859, which was referred to in the arguments in this case, did not proceed on the assumption that this law maxim had been recognised as a rule of practice by the Scottish Courts. My opinion was founded partly on the Roman law, which in the passages quoted from the Digest negatived the right of the representatives of an injured person to prosecute the *actio injuriarum*, partly on the absence of any authority in our own law which could support such a claim, but also on the inconvenience and injustice of allowing representatives to make a claim which the injured person might have good reasons for not preferring in his own name.

I do not consider that the case of *Darlington* is conclusive one way or the other, because it only decides that a claim which has been made by the deceased dependant may be followed to its conclusion by the representatives, and that I think is a sound interpretation of the statute. While it may be that the authority of the case of *O'Donovan* is somewhat shaken by the observations of the learned judges in *Darlington's* case, I am of opinion that this claim is not well founded, and that the judgment of the arbitrator is right.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court answered the question of law in the case in the affirmative, recalled the determination of the Sheriff-Substitute as arbiter, and remitted to him to proceed as accords.

Counsel for Appellant—Scott Dickson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Hunter, K.C. —Carment. Agents—W. & J. Burness, W.S.

TEIND COURT.

Friday, July 10.

(Before the Lord President, Lords M'Laren, Kinnear, Johnston, and Mackenzie.)

MINISTER OF DALSERF *v.* THE HERITORS.

Teinds—Stipend—Augmentation.

Circumstances in which, all the heritors consenting, the Court *granted* an augmentation of stipend of seven chalders.

In a process of augmentation raised by the minister of Dalserf against the heritors the minister craved an augmentation of seven chalders. The heritors, by minute produced in process, unanimously consented to the augmentation craved. It appeared that there had been no modification of the stipend since 1849, at which date it was fixed at eighteen chalders, and that the predecessor of the present minister, who had been possessed of considerable private means, had occupied the benefice for a period of fifty-six years. The free teind was stated to amount to £120.

LORD PRESIDENT—This is an unusual demand, and under ordinary circumstances I do not think this Court would be prepared to grant it. But the circumstances here are peculiar. There has been no modification of this stipend since 1849, and there is a complete concurrence on the part of all the heritors in the augmentation asked for. They no doubt take the view that the present low figure at which the stipend stands is due to the personal circumstances and the moderation of the previous incumbent, who lived a long time, and they feel that it is right that the benefice should not suffer on that account. I regard this as quite a special case, and in the peculiar circumstances we find here I think your Lordships may grant the augmentation.

LORDS M'LAREN, KINNEAR, JOHNSTON, and MACKENZIE concurred.

The Court granted the augmentation of seven chalders.

Counsel for the Minister — Henderson Hamilton. Agents — Gardiner, Gillespie, & Gillespie, S.S.C.

Saturday, July 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EARL OF LAUDERDALE *v.* SCRYMGEOUR-WEDDERBURN.

(See *ante* December 16, 1904, 42 S.L.R. 222, 7 F. 1045.)

Jurisdiction—Court of Session—Heritable Office—Hereditary Standard Bearer for Scotland.

Held that the Court of Session has jurisdiction to determine claims to the Office of Hereditary Standard Bearer to the Kings of Scotland, that being a heritable office and not a mere title of honour.

Res Judicata—Heritable Office—Award of Court of Claims Appointed at Coronation.

The parties to an action of declarator of right to the Office of Hereditary Standard Bearer for Scotland had both been claimants before a Court of Claims appointed by Commission under the Great Seal to hear and determine claims to perform services at His Majesty's Coronation. The defender's claim had been allowed and the pursuer's refused by the Court of Claims. The defender now pleaded *res judicata*. *Held*, on consideration of the terms of the Royal Commission creating the Court of Claims and the terms of that Court's deliverance, that that Court did not finally determine the question

of legal right, and the defender's plea *repelled.*

Observations (*per* Lord Kyllachy) on the constitutional power of the Crown to create cumulative jurisdictions superseding the jurisdiction of the ordinary Courts.

Process—Title—Title to Defend—Heritable Office—Title Averred Sufficient if Valid to Exclude Pursuer though not Exclusive of Possible Superior Title.

The pursuer in an action of declarator of right to the office of Hereditary Standard Bearer for Scotland, founded upon a charter in his predecessor's favour granted by Charles II as *ultimus hæres* to John Scrymgeour, Earl of Dundee, in whom the office had been vested. The defender averred that he was heir-male of Lord Dundee, and that the said charter was invalid against him. The pursuer denied that defender was heir-male, and pleaded that he had no title to defend. Defender declined to prove himself the heir-male to Lord Dundee by the appropriate service, but offered proof of kinship as an heir-male by descent in male line within the destination under which Lord Dundee had held the office.

Held that defender, by proving that he was within the destination by male descent, could show sufficient title to defend as against the pursuer, and, for that, need not exclude by service possible superior claims of other Scrymgeour descendants.

Prescription — Negative Prescription — Decree in Absence—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 24.

The pursuer in an action of declarator of right to the Office of Hereditary Standard Bearer for Scotland, founded upon a decree of 1671 in favour of his predecessor, in an action in which defender's predecessor had been cited and had appeared, but had been allowed to withdraw prior to decree being pronounced. It having been decided that the Court of Session had jurisdiction, *held* that the decree of 1671 was binding, and was irreducible by reason of the negative precription and the Court of Session Act 1868, section 24.

On 28th April 1902 Frederick Henry, Earl of Lauderdale, brought an action of declarator and interdict against Henry Scrymgeour-Wedderburn of Wedderburn, residing at Birkhill, and another, in which the pursuer sought to establish his sole right to the Office of Hereditary Standard Bearer for Scotland.

