible. The plea here is not put exactly as *res judicata;* it is merely a plea of issue joined in another Court. But if it had been a Scottish Court, instead of an English Court, which had pronounced the decree of separation, this would have been no answer to the action. The case of *Warrender* v. *Warrender* is no doubt hostile, but we have no record of the grounds on which that judgment went. Supposing this plea were held preliminary, and not peremptory, the consequence would only be, to send back the cause to be taken up at the point where the irregularity commenced, and then it would proceed to the merits in the usual way.

LORD CHANCELLOR TRURO.—My Lords, this case has come before your Lordships by a reference from the Appeal Committee. It appears that the respondent to an appeal, which has been presented to your Lordships' House, presented a petition, alleging that it was incompetent for the party who had presented that appeal to maintain his appeal on certain grounds, namely, that by a solemn statute the appeal was taken away, in respect of decisions of a certain kind, and embracing the decision in question, unless leave to appeal were given by the Court, which pronounced the decision, to the party.

My Lords, that petition, praying your Lordships to dismiss the appeal as incompetent, stated as the ground, "Because the interlocutors appealed from are interlocutors repelling a preliminary or dilatory defence; and against such interlocutors no appeal to the House of Lords is competent, unless with express leave of the Court of Session, which leave has, in this instance, been refused." That was the ground on which the party prayed your Lordships to hold the appeal to be incompetent, and that, of course, was the ground on which the party, the respondent in that latter petition, came to answer it.

My Lords, this question arises upon the statute 6 Geo. IV. c. 120. Your Lordships have heard, during the argument, that by the 5th section of that statute it is enacted, "That it shall be the duty of the Lord Ordinary, at the first calling of the cause before him, to hear the parties on the dilatory defences, with power to reserve consideration of such dilatory defences as require probation, until the peremptory defences shall be pleaded, and the record adjusted in the manner hereinafter directed." Then, after providing for certain proceedings, and what shall take place

as consequent upon them, it concludes with enacting, that where the action is not dismissed, it shall not be competent to appeal to the House of Lords against the interlocutory judgment. Therefore, that section, as your Lordships observe, deals entirely with dilatory defences, and the ground upon which the appeal is asked to be deemed incompetent by your Lordships is, that, under that section, so dealing with dilatory defences, it was not competent to the party to appeal without the leave of the Court, and that the Court in this instance, although it was asked, gave no such leave.

It becomes therefore necessary, in order to decide upon the petition so presented, to consider whether the case does fall within the section to which I have referred—in other words, whether the plea, the second defence in this case, was to be deemed a defence entitled to be considered as a dilatory defence, or whether it was to be considered as what is described as a peremptory defence? Was it a defence which tended to delay the pursuer, and which presented no answer to the case upon which the pursuer might be entitled to succeed without offering any defence to the justice or law of the claim, supposing it to be properly prosecuted?

Your Lordships have been referred to various text-books on that subject. I own it does not appear to me that there is any difference in the authorities on that subject; nor does it appear to me that there is any difficulty in coming to a satisfactory conclusion as to what is entitled to be considered as a peremptory plea or defence. The distinction is well known in England, and it is also as well known in Scotland, and is dealt with. There are various rules applicable to pleas of those two classes, each of those two classes differing from the other, and it can excite no surprise that the proceeding should be more strict, and should be more prompt, where a defendant does not defend himself against the claim or right which is set up on the part of the plaintiff or pursuer, but where he merely answers the form of the proceeding, leaving the pursuer or plaintiff, therefore, without any answer whatever to the justice or to the law of his claim.

My Lords, looking at the authorities which have been cited—and I am inclined to think that all the authorities have been cited which were calculated to afford your Lordships any light or information—it appears to me, that although there are some words to be found, in certain of the passages which have been read, which admit of two senses, yet that, where the words have been used by the author in the same sense, the same conclusions have followed.

My Lords, I apprehend that there is really no difficulty in determining what is to be considered as a dilatory defence, and what is to be considered as a peremptory defence. That defence which gives (as I have before stated) no answer to the plaintiff's claim, but which merely points out some irregularity or some circumstance which may well consist with the plaintiff's claim being in point of law perfectly undoubted, which offers no answer to it, and, in that respect, leaves it perfectly untouched, so that the plaintiff may, by instituting a suit in some other form, or at some other time, be well entitled to maintain it—such a defence I consider to be dilatory. But I can in no sense understand the word "dilatory" to apply to a plea which leaves nothing to be decided in the case in which that plea or defence is urged, and which leaves the pursuer no case on which to go to any other Court, or to any other tribunal, or to adopt any proceeding in any other form. That defence which says, not that you are not entitled to redress in this particular instance in the suit, or in this form, but that you have no case which entitles you in any form to redress, I consider to be peremptory, and not intended to be comprised within this class.

