this easy road to escape a difficult task, viz., to hand over the funds to the School Board on conditions which are really no conditions but result merely in relief of the rates.

To sacrifice the opportunity of maintaining in a locality something having the mark of individuality, whether in the form of bursaries, provision for education in special subjects, or otherwise, and merely to throw the funds, so generously provided by a testator not forty years ago, into the general purse of the School Board, would, I think, be a very grievous local misfortune. Accordingly I have come without hesitation to the conclusion that this application should be refused, as fortunately it is not warranted by anything in the Education Act and is inconsistent with the practice of the Court in such matters. I refer, as the most recent authority in *pari casu* of which I am aware, to the *Governors of Lady Burnett of Leys School* (1911), 48 S.L.R. 667, which when read along with a complete account of the *Dalry* case, appears to me to indicate the lines on which the case ought to have proceeded, instead of those on which it has. Nor can I altogether reconcile the course taken here with much that was said in the *Alloa* case (1 F. 48).

LORD PRESIDENT — LORD DUNDAS and LORD SKERRINGTON agree in the judgment I have proposed.

The Court pronounced this interlocutor—

"Approve of the said report: Authorise the petitioners, as trustees acting under deed of mortification by Miss Christina Anderson of Moredun, of 'The Anderson Female School,' to transfer to the School Board of the parish of Liberton, under the conditions set forth in the appendix to the petition, the area of ground conveyed by said deed of mortification, with the whole buildings thereon, and the balance of funds now belonging to the endowment, after deducting the expenses of the present application and relative proceedings, and for that purpose to execute such conveyances and transfers and all other deeds which may be necessary for fully vesting the said School Board of the parish of Liberton therein; and decern: Further, remit to the reporter to adjust the necessary deeds."

Counsel for Petitioners—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, June 20.

FIRST DIVISION.

[Court of Lord Lyon King of Arms.

ROYAL COLLEGE OF SURGEONS, EDINBURGH *v.* ROYAL COLLEGE OF PHYSICIANS, EDINBURGH.

Jurisdiction—Lord Lyon King of Arms—Right to Precedency.

The jurisdiction of the Lord Lyon King of Arms in regard to matters of precedency is purely ministerial and does not entitle him to determine the legal right to precedency.

One of two colleges presented a petition to the Lord Lyon King of Arms craving him to find and declare that it was entitled "in all time coming to precedency" over the other. The Court *dismissed* the petition, *holding* that the Lord Lyon had no jurisdiction to determine the question.

On 11th February 1911 the Royal College of Surgeons, Edinburgh, presented a petition to Sir James Balfour Paul, Lord Lyon King of Arms, in which they craved his Lordship to "find, decern, and declare that the petitioners are entitled in all time coming to precedency over the Royal College of Physicians of Edinburgh on all public or ceremonial occasions, or otherwise to grant unto the petitioners such precedency."

The petition stated — "That the petitioners claim, on various grounds, and, in particular, by virtue of the Royal, Parliamentary, and other grants in their favour, produced herewith, as well as by virtue of usage, that they are, on all public or ceremonial occasions, entitled to precedency over the Royal College of Physicians of Edinburgh, or otherwise that such precedency ought to be granted to them. That this claim is disputed by the said Royal College of Physicians. That on 13th March 1901 the Right Honourable Alexander Hugh, Lord Balfour of Burleigh, then Secretary for Scotland, on representations by the said Royal College of Physicians, and without affording to the petitioners any opportunity of being heard thereanent, intimated to the petitioners that he had decided that on the occasion of the presentation of Addresses to his late Majesty King Edward VII precedence over the petitioners should be given to the said Royal College of Physicians, and further, that this decision would be acted on by the Scottish Office until disturbed by any higher authority. A copy of the letter of Sir William C. Dunbar, then Assistant Under Secretary for Scotland, making the foresaid intimation, is herewith produced. That no power to deal with such matters has been committed to, or is possessed by, the Secretary for Scotland, and that the said decision, which subverted the existing usage, was *ultra vires* of the said Right

Honourable Alexander Hugh, Lord Balfour of Burleigh, and is wholly inept and ineffectual in law. That in view of the statement that the said decision will be acted on by the said Scottish Office until disturbed by any higher authority, the petitioners find it necessary to make the present application to your Lordship."