The Office of Standard Bearer to the Kings of Scotland was formerly enjoyed by the representatives of the family of Scrymgeour. It is said that the office was bestowed *circa* 1100 A.D. upon Sir Alexander Carron in reward for valour in battle, and that his name was altered to Scrymgeour or "good fighter." The office was admittedly hereditary in the Scrymgeour family down to 1600, and the head of the family also held the hereditary office of Constable of Dundee. By the Scots Act 1600, c. 44, the office of Standard Bearer was confirmed and of new granted to Sir James Scrymgeour of Dudhope and his heirs-male. The last undisputed holder of the office was John Scrymgeour, third Viscount Dudhope and first Earl of Dundee, who died in 1668. He died without issue; various apprisings had been led by creditors which affected his lands and purported to affect his office of Standard Bearer. Charles Maitland of Hatton, brother to the Duke of Lauderdale, and subsequently Earl of Lauderdale, acquired right to some of these apprisings, and obtained on 11th July 1670 a charter under the Great Seal granting to him the lands and offices of the Earl of Dundee on the narrative that they had fallen to the Crown as *ultimus hæres.* On 29th November 1670, Maitland of Hatton obtained another charter conveying to him the barony of Dudhope, and, *inter alia,* the Office of Standard Bearer, on the narrative that they had come into the King's hands by recognition. These grants to Maitland were confirmed by the Acts 1670, c. 49, 1672, c. 73, and 1681, c. 72, but *salvo jure cujuslibet.* It was not disputed that the pursuer, the present Earl of Lauderdale, was his heir-male and representative. Maitland of Hatton had also brought an action in the Court of Session to have the grant of *ultimus hæres* declared valid, and on 14th February 1671, he obtained decree in his favour, relating, *inter alia,* to the Office of Standard Bearer. In that action James Scrymgeour of Kirkton was called as one of the defenders, and appeared although he withdrew before decree. This James Scrymgeour was an ancestor of the present defender, and it was through him that he averred descent within the old destination of the office and claimed right to it or at least right to exclude the pursuer.

Neither party was able to aver continuous exercise of the office by his own family and competing claims had been asserted from 1761 onwards. In view of the Coronation of King Edward VII, a Court of Claims was constituted in 1901 by Commission under the Great Seal in order to hear and determine claims to perform services at the Coronation. [The terms of the Commission are quoted in Lord Kyllachy's first opinion.] Three claims to the office of Standard Bearer for Scotland were presented, by the defender, by the pursuer, and by the Rev. R. C. Scrimgeour (who was also called as a defender in this action but did not appear). On 15th January 1902 the Court of Claims pronounced a deliverance finding that the right to the office "is vested in the family of Scrymgeour," and that the defender had "established a *prima facie* right to represent that family." The defender's claim was accordingly allowed by the Court of Claims, and he duly performed the services of the office at the Coronation in 1902.

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) *Res judicata.* (3) No jurisdiction. The right to the office in question has been decided by the Court of Claims, which was appointed

by the King for the special and exclusive determination of this among other matters. (4) No title to sue. (7) The decree of 14th February 1671, and the gift upon which it bore to proceed, are inept and of no effect, and have been held to be so by the Court of Session, as set forth in answer 6, *et separatim*, the said decree and gift did not and could not validly include or deal with the office in question. (8) The office in dispute having been conferred on the defender's ancestor and his heirs-male as a personal dignity to be held by him and them *jure sanguinis*, and having been publicly confirmed by the Act 1600, c. 44, could not be lost or affected by apprising nor by recognition, but only by failure or corruption of blood, or by an Act of Parliament repealing the said Act."

The pursuer pleaded, *inter alia*—"(2) In respect that the defender is not the heir-male of Sir James Scrymgeour mentioned in the Act 1600, cap. 44, he has no title or interest to resist the conclusions of the summons. (3) In respect of the decree of 14th February 1671 condescended on, the pursuer is entitled to declarator and interdict with expenses against the defender, the said Henry Scrymgeour-Wedderburn."

On 13th December 1902 the Lord Ordinary (KYLLACHY) repelled the defender's pleas-in-law (1), (2), and (3), and appointed the cause to be put to the roll for further procedure.

Opinion.—"In this case, which involves a competition for the ancient office of Hereditary Standard Bearer for Scotland, I have as yet heard no argument on the merits. By desire of parties, the recent discussion was confined to the defender's two preliminary pleas of—(1) No jurisdiction; and (2) *res judicata*. Upon these two pleas the defender asks a judgment in the first instance.

"I have given respectful attention to the argument in support of these two pleas—an argument which was urged with great earnestness and ability, but I am unable to find that either plea has any solid foundation.

"As regards jurisdiction, the defender's case seems to rest on this proposition, that the office in question is at best merely a name, or, at all events, a mere decoration or title of honour; and if that be so, it may, perhaps, be the case that such matters are outside the cognisance of the courts of law.

"But it is, in my opinion, quite impossible to hold that such is the legal character of this particular office. It is not a mere title of honour. It is a heritable office granted by the Crown in fee and heritage, held under the Crown, feudalised by infeftment, and transmitted, so far back as our records go, by special service and Crown precept. It may not have all the incidents of an ordinary landed estate. One of the questions here—perhaps the main question on the merits—is whether it is transferable by disposition or adjudgable by creditors. But it is, or involves what, at all events, is a right of property, and belongs to a class of rights well known in the law of Scotland, and which in numerous reported cases have been the subject of litigation in this Court. What pecuniary rights are now attached to it may be a question. According to the titles, the office is granted 'with all honours, lands, fees, duties, privileges, and immunities belonging thereto.' But even assuming (what I cannot at this stage assume) that it has not now any commercial value, it is none the less an heritable office, constituted as I have described, and the right to which is a right of property—a right depending on the construction of Scotch titles and Acts of Parliament—and therefore, as it seems to me, beyond doubt a right cognisable by this Court.

"It is not, I think, necessary, or at this stage desirable, to refer particularly to the decisions and Acts of Parliament to which the parties severally appeal. It would be difficult to do so without trenching on the merits. But I may note for convenience—(1) That it appears to be common ground that the office was granted out by the Crown at a date long prior to the Act of 1445, cap. 44, which prohibited 'the giving of offices in fee and heritage for time to come'; (2) that the Retours for Forfarshire (No. 280) appear to show that the alleged common authors of both parties, from an early period, made up their titles to the office by special service and precept from Chancery; and (3) that the whole history and legal incidents of this class of rights are discussed, elaborately and with great research, in the case of *Cockburn* of Langton, M. 150 and 157, and particularly in the session papers in that case, which are preserved in the Advocates' Library.

"If, therefore, the present action had been brought, say, at this time last year, I am unable to doubt that the action must have been entertained, and allowed to proceed to judgment.