Now, what is the plea or defence in the present case? It is, that even if you, the pursuer, have sustained the wrong of which you complain, you have prosecuted for that wrong, and have obtained the full redress to which that wrong entitles you—you had the option of coming to this Court, if you had thought fit; you had the time to do so; but when you were sued in England by process for a restitution of conjugal rights, you did not content yourself with merely answering that case, saying that the conduct of the husband who claimed restitution of the conjugal rights had been such as to forfeit his claim to that restitution, but you, on your part, claimed certain relief in respect of the injury which you had sustained—you must be taken to have been aware of the extent of that relief which you claimed, and that relief to the extent which you claimed, and which you were entitled to claim, was afforded you to the full—you have therefore made your election, and have obtained a judgment, which pronounced a divorce *a mensâ et thoro* between you and your husband. This is a suit instituted for the same cause, and your ground is merely that the judgment which you have obtained did not give you such extensive relief as you might have obtained if you had prosecuted your case in this Court.

No doubt, in England, marriage is indissoluble except by act of parliament;[1] but the law in Scotland is otherwise. But it seems to me, that if, in England, as would be the case in Scotland, proceedings are instituted in respect of a particular injury, or if, in the course of a suit instituted for a different purpose than obtaining redress for any such injury, the party who has sustained the injury sets it up in that form, not merely with a view of repelling the object of the suit,

[1] This law of England has since been altered. See 20 & 21 V. c. 85; 21 & 22 V. c. 108, and later amending acts.

but for the purpose of obtaining substantial benefit and relief, such as might have been the subject of a distinct and independent suit by the party so setting it up, in the suit commenced against him or her, such a case must be considered as resting precisely on the same ground as if the proceeding had been instituted on the part of the defendant in the one case, and that defendant would be in the same situation as another plaintiff, suing for and obtaining the same relief, would be.

I consider, therefore, that first of all this defence as put in, is pleaded, and is offered, as an entire answer to the case on the part of the pursuer. It does not follow that, in point of law, it will be an answer; but it is pleaded with the intention of contending and of arguing, that it is an entire answer to all claim on the part of the pursuer; and the question before this House now is, not whether the party is correct in supposing that the plea does disclose a full and effectual answer to the pursuer's claim, but the question is simply here, if it is so offered—and if that is his view, can it be considered as falling within the description of a dilatory plea? I own it strikes me that there is no ground for that conclusion.

The learned counsel, with a candour for which I think the House is indebted to him, declined to argue whether this was a dilatory or a peremptory plea, but sought rather to relieve himself and the House from a question on which no reasonable doubt could be entertained, by setting up another ground on which to entitle the party to the benefit of the petition—namely, that the parties have so treated it, and have so dealt with it in the Court in Scotland. But, my Lords, that was not the ground on which the petition was presented. The petition was presented simply and solely, and the reason and ground urged in its support was the character of that plea or defence, that it was what is here called a preliminary or dilatory defence, using the words "preliminary" and "dilatory" as synonymous. I do not think the act of parliament intended that those words should at all be considered as having the same sense.

My Lords, it was suggested before the committee, that by the course of proceeding below, the party might have prejudiced the objection; but the committee did not think it right to trouble the House on that part of the argument, and they desired the case to be argued before your Lordships simply on the character of that defence or plea—whether it was to be considered as a dilatory plea, and whether, therefore, the appeal was taken away without the leave of the Court, under the 5th section of 6 Geo. IV. c. 120. I own it appears to me, that the learned counsel who has appeared at your Lordships' bar, and argued very ably that part of the question to which he was desired to direct his attention, has felt that it could not be with any reason, or any probability of success, argued that this was a dilatory plea, and therefore resorted, as I have before stated, to another and totally different ground from that which seemed to me to have been the subject of the petition—namely, that the party had prejudiced himself by allowing his plea to be treated in a different sense from that which he now insists properly belongs to it. I consider the question before your Lordships to be, whether or not, under the 5th section of the statute, to which I have referred, this is to be considered as a dilatory defence, the decision on which, therefore, could not be the subject of appeal without the leave of the Court. I humbly submit to your Lordships, that this is not a dilatory defence—that it is not within that section—and that it is competent to the party to present his appeal to this House. Upon the hearing of that appeal, of necessity much of what has been urged before your Lordships to-day will have to be considered. On the present occasion, I shall advise your Lordships, that the petition praying that the appeal may be dismissed as incompetent, ought to be dismissed; and I move your Lordships that that petition be dismissed.

Mr. Anderson.—I hope your Lordships will give us the costs of this hearing.

LORD CHANCELLOR.—They must be reserved.

Respondent's petition dismissed—appeal sustained—and costs reserved.

First Division.—Lord Wood, *Ordinary.*—Smedly and Rogers, and Dodds and Greig, *Appellant's Solicitors.*—Grahame, Weems and Grahame, *Respondent's Solicitors.*

MARCH 12, 1852.

THE LORD ADVOCATE, and HER MAJESTY'S COMMISSIONERS OF WOODS AND FORESTS, *Appellants*, *v.* JAMES REDDIE and others, (River Clyde Trustees), and WILLIAM HAMILTON, *Respondents.*

Crown—Crown Property—Navigable Rivers—Agreement—Transaction—Statute 3 and 4 Vict. c. 118—Clause—Construction—*The River Clyde Trustees, appointed by statutes for the improvement of the navigation, were* inter alia *entitled to widen or narrow the channel as they should think fit. At first they narrowed the channel and afterwards they widened it, thereby leaving a strip of ground* ex adverso *the land of H. who claimed it. The trustees disputed his title, but on condition of his waiving opposition to another bill promoted by them in Parlia-*