The respondent the Royal College of Physicians lodged answers in which they submitted that the Lyon King of Arms had no jurisdiction to deal with the question raised in the petition, and also that the petition was incompetent.

They averred—"It is further explained that on 9th February 1911 the respondents presented a petition to His Majesty the King, praying that His Majesty would be graciously pleased to ordain and declare that on all occasions, place, pre-eminence, precedence, and preaudience as between the Royal College of Physicians of Edinburgh and the Royal College of Surgeons of Edinburgh shall be given to the said Royal College of Physicians, and to grant a warrant to the Lyon King of Arms to see His Majesty's gracious order observed and kept, and to record the same in the Lyon Office in Edinburgh, to the end that the Officers of Arms of Scotland and all others upon occasion may take full notice and have knowledge thereof. The said petition is still before His Majesty. The respondents therefore submit that the present petition to the Court of the Lord Lyon ought to be sisted *in hoc statu* to await the declaration of the King's pleasure on the petition of the respondents. Further, the present petition contains (1) no statement that the petitioners hold any grant of precedence; nor (2) any reference to the grants in their favour produced by them which is sufficient to make them relevant to the petition; nor (3) any statement of any facts on which they found their contention that they enjoy a title by usage. The petition ought therefore to be dismissed as irrelevant and lacking in specification. In any event the petitioners have no right of precedence over the respondents by usage or by any other title, and therefore none can be accorded to them by the Lord Lyon."

On 9th March 1911 the Lord Lyon King of Arms pronounced this interlocutor—"The Lord Lyon King of Arms, acting on the instructions of His Majesty's Secretary for Scotland, declines jurisdiction in this cause."

The petitioners the Royal College of Surgeons appealed to the First Division, who on 14th March 1911, after hearing counsel for the parties in the Single Bills, remitted to the Lord Lyon to proceed as accords.

Thereafter on 12th April 1911 the Lord Lyon pronounced the following interlocutor:—"The Lord Lyon King of Arms having heard counsel on the amended answers for the respondents, repels the answer for the respondents so far as it deals with his jurisdiction: Finds that he has jurisdiction so far as concerns a claim to a right of precedence: *Quoad ultra* continues the cause and appoints it to be put to the roll to hear parties as to the relevancy and further procedure, and decerns."

Note—"This is a petition by the Royal College of Surgeons of Edinburgh, stating that in 1901 Lord Balfour of Burleigh, who was then Secretary for Scotland, decided, without hearing parties, that on the occasion of the presentation of addresses to his late Majesty King Edward VII, precedence over the petitioners would be given to the Royal College of Physicians of Edinburgh, and further, that this decision would be acted on till disturbed by a higher authority.

"In February 1911 the Royal College of Physicians presented through the Secretary for Scotland a petition to His Majesty praying that he would be graciously pleased to grant them precedence over the Royal College of Surgeons. The two petitions, that of Physicians to the King and that of the Surgeons to Lyon, appear to have been presented almost simultaneously.

"The Secretary for Scotland, after some correspondence on the subject, wrote to Lyon on 7th March 1911, to the effect that 'he had given the matter the most careful consideration in consultation with the Lord Advocate, and that he is of opinion, as advised, that the Lyon King of Arms has no jurisdiction on the question at issue, the decision of which rests solely with the Sovereign. It would therefore appear that the proper course for you to adopt is to decline jurisdiction in the matter.' Acting on this letter I issued an interlocutor in its terms 'declining' jurisdiction. This was appealed to the First Division of the Court of Session, and the case was remitted to me to decide whether or not, in my opinion, I had jurisdiction.

"The present petition prays that I should find, decern, and declare that the petitioners are entitled to precedence in all time coming over the Royal College of Physicians on all public or ceremonial occasions, or otherwise to grant to the petitioners such precedency. The latter part of the prayer of the petition is certainly beyond my power to consider, and indeed it was not seriously pressed by the petitioners. It is only the King who can grant any particular precedence. The question now at issue is whether the Lyon has power to investigate the claim of any alleged right to precedence, or merely to see that an order of precedence which has been proved should be observed by the parties concerned—in other words, whether his duties are judicial or merely administrative.