"But the defender next pleads *res judicata* in respect of what he seems to contend is a judgment pronounced by a Court or Commission of, he says, at least cumulative jurisdiction, namely, the Court of Claims constituted by His Majesty for the purposes of the recent Coronation. It is said that by that Court or Commission it was adjudged that the claim of the defender to perform on the day of the Coronation the services of Hereditary Standard Bearer for Scotland should be allowed to be exercised by him on that day, and that the claims of the pursuer and of another person to exercise the said office should be disallowed.

"Now, it is quite true that, as set forth in a Proclamation of 26th June last, entitled 'A Proclamation declaring His Majesty's pleasure touching his Royal Coronation and the solemnity thereof,' His Majesty having in view, as expressed in said Proclamation, that 'many of our loving subjects do claim and are bound to do and perform divers services on the said day and at the time of the Coronation,' did, by Commission under the Great Seal, appoint various high officers and other members of the Privy Council 'to receive, hear, and determine the Petitions and Claims which

shall be to them exhibited by any of our loving subjects in this behalf,' and did appoint the said Commissioners, or such of them as might be summoned for that purpose, to sit at the time named for the execution of the said Commission; publication of said Commission being, by the said Proclamation, made 'to the intent that all such persons whom it may anyways concern may know when and where to give their attendance for the exhibiting of their Petitions and Claims concerning their services before mentioned, to be done and performed at our said Coronation.'

"It is also true that the Commission thus constituted sat at the time appointed, and, *inter alia*, gave forth the following deliverance upon the claims exhibited by the pursuer and defender, and by another person:—'The Court considers that the right to the office of Hereditary Standard Bearer of Scotland is vested in the family of Scrymgeour, and that the petitioner Henry Scrymgeour Wedderburn has established a *prima facie* title to represent that family. And the Court adjudges that the claim of the said petitioner, the said Henry Scrymgeour Wedderburn, be allowed him, to be exercised on the day of Their Majesties' Coronation: And as to the petitions of the said Earl of Lauderdale and the said Reverend R. C. Scrimgeour, it is considered and adjudged by the Court that the claim of the said petitioners and each of them to exercise the said claim at the said Coronation be disallowed.'

"The questions, however, are — (1) Whether the deliverance thus made is or purports to be a final judgment on the question of legal right now submitted to this Court; and (2) whether, if so, such judgment excludes the jurisdiction of the Court, and absolves this Court from the duty of declaring the legal rights of the parties before it.

"Now, it is, I think, manifest that the terms of the deliverance must be read and construed with reference to the scope and terms of the Commission under which it was pronounced. And that being so, it is, in the first place, necessary to see how far that Commission authorised or contemplated the determination, that is to say, the final determination, of questions of legal right. As to that matter, it appears to me that on its just construction the King's Commission as set forth in the proclamation neither authorised nor contemplated anything of the kind. It had, as I read it, exclusive reference to the Coronation Ceremony, and it conferred no powers or authorities except in connection with that ceremony. The position was, as I think was generally understood, simply this. The Coronation was imminent. There were numerous competing claims made or anticipated with reference to the performance of services on the occasion, and these claims it was absolutely necessary to deal with, and to deal with at once. Of course they could not be so dealt with except on a *prima facie* view of their merits, but to that extent they had to be dealt with, and allowed or disallowed. And such was, as I read the Commission, the whole scope and measure of the jurisdiction which it conferred. The Commissioners were of course in a sense a Court. But they really, I apprehend, constituted an executive committee of the Privy Council, charged with the duty of advising His Majesty with respect to urgent matters, viz., the disposal, for the purposes of a particular State function, of claims to perform services at that function.

"It is not, of course, presumable that a Court thus commissioned should profess to adjudicate—at all events to adjudicate finally—upon legal rights. It remains to consider whether it in fact did so. I am of opinion that it is only on a strained construction of the terms of the deliverance that such a conclusion can be reached. The introductory paragraph goes, it may be suggested, somewhat beyond the operative adjudication. But nevertheless it is the operative adjudication with which we are here concerned. And what was 'adjudged' simply was that the defender and not the pursuer should perform at the Coronation the services claimed. And the provisional character of that adjudication is, I think, emphasised by this—that in the introductory paragraph, to which I have referred, and on which the defender founds, his (the defender's) title to represent a family of Scrymgeour is 'considered' only to be established *prima facie*.

"For these reasons I am of opinion that the deliverance or judgment of the Court of Claims does not upon its just construction determine the present question. And this makes it unnecessary to consider the larger and constitutional question as to the *power* of the Crown to supersede with respect to legal rights the jurisdiction of the ordinary tribunals. In my opinion, as I have said, no such question arises here. But I may recal, what is matter of history, that the power of the Crown to create, by virtue of its prerogative, 'cumulative jurisdictions' was the subject of much controversy in the years preceding 1688; and that if it is desired to pursue the history of that controversy reference may be made to (1) the Scots Act 1681, cap. 18; (2) the Articles of Grievances, April 13, 1589, Scots Acts, vol. 3, p. 172; and (3) Scots Act 1690, cap. 28.

"I propose, for these reasons, to repel the two pleas in question; to appoint the debate to be resumed on the merits; and to grant, if that is desired, leave to reclaim."

Subsequently, on 1st July 1903, in respect of pursuer's plea-in-law (2), the Lord Ordinary sisted process to enable the defender to serve himself as heir-male of John, Earl of Dundee.

Opinion.—"In this case I some time ago heard, by desire of parties, an argument, and pronounced judgment upon two pleas stated for the defender—(1) no jurisdiction, and (2) *res judicata*. The other day I heard a second argument which, by desire of parties, was confined to two other points, viz., (1) the defender's title to contest the pursuer's declarator, and (2) the relevancy of the pursuer's case.

"With regard to the relevancy, I should be very unwilling, in a case depending mainly upon the construction of titles and documents, to pronounce any judgment on relevancy, or to form or express any opinion touching the merits of what may turn out to be a competition of heritable titles. It would, I think, be most undesirable to do so until the case has been put in the position of a concluded cause by an allowance of proof and a full production of documents, either admitted or proved. It is only, therefore, as affecting the question of the defender's title to contest that I propose even to touch upon the sufficiency of the pursuer's averments, that is to say, his averments read in connection with the titles to which he refers.

"But the question of the defender's title does come up, I think, quite properly at this stage. For on the record it stands in such a position that I think the pursuer is well justified in asking that he shall not be required to enter upon a competition of titles with the defender unless it appears either (1) that the defender has a good *prima facie* title on which to compete, or (2) that the defender, having no such title, he (the pursuer) is himself in the same position.

"Now it is, I think, impossible to say that the pursuer is in the position of having no title, or no title *prima facie* good. The title which he sets forth may perhaps be liable to be reduced upon some ground. I do not know. Perhaps even *ex facie* it may be in some particulars open to criticism from the point of view of the feudal formalist. That may or may not be so. But substantially I do not, I confess, see that *prima facie* there is anything wrong with it. The pursuer is infeft in this heritable office. He and his authors have been so under a series of connected infeftments for more than two centuries. They have held it for that period under charters flowing from the Crown, which charters, unless the Crown was *non dominus*, cannot be impeached by third parties. And with respect to any infirmity in the Crown's title the only suggestion, so far as I could make out, was this, that this heritable office being limited to heirs-male of the Earl of Dundee, it was, for some reason, incapable of reverting to the Crown, either by way of succession or by way of return, and was so even if, as set forth in the title, no heir-male, or other heir having right, came forward, on the death of the Earl of Dundee, to claim it.

"Now I confess that taking the view of the legal character of the office, which I expressed in my former interlocutor, I am not prepared, certainly at this stage and as at present advised, to make any assumption of that kind. On the contrary, I think that at least, *prima facie*, the Crown's title is good, and that the pursuer's title, as flowing from the Crown, is in the same position.

"Now, that being so, what is the defender's title on which he claims right to impeach (either by way of reduction or *ope exceptionis*) the Crown's grant on which the pursuer founds? He alleges, in general terms, that he is the heir-male of the Earl of Dundee, that is to say, the Earl who died in 1668, and on whose death the barony of Dundee, including the office in question, was assumed to revert to the Crown. But he produces no service. He condescends on no pedigree. As I understand it, he claims, upon the bare averment that he possesses the character of heir-male, to enter upon a competition of titles with the pursuer—a competition involving a protracted and costly proof. That is really the defender's contention.

"Now, giving the fullest effect to the circumstance that the defender is called to the action and does not initiate it, I am quite unable to accept this contention. I do not consider that it would be either just or convenient that such a procedure should be allowed. But I am afraid I must also add that the defender's claim to be heir-male of the Earl of Dundee and of the family of Scrymgeour is, at least as set forth on record, in a somewhat unfavourable position. His allegation, it will be observed, is that he is heir-male of Scrymgeour of Kirkton, and as such, heir-male of the Earl of Dundee; and no doubt if his statement had stopped there, it would have been at least possibly true; for, of course, the Scrymgeours of Kirkton might have become heirs-male of the family at a quite recent date. But the defender goes on to allege that the Scrymgeours of Kirkton became the senior line of the family *on the death of the said Earl*—that is to say, that the then Scrymgeour of Kirkton was the heir-male of the Earl at his death in 1668. And yet, if anything is clear upon the documents already produced, Scrymgeour of Kirkton preferred no such claim in 1668, or even in 1671, when he was called and appeared in the action of declarator which was in that year brought by the pursuer's author. For it appears from the decree of 1671 (a decree which, I may say in passing, was pronounced by a Court of which Lord Stair was a member and had just been appointed President, and which, so far as I can see, is a decree worthy of all respect)—I say it appears from that decree that Scrymgeour of Kirkton, although called to and having appeared in the action, was neither called nor appeared as heir-male or even as heir-general, but was called, and at all events appeared, simply as the nominatim substitute in a certain tailzied destination dated in 1587, which, rightly or wrongly, was held by the Court to be displaced by a later title dated in 1617. It appears also from the same decree that when that fact was ascertained the next step of the counsel who represented Scrymgeour of Kirkton and the other defenders (the sisters of the deceased and his heirs-of-line), was to put forward as the heir-male of the deceased a different person altogether. They put forward as heir-male a certain Alexander Scrymgeour, whose compearance was (I think not unreasonably at that stage) disallowed, because he was not, as it appeared, able even to condescend on his relationship. It is very difficult in

these circumstances to see how the defender can now claim to be heir-male of the Earl of Dundee on the ground that Scrymgeour of Kirkton was the heir-male of the Earl at his death.

"That, however, is perhaps a digression. The broad, and, I think, important fact is that the defender's title rests simply on a bare averment of his alleged propinquity; and it appears to me that that being so, the pursuer is entitled to demand that before further procedure the position of the defender should be cleared up.

"Now, there are two ways in which that might be done. There might be a proof allowed of the defender's averments as contained in answer 3; or I might sist process to enable the defender to obtain, if he can, in the appropriate Court a service as heir-male-in-general to the Earl of Dundee, who died in 1668. Of course each of these courses has its disadvantages. In a proof the function of criticism, which in a service would be performed by the proper persons, viz., the competing heirs-male, if there be any, would fall to be performed by the pursuer. On the other hand, in a service the pursuer could not appear; and it might not improbably happen that—there being no appearance for any competing heir-male—the defender might prevail by simply proving to the satisfaction of the Sheriff in Chancery his descent in the male line from some common ancestor of himself and the Earl. As between these alternatives I have accordingly had some difficulty. But, in result, I have come to the conclusion that the proper course is, before further answer, to allow the defender an opportunity of obtaining a service if he can. I think that is the proper and usual course. My impression is that the production of an appropriate service would supersede any proof—I mean on the question of propinquity. But it is not necessary to decide that point now. All I propose to do at present is, before further answer, to sist process until the first sederunt-day in October to give the defender an opportunity of establishing by the appropriate service that he is, as he alleges, the heir-male of John, Earl of Dundee."

The defender having intimated that he did not desire to serve as heir in the said capacity, the Lord Ordinary on 4th December 1903 sustained the second plea-in-law for the pursuer and decerned in terms of the conclusions of the Summons.