"Two objections were lodged by counsel for the respondents against the jurisdiction of Lyon—*first*, that there was no such thing as a legal right of precedence; *second*, that even if there were, it did not fall under the judicial powers possessed by Lyon. As regards the first point, I confess I cannot see how precedence cannot be made the subject of legal right as well as other things. The respondents themselves

have presented a petition to the King for a grant of precedence. If that were granted them, would they not have a legal right to the precedence conferred, which they would quite properly insist on being admitted on all occasions, and they could take steps to enforce it if necessary. Lord Fountainhall (ii, 315) expressly treats precedence as a subject capable of prescription, thus indicating that it is a separate entity, and capable of being constituted a legal right. On this point, therefore, I am of opinion that the respondents have not shown any cause why precedence should not be considered as a right which may be enforced at law.

"The other point is more difficult. There is no doubt that the word precedence does not occur in any of the Acts of the Scottish Parliament which deal exclusively with the duties of the Lyon. But it is clear that when questions of precedence had to be decided by Parliament the Lyon was considered a most essential officer in assisting Parliament to come to a conclusion. In 1587 a Commission was appointed to take into consideration the precedence of the different estates of Parliament and the individuals and bodies composing them. The Committee were enjoined to 'take with them Lyon' before any decision was given—Acta Parl. Scot. iii. 444. In 1592 also a similar Commission was appointed with the distinct proviso that the Earl Marshal and Lyon were always to be members. The respondents no doubt quoted Sir Ilay Campbell's opinion to the effect that Lyon had no jurisdiction in precedences, or rather that he could not decide in such questions 'with any effect,' whatever that may mean; but on the other hand Lord Kames is quite of the contrary opinion, and states distinctly—Tracts, 3rd ed., p. 211—that 'controversies as to precedence pertain to the Lyon.' Since the Union and the consequent abolition of the Privy Council the whole practice of the Lyon Court shows what a universal consensus of opinion there has been that it is the place where matters concerning precedence may be referred. It is the fact, as stated by the respondents, that there is no case on record in the Lyon's books on which a formal judgment on a question of precedence has been given. But if formal judgments are wanting, there is no lack of informal findings. One of the earliest on record is exactly a hundred years ago, when a dispute having arisen as to the respective precedency of doctors of divinity, law, and physic, and gentlemen of landed property, in the procession of the Lord High Commissioner to the General Assembly, the Commissioner, it is stated in the 'Precedency Book' in the Lyon Office, was pleased to apply to the Lyon 'officially' to have the point settled; and though no formal interlocutor was issued, an opinion, which was duly recorded in Lyon's books, was given by the Lyon Depute dealing with the case. From that day to this there have been constant applications to the Lyon to settle points of precedence. Rarely a month passes without some point in this connection being brought under his notice for an opinion.

"The belief that Lyon has jurisdiction on matters of precedence is of very old standing. Before the Union of 1707 it was, according to the 'Precedency Book' before alluded to, the Lyon who proposed, in draft, the ceremonial for the Riding of the Scots Parliament, assigning all persons their respective places, and this was approved by the Privy Council. There was an appeal to Parliament by persons who considered themselves 'prejudged,' thus showing that it was the Lyon who pronounced judgment, in the first place, on their respective positions.

"In 1681 when the Usher of Parliament claimed precedence over Lyon in a petition to the Privy Council (because obviously the Lyon could not decide a case in which he was one of the interested parties), it was stated that amongst the duties of Lyon were, *inter alia*, 'to know and order the degrees of nobility . . . to rank and order all degrees of subjects in proper and convenient places, at Coronations, Parliaments, Triumphs, Jousts and Tournaments, Marriages of Princes of the Blood, Funerals and other Public Solemnities, Cavalcades and Processions.' As it is not disputed that Lyon has at all events a ministerial function to perform in the marshalling of processions and the like, it is difficult to see how this ministerial function can be separated from a judicial one. Were all the members in, say, a procession definitely assigned by royal authority to certain positions, his function no doubt would be purely ministerial; but it may often happen that two persons or bodies may each assert, as in the present case, that they have priority of place over the other. What can the Lyon do in such a case but call upon them to produce proofs in order to enable him to determine what their respective places should be, and thus his ministerial function becomes a judicial one.