The defender reclaimed, and argued—(1) No jurisdiction. The Court of Session had no jurisdiction in dignities — Mackay's Manual, p. 118, sec. 9; Kames' Law Tracts, Courts, 223; *Montrose Peerage*, 1 Macq. 401, at p. 440; Cruise on Dignities, 2nd ed., 249, *et seq.*; Riddell, Peerage, i, 20, 24, 46, note, 128; *Earl Cowley*, [1901] A.C. 450, per Lord Halsbury, at p. 454. The office in question here, in its origin, its nature, and its possession, was a dignity and not a patrimonial right—Ersk. ii, 12, 7, iii, 8, 86; *Wilson*, 1759, M. 165, Lord Kames' note, p. 167; *Bower*, 1682, 2 Br. Supp. 18, 3 do. 348, Fountainhall, i, 171; *Town of Edinburgh* v. *Earl Marischal*, 3 Br. Supp. 348; *Waddel* v. *Inglis*, M. 13,134, 16,633; *Stewart* v. *Miller*, 1802, 4 Pat. 286, per L.C. Eldon. *Cockburn*, 1747, M. 150, related to an inferior office of commercial value. It was not competent to bring a declarator that a man is not the heir of a deceased person—*Officers of State* v. *Alexander*, May 25, 1866, 4 Macph. 741, 2 S.L.R. 34. (2) *Res judicata*. Even if the Court of Session had jurisdiction, the Court of Claims superseded it or at least had as great jurisdiction in this question, and had decided it. The pursuer had applied to the Court of Claims and must abide by its decision. Really the King was the proper Court to decide, with whatever advice he chose, and he had decided with the advice of the Court of Claims. (3) The Act 1600, c. 44, rendered it *ultra vires* to consider claims to the office outwith the statutory destination there set forth, and so long as the defender was within it he must exclude pursuer.

Argued for the pursuer (respondent)—(1) The Court of Session had jurisdiction; this was a heritable office, not a mere dignity. Even if it were a dignity, the jurisdiction of the Court of Session was preserved by Article xix of the Act of Union 1706 (5 Anne, c. 8), and by Article xx all heritable offices were reserved to their owners as rights of property—Erskine, i, 3, 18; Schedule of Peerage Cases, app. to 1882 Report of Lords' Committee on Peerage; Erskine i, 3, 9; *Earl of Caithness*, M. 163. (2) At the utmost the jurisdiction of the Court of Claims extended only to the exercise of an office on a particular occasion; its deliverance could not determine the question of permanent right, nor did it purport to do so—*Sitwell* v. *M'Leod*, June 21, 1899, 1 F. 950, esp. at 656, 36 S.L.R. 762. (3) The defender had no title to resist the conclusions of the summons—*Ross*, November 14, 1855, 18 D. 34; *Saltoun*, November 24, 1857, 20 D. 89; *M'Leod's Trustees*, May 21, 1891, 18 R, 830, 28 S.L.R. 657; *Drummond* v. *Ross*, November 25, 1824, 3 S. 315; *Pollock* v. *Turnbull*, January 16, 1827, 5 S. 181; *Lyle* v. *Balfour*, November 17, 1830, 9 S. 22; Stair, iv, 3, 47; Erskine, ii, 3, 23.

[*v.* also argument at later stage, *infra.*]

On 29th November 1904 the First Division *adhered* to Lord Kyllachy's interlocutor of 13th December 1902, repelling defender's pleas-in-law (1), (2), and (3), but *recalled* the interlocutors of 1st July and 4th December 1903, and in place thereof allowed the parties a proof of their respective averments.

LORD PRESIDENT (LORD KINROSS)—We have now to consider three interlocutors pronounced by the Lord Ordinary, the first on 13th December 1902, the second on 1st July 1903, and the third on 4th December 1903.

By the first of these interlocutors his Lordship repelled the first, second, and third pleas-in-law for the compearing defender, these pleas being (1) that the action is incompetent, (2) *res judicata*, (3) no jurisdiction. I think the Lord Ordinary was right in repelling all these pleas, and

as his Lordship has given at length his reasons, in which I agree, for following this course, I do not think it necessary to examine these pleas in detail. The first and third of them run very much into each other, and substantially involve the proposition that the office of Standard Bearer was of such a character that it did not carry with it any rights or incidents cognisable by a civil court. I agree with the Lord Ordinary in thinking that this is not, at all events upon the averments of the parties and the information before us, the true character of the office, and that a question relating to it such as that which we have before us may be competently entertained and considered by this Court. The plea dealt with by the interlocutor of 13th December 1902, upon which we heard most argument, was *res judicata*, the adjudication pleaded in bar of the action, being the determination or report of the Court of Claims appointed by His Majesty the King to receive, hear, and determine petitions and claims to perform services at or in connection with the Coronation. The duty was not confided to the Court of Claims of determining finally questions such as those which are raised in the present action, and I am of opinion that the deliverance issued by that Court cannot be successfully pleaded in bar of such an action as the present. The Court of Claims necessarily proceeded upon the information before them, while in the present action allegations are made of matters which were not proved before the Court of Claims.

By the second interlocutor, that of 1st July 1903, the Lord Ordinary, before farther answer, sisted process till the 1st day of October then next to give the defender an opportunity of establishing by the appropriate service his averment that he is the heir-male of John, Earl of Dundee, who died in 1668. This interlocutor appears to have proceeded upon the ground that the defender could not establish his plea that he was heir-male of John, Earl of Dundee, in any other way than by service to him in that character. It appears to me, however, that for the purposes of the present action it may possibly be competent to prove otherwise than by service some at least of the material allegations which the defender makes, and that it would be unsafe to separate this question from the others arising in the case. There are a number of other allegations made by both parties on record which may possibly prove to be material to the determination of the case, and I understand that the counsel on both sides decline to renounce probation. Under these circumstances I think that our proper course would be to pronounce, and I propose that we should, with a view to preparing the cause for final judgment, now pronounce, an interlocutor in the following or in similar terms—"The Lords having heard parties, and considered the record, proceedings, and productions, adhere to the Lord Ordinary's interlocutor of 13th December 1902; recal his Lordship's interlocutors of 1st July 1903 and 4th December 1903; and counsel for both parties having declined to renounce probation, allow the parties a proof of their respective averments, said proof to be taken before Lord Adam on a date to be afterwards fixed by his Lordship; meantime reserve all questions of expenses."

Lord Adam—I concur.

Lord M'Laren—I am of the same opinion. On the question of *res judicata* it seems to me that the decision of the Court of Claims has already received full effect, because that decision was only to the effect that Mr Scrymgeour-Wedderburn was entitled to officiate as Standard Bearer at the King's Coronation. That ceremonial has passed and the judgment has received full effect. The question is therefore entirely here as to which of the competing parties is entitled to the hereditary office in perpetuity. On the question of further procedure I agree with your Lordships that there ought to be an order for proof, because the foundation of the title of each party rests on a question of fact which is not admitted by either, namely, his propinquity to the original grantee.

Lord Kinnear—I agree with your Lordships in thinking the question is not ripe for decision on its merits, and cannot be disposed of on its merits without prejudice to the parties until we have the facts before us on which either party relies. We can have these facts only by the parties being allowed a proof or by one or both renouncing probation, and therefore the only course will be to allow a proof.

Parties having been allowed a proof, the defender asked for a diligence against documents in the pursuer's possession, and certain questions to which this gave rise were then decided and reported, *ante*, vol. 42, p. 222, 7 F. 1045. Proof was led before Lord M'Laren on 14th July 1906 and 12th January 1907, certain genealogical specialists being examined. Thereafter the parties were heard again upon the defender's reclaiming note.

Argued for the defender and reclaimer—(1) The origin, nature, and history of the office showed it to be not a right of property but a personal dignity, affectable only by failure or corruption of blood or by statute. A special patronymic was bestowed upon the original grantee and his heirs. There was a *delectus familiæ* in the grant; the office implied high honour; the holder took precedence before the Lord Advocate. It carried no emoluments, and was an honourable burden rather than a right of property, and in respect of having performed the duties, the distinct office of Constable of Dundee with lands was granted to the Standard Bearer. (2) From its nature the office could not be affected by apprising or adjudication. This was decided in respect of the Earl Marischal —(*Bower*, 1682, 2 Br. Supp. 18, 3 do. 348, Fount. 1, 94, 171). The duties of that office were to lead the van in battle, and were thus analogous. In *Cockburn*, 1747, M.

150, 157, 1 Pat. (H.L.) 603, the office of Hereditary Usher was held adjudgable, but it was of an inferior standing, carrying profits without involving *delectus*. Although Ersk. (ii, 12, 7), stated that the office of High Constable was adjudgable, that was denied by Fountainhall (i, 98, *sub voce* Duke Hamilton, 1680). The office of Keeper of the Register of Sasines was not adjudgable — *Wilson*, 1759, M. 165, Lord Kames' note, p. 167. Lord Kames explained that the emoluments only were adjudgable, not the office. The sale of public offices was illegal—*Stewart*, 1802, 4 Pat. 286—and offices of high dignity were *extra commercium*—Ersk. iii, 8, 86—although minor offices were assigned—*Waddell*, 1771, M. 13,134, 16,633, 2 Pat. 205. Apprising therefore could not affect the title to the office of the heir of the family of Scrymgeour, who held it *jure sanguinis* under a statutory title not affectable by any subsequent proceedings. (3) The history of the office showed it had never changed its character so as to become a right of property. It never entered the entails of the lands; it was never an office of profit; its character and history were in contrast to those of the office of Constable of Dundee, and the charters dealt differently with the two. The inclusion in 1643 of the office in the barony titles was mistaken and could not alter its nature—*Lord Advocate* v. *Cathcart*, May 19, 1871, 9 Macph. 744, Lord President Inglis at p. 749, 8 S.L.R. 503. The office had not passed by infeftments, for infeftment was incomplete without delivery of possession—Ersk. ii, 3, 18—and there had never been symbolic delivery of the office. (4) The titles obtained by Maitland of Hatton did not carry the office. The charter of *ultimus hæres* was invalid because an heir-male existed. The decreet of recognition did not contain the office—Ersk. ii, 5, 10, 17—and recognition was inconsistent with the title in virtue of *ultimus hæres*. The decree of 14th February 1671 in favour of Maitland of Hatton had twice been considered and treated as invalid by the Court of Session—*Scrymgeour of Kirkton and Others* v. *Lauderdale*, 1686, Fount. i, 394, M. 6485, 16,395; *Lauderdale* v. *Lord Gray and the Officers of State*, January 18, 1785 (Campbell's Coll. of Sess. Papers, Adv. Lib.) (5) The titles of Maitland of Hatton could not by their nature have carried the office, as they all related to feudal estate. Further, after the Act 1455, c. 44, the King could not create any new heritable office, and although the grant of Charles II purported to pass on an old office, that office, by the terms of its destination under 1600, c. 44, was not transmissible. Moreover, *ultimus hæres* was not succession but confiscation—Stair, iii, 3, 47. (6) The defender had sufficiently proved his descent in male line within the destination of the office in the Act 1600, c. 44.

Argued for the pursuer (respondent)—(1) The office was a heritable office, not a mere dignity, and fees were actually paid to its holder. It was carried by retour, and in 1643 was included as part of the barony subjects; a barony title carried all the pertinents—Stair, ii, 3, 45; *L. Clackmannan*, 1630, M. 16,399. Whatever such offices had been originally, they had become benefices like feus, and were no longer inalienable. *Cockburn* (*supra*) overruled *Bower* (*supra*). (Reference was made also to Riddell on Peerage, vol. ii, p. 850; Balfour's Heraldic Tracts, Appendix II, pp. xxviii, *et seq.*; *Macdonell*, 1828, 6 S. 600.) The Act 1600, c. 44, was only a private Act, and these were reducible by the Court of Session—Ersk. i, 1, 39. (2) The decree of 1671 must prevail unless reduced, and it was no longer reducible—Court of Session Act 1868, sec. 24. All the objections now urged to that decree were competent and omitted—*Carmichael*, June 19, 1866, 4 Macph. 842, 2 S.L.R. 89. The negative prescription applied—*Dundonald*, 1836, 14 S. 737; *Fraser*, February 18, 1898, 25 R. 603, 35 S.L.R. 471; *Cubbison*, 1837, 16 S. 112, *per* Lord Corehouse, p. 119; *Paul*, February 8, 1814, F.C.; *Blair*, 1789, M. 12,196; *Macdonald*, 1790, M. 12,198. (3) Although defender's title to defend had been held to be sufficiently averred, it had not been sufficiently proved. [The Court found it unnecessary to decide this.]

At advising—

LORD PRESIDENT — The case for judgment is both important and interesting. It deals with the right to an ancient and honourable office, that of the Standard Bearer to the King of Scotland. We have before us in the papers the results of a long and most painstaking archæological inquiry, and we have had the assistance of a careful and able argument on both sides of the bar.