"But if there were any doubt as to the jurisdiction of Lyon in matters of precedence, it appears to me to be removed by the precise terms of the Royal Warrant for a scale of precedence in Scotland of 9th March 1905. This warrant concludes, 'Our Will and Pleasure therefore is that Lyon King of Arms, to whom the cognisance of matters of this nature in Scotland doth properly belong, do see this Order observed and kept,' &c. 'Matters of this nature' evidently refer to the words 'place, preeminence, and precedence' which occur in a previous passage in the warrant.

"It has been doubted whether a body or corporation can have any precedence as such, but I may point out that in 1695 Parliament ratified to the Incorporated Trades of Dundee such place and precedence, *inter se*, as they had hitherto possessed for more than forty years, the ordinary period of prescription—Acta Parl. Scot. ix. 510.

"As the petitioners contend that they already possess a right of precedence over the respondents, I propose to send the

case to the roll to consider as to relevancy and further procedure."

The respondents the Royal College of Physicians appealed, and argued — The Lyon had no jurisdiction to entertain this petition, for (1) there was no such thing as a legal right of precedency, and (2) if there were such a right he had no jurisdiction to determine it. In support of the first proposition he argued—*Esto* that the Court of Session did formerly (1606) determine questions of precedency in regard to peerages, it did not deal with precedency as a legal right by itself, but as incidental of the particular peerage which was the subject of litigation — Gilbert Stewart's Public Law and Constitution of Scotland, p. 269; Seton's Laws of Heraldry, p. 40; Sir Ilay Campbell's Preface to A.S., 1811, pp. 20-21; Riddell on Peerages, i, 3-5; Mackenzie on Precedence, ii, 542-8; Kames' Law Tracts, 211; Ersk. Inst. i, 4, 32-3; Bankton's Inst. iv, 6, 11-12; Fountainhall, ii, 315 (*Sutherland Peerage* case). (2) *Esto*, however, that there was such a right, the Lyon had no jurisdiction to determine it, for the King alone could do so—*Cowley* v. *Cowley*, [1901] A.C. 450, at p. 454; Report of Proceedings in the Privy Council as to the Precedence of the Corporations of Edinburgh and Dublin (*vide* Marwick's Precedence of Edinburgh and Dublin (1865) at p. 111). The statutes which regulated the Lyon's functions clearly showed he had no such jurisdiction — 1587, cap. 46; 1592, cap. 127; and 1672, cap. 21 (*vide* Thomson's Acts, vol. i, 552, 622, and vol. ii, 506).

Argued for respondents—A right of precedency was clearly recognised by the law of Scotland, for there were many instances in which the Court had determined such questions — *Sutherland Peerage* case (*vide* Maitland Club Miscellanies, 361 *et seq.*; Fountainhall, ii. 315); *Glencairn* case, 1 Macq. 444, *Montrose* case, 457; *Lothian and Roxburgh* case (*vide* Scots Acts, viii, 473, and ix, 115); Tait's Acts of Sederunt, 1679, p. 142; Decreet of Ranking (*vide* Maitland Club Miscellanies, i, 347, 391, and 397); Incorporated Trades of Dundee, Scots Acts, ix, 509-10; Riddell's Peerage, i, 152. It was immaterial whether the King could invert the existing order of precedency or not; so long as it did exist the question at issue was one of legal right — Coke's Inst., part iv, p. 361; Mackenzie on Precedency, ii, 511, 570; Dirleton's Doubts, Prerogative, 137; 31 Henry VIII, cap. 10; Ersk. Inst., i, 2, 2 and 8; i, 3, 1 and 18; i, 4, 33. *Esto* that the Scots Acts cited by the appellant did not in terms confer jurisdiction on the Lyon in matters of precedency, they were careful to say that no right given was to be taken away. Moreover, it was well settled that all matters relating to arms — *e.g.*, precedency — appertained to the Lyon—*Macdonell* v. *Macdonald*, January 20, 1826, 4 S. 371; *Cuninghame* v. *Cunyngham*, June 13, 1849, 11 D. 1139; Royal Warrant, March 9, 1905. Reference was also made to *Russell's* case, 1793, 4 Modern Reports, p. 128.

At advising—

LORD PRESIDENT—This case originated by a petition presented in the Court of the Lord Lyon King of Arms by the Royal College of Surgeons, in which they ask for a decree from the Lord Lyon decerning and declaring that the petitioners are entitled in all time coming, on all public or ceremonial occasions, to precedency over the Royal College of Physicians.

The case was before your Lordships before, and parties were allowed to amend the pleadings that they had made; and accordingly, in the amended pleadings and the answers for the Royal College of Physicians, they plead that the Lyon King of Arms has no jurisdiction to deal with the question raised in the petition. The Lyon King of Arms has pronounced an interlocutor finding that he has jurisdiction, and continuing the case for further procedure, and it is against that interlocutor that this appeal is taken before your Lordships.

Now your Lordships will have already noticed that this petition is presented as a petition to the Lyon King of Arms in his capacity as a judge in one of the inferior judicatories of Scotland. From that inferior judicatory an appeal lies to your Lordships' Court, and your Lordships have to determine upon the merits such things as come from that Court by appeal. And I think it is a corollary of that that your Lordships would enforce any decree which was pronounced by the usual methods by which the Court enforces its decree.

Now having said that, the next observation I make is this, that there is no trace in the statutes which deal with the office of the Lyon of any jurisdiction being given in the matter of precedency. There is no authority for it in any text writer, because the note that was quoted of a very learned editor of "Erskine" is not an authority; and there is admittedly no recorded instance of a decision of such a matter.

I think that is enough to dispose of the case, and I only say further that so far from the terms of the Royal Warrant of 1905 which is referred to in the note which the Lyon has appended to his interlocutor, in so far from that, as he thinks, substantiating his jurisdiction, it seems to me to act in exactly the opposite way. The Royal Warrant of 1905 established a scale of social precedence in Scotland. It did not, as a matter of fact, deal either with colleges of physicians or surgeons, but that is immaterial. It went on—and this is the point upon which the Lord Lyon bases his view —"Our will and pleasure therefore is, that Lyon King of Arms, to whom the cognisance of matters of this nature in Scotland doth properly belong, do see this order observed and kept."

That seems to me, upon the face of it, an absolutely ministerial injunction and nothing more. It might be, I think, a very difficult constitutional question whether it was within the prerogative in 1905 to create a jurisdiction which did not exist before. But I do not think it is at all necessary to go into that. It certainly might acknowledge one that existed before, but upon the terms of it I think it is plainly an injunc-

tion to Lyon that lays upon him certain ministerial duties; and that he has a ministerial office in seeing that such precedence as is enjoined by the King in a warrant is observed in any procession or ceremonial "whereof Lyon hath the management," I have no doubt.

Upon these very simple grounds I think that the interlocutor must be recalled and the petition dismissed.

I really cannot imagine how the question of the supposed precedence between the one body and the other could be a matter which we, sitting as a court of law as we do in reviewing the judgment of the Lyon, could possibly propose to carry out by interdict and the sanctions of interdict, imprisonment, and so on. But while I say this, I may also say that if you are not dealing with a question of law, not going, as here, by means of a petition to ask a decree, but going to a person to settle a dispute between you, I could not imagine any more proper person to go to than the Lyon. And if these two bodies choose to agree between themselves that they will abide by his decision, I see no reason why—not sitting in his Court, but simply as a high authority on such questions—he should not decide such a dispute. No more proper person, I think, could be found. But I think there is neither precedent nor authority nor principle for making it matter of litigation in the courts of law; and accordingly I propose that we should deal with it as I have said.

LORD KINNEAR—I am of the same opinion. I think it enough for the decision of this case that the supposed jurisdiction of the Lyon Court in this matter certainly rests upon no Act of Parliament and upon no such continuous and accepted practice as should enable the Courts to presume a legal and constitutional origin. There is no instance before us of the supposed jurisdiction having been exercised, and, as I have said, there is no statutory foundation for it.

I agree also with your Lordship's observation that if bodies of this kind resolve to submit any dispute about precedence to anybody, the Lyon is a most appropriate, and probably the most appropriate, person to whom they could go. But although the Lyon Court is a statutory tribunal with undoubtedly jurisdiction on other matters, his decision upon a submission of that kind would be the decision of an arbiter and not the decision of one of the courts of the realm.

LORD JOHNSTON — It seems not to be contested that the Lyon King of Arms has certain executive functions in relation to precedence, and if so it does not seem to be unreasonable that he should have jurisdiction to inquire into and determine questions of precedence