The form in which the case presents itself is an action of declarator at the instance of the Earl of Lauderdale, in which he seeks to have it found and declared that in virtue of his titles the said office of Standard Bearer belongs to him. He called as defenders Mr Scrymgeour-Wedderburn of Birkhill, and the Rev. R. C. Scrymgeour, being the two persons who had appeared as rival claimants before the Court of Claims shortly to be mentioned. Mr Scrymgeour-Wedderburn alone defends, and alleging that he is in right of said office seeks absolvitor from the conclusions of the summons. The case is before your Lordships not for the first time, though I personally on the former occasions did not share your Lordships' deliberations, and I think it is necessary first briefly to recapitulate the former history of the case.

It is common ground between the parties that the office of Standard Bearer, which had been long in the family of Scrymgeour, was confirmed to Sir James Scrymgeour of Dudhope and his heirs-male by an Act of the Scots Parliament in 1600. It was undisputedly possessed and enjoyed by John Scrymgeour, Third Viscount Dudhope and Earl of Dundee. This nobleman fell into debt, and various apprisings were led against his estate. In 1668 he died admittedly without male issue of his body. Shortly thereafter Charles Maitland of Hatton, Lord Hatton and afterwards Earl

of Lauderdale, acquired, as alleged by the pursuer, the right to the Standard Bearership. This he did by obtaining a grant of the same (it will be understood that I am still setting forth the allegations of the pursuer) from the Crown, who had succeeded as *ultimus hæres* in default of male heirs to the Earl of Dundee, and he was duly infeft on the charter issued in respect of the grant.

He also bought up some of the apprisings and upon them obtained a Crown Charter of Adjudication. He further obtained some supplementary titles. All these infeftments were confirmed by Act of Parliament. Till 1761 the right was held on personal titles only, but in that year the seventh Earl of Lauderdale made up title as heir of the third Earl, and obtained thereafter a Crown Charter of Adjudication affecting the said office. Since then the Earls of Lauderdale have duly made up title to the said office, and the present pursuer has the same in his infeftments. Further, it is matter of admission that the present pursuer is the heir-male of Charles Maitland, afterwards third Earl of Lauderdale. On this statement the pursuer says his title to the office is complete.

The defender replies that the whole proceedings of Charles Maitland as regards the Standard Bearership were inept. He says that the right was incapable of being attached by diligence, and consequently did not fall under the apprisings; and that it did not fall to the Crown as *ultimus hæres*, because although the Earl of Dundee died without heirs-male of his body he did not die without heirs-male; and he says that he is, if not the heir-male, at least an heir-male of the said Earl, and as such entitled to resist the unfounded claim of the pursuer.

In this state of allegation each party began by an attack on the title of the other. The defender first pled no jurisdiction, by which he meant that the Court of Session had no jurisdiction to declare the right to such an office, just as it had no jurisdiction to declare the right to a Peerage. Lord Kyllachy as Lord Ordinary on 13th December 1902 repelled that plea, and to that judgment your Lordships on 29th November 1904 adhered.

The defender next pled *res judicata*. This plea was founded on the fact that the Court of Claims appointed to deal with claims of persons to render services at the late Coronation of his present Majesty, had on 15th January 1902, in a competition between these two parties and the other defender as to the right to be present at the Coronation as Hereditary Standard Bearer for Scotland, pronounced in favour of the present defender and against the pursuer. The Lord Ordinary of the same date, 13th December 1902, repelled this plea also, and to that also your Lordships adhered.

The pursuer then attacked the defender's title to defend. The Lord Ordinary after hearing parties sisted the cause in order that the defender might produce if he could a service as heir-male of the Earl of Dundee, who died in 1688. Upon the defender refusing to do so, he, on 4th December 1903, sustained the second plea-in-law for the pursuer, which was to the effect that the defender not alleging himself to be the heir-male of the Sir John Scrymgeour mentioned in the Act of 1600 (it is admitted that the Earl of Dundee was his heir-male) had no title or interest to oppose the conclusion of the summons, and decerned and declared in favour of the pursuer. On 29th November 1904 your Lordships recalled that interlocutor and, parties having declined to renounce probation, ordered a proof. That proof, oral and documentary, with minutes of admissions, is now before your Lordships.

I mentioned already that up to this point I was not a party to your Lordships' deliberations. I think it therefore expedient that I should first explain what I understand to be the precise effect of your Lordships' interlocutor recalling the Lord Ordinary's interlocutor of 4th December 1903. I do not hold that you thereby express dissent with all the views expressed by the Lord Ordinary in his note. What I do hold to have been determined was that it was not right to deny the defender a title to defend solely on the ground that he did not *ante omnia* assert and prove that he was the heir-male of the Earl of Dundee. He did assert and offer to prove that he was one of the heirs-male of Sir James Scrymgeour, *i.e.*, within the destination of the Act of 1600; and if that was so, and if his further allegations as to the ineptitude of Charles Maitland's titles were made out, then your Lordships held that he would have shown a sufficient title to prevent the present pursuer obtaining his decree even though he himself might conceivably have to give way before the superior claims of another Scrymgeour who could show that he was the heir-male of the Earl of Dundee. I accordingly approach the case from that standpoint, although as this case may go further I may perhaps be allowed to add that I respectfully agree with that judgment.

One other point ought to be mentioned in order to be put aside before I come to the merits of the case. Neither party is in a position to plead the positive prescription as determining the matter in his favour, because neither can show undisturbed possession. The office of Standard Bearer is not such a thing as admits of a proof of possession except on stated occasions. But following the analogy of acts of presentation in the case of patronage, probably if either party had been able to show that on successive occasions of coronations he and his ancestors had been summoned by the Sovereign to execute his office that would have been sufficient. Admittedly neither can do so.

Coming now to the merits of the case one might either first consider the point whether the defender had failed to connect himself with the destination of 1600 at all, in which case he would be a mere third party and not entitled to defend; or one might consider whether Charles Maitland's titles were truly inept to transmit to him

the office upon the grounds pled by the defender, a resolution of which in the negative would at least drive the defender to prove that he was the heir-male of the Earl of Dundee. On both of these questions we had careful and sustained argument. In my view of the case, however, there is another consideration which makes it unnecessary to resolve either of these questions, and that depends upon a fact which I have not so far stated.

In 1671 Charles Maitland, having by this time obtained the charter of *ultimus hæres* of 11th July 1670, which included *ex facie* the office of Standard Bearer, raised an action of declarator in which he called as defenders a John Scrymgeour, undesignated, but called as apparent heir (not, be it observed, heir-male) to the deceased Earl of Dundee, and also, *inter alios*, John Scrymgeour of Kirkton, who was, according to the defender's genealogy, his ancestor. In this action he obtained decree, and the extract decreet we have before us. Like all extracts of that period it narrates not only the conclusions of the action and the decree proper but also the whole proceedings in the action. Now the conclusions set forth that the pursuer Charles Maitland, being the holder of the charter of 11th July 1670, which is then narrated as including various lands, &c., and, *inter alia*, "the office of bannerbearer," it ought and should be found and declared that the whole foresaid lands and others particularly and generally also mentioned do properly belong and pertain to the said Charles Maitland, and then after detailing the various steps of procedure, and the defences, answers, replies, and duplies, goes on to say that the Lords repelled the defence and therefore found, decerned, and declared in manner above written.

Now that is a decree which in terms actually declared this office to belong to Charles Maitland, in a process to which Scrymgeour of Kirkton was called, and in my opinion that concludes the whole matter. If your Lordship's judgment in this case is sound that this Court has jurisdiction to determine to whom this office belongs, then that was equally true of the same Court in 1671. The pursuer as heir of Charles Maitland is in right of that decree. It seems to me, therefore, that the present defender can never prevail against the pursuer without reducing that decree, and that he cannot do because of the negative prescription. For the pursuer can plead the negative prescription against the defender even although he cannot himself assert the positive. (See *Dundonald* v. *Dykes*, 14 S. 737, and the well-known case of *Cubbison* v. *Hyslop*.)

The defender attempted to criticise the result at which the Court arrived by examining the arguments of parties as set forth in the pleadings of parties detailed in the extract. But none of these criticisms are of any avail, for at best they could only show that the Court was wrong. It is quite true that the contention seems to have turned on whether the ruling deed of the lands was a taillie of 1617 or an earlier taillie of 1587. And the reason for that was the taillie of 1617 was limited to the heirs-male of Sir John Scrymgeour. We have got that deed here, and it is so. It is perhaps well to remind your Lordships, in case of misunderstanding, that the *assignati quicunque* in a deed of that date were assignees before infeftment. If this were the ruling deed no one could prevail against the donation of the Crown unless he could allege he was heir-male of Sir John. The deed of 1587, which we have also got, taillied the lands to a much wider destination, one branch of which was a Scrymgeour of Kirkton and his heirs, so that the Scrymgeour, defender in the process, could prevent it being said that the lands had fallen to the Crown as *ultimus hæres*. It is also the fact that if you look at the deed of 1617 you find that it does not include the Standard Bearership. But all this does not make an objection of the kind known as inherent nullity. It only would go to show that the judgment was wrong. It is possible to say that there ought to have been a distinction made, *i.e.*, that the lands ought to have been declared as belonging to Charles Maitland, but not the Standard Bearership. But if so Scrymgeour of Kirkton was there and ought to have said so. Everything now pled as to the peculiar nature of the right to the office could have been said then. The reason very probably was that at that time the parties thought much of the lands and but little of the office. But the bare fact remains that a declaration in plain terms of the right to the office is sought by Charles Maitland, and that decree of declarator is pronounced in the terms craved.

The fact that the procurators for Scrymgeour are allowed to withdraw and the decree is pronounced as a decree in absence is also of no avail to the defender. This, of course, is an *ex facie* objection. But it was long ago noted that a decree in absence proceeding on a personal citation (and *a fortiori* in a case where appearance was entered) could not be reduced merely on the ground of being in absence after the death of the defender—*Macdonald*, 1790, M. 12,198—and the Court of Session Act 1868 by section 24 protects all such decrees after twenty years after their date.

This view if sound makes it unnecessary to decide either of the other two questions. But in view of the importance of the case it may be as well that I should say something about them.

With regard to the question of the quality of the office I share the views expressed by Lord Kyllachy in the first page of his first opinion. Whatever may have been the quality of the office in the dim ages in which it was first created, I think it fell under the feudalising influence which was apt to treat all such things as heritable and feudal, and accordingly, confessedly from times far earlier than the death of the Earl of Dundee, it finds its place in charters and infeftments along with other landed

property, and the successive holders make good their right by service. If that is so, then I think it became subject to disposition and to diligence, and could then be carried by the charter of recognition or by the charter of adjudication. The case of *Cockburn* of Langton is another example of such a process, and I do not think that the different class of the services makes any difference in the law. After all the Sovereign could if he chose save himself by not summoning his Standard Bearer to him on any occasion.

Then as regards the pedigree, my view is that although the defender raises a sort of moral conviction that the Scrymgeours of Kirkton were a branch of the Scrymgeours who held the office, yet I agree I cannot say that I think he has produced proof to get over the gap which occurs when you come to David of Sonahard. And unless he can get over this gap admittedly he must fail. And here again I think Lord Kyllachy's remarks on another aspect of the decree of 1671 are very weighty. They might have been got over by other proof. But such proof has not been in my judgment forthcoming.

The result on the whole case is that though one cannot help feeling that Charles Maitland in 1671 got either by accident or design an office to which it is difficult to see he was entitled, yet that having got a decree in his favour, and the office having thereafter been duly transmitted, the present pursuer is entitled to prevail.

LORD M'LAREN—I concur.

LORD KINNEAR—I had intended to express my own views in this case, but every point upon which I think it turns has been expounded in the opinion which your Lordship has just delivered. I am content, therefore, to say that both upon the general law of the case and upon the particular facts I entirely agree with all that has been said.

The Court sustained the pursuer's third plea-in-law, and decerned in terms of the conclusions of the summons, with expenses.

Counsel for Pursuer — The Dean of Faculty (Campbell, K.C.)--Macphail. Agents —Tods, Murray, & Jamieson, W.S.

Counsel for Defender—H. Johnston, K.C. (in 1904) — Clyde, K.C. — Hunter, K.C. — Stevenson. Agents—William Duncan & Company, S.S.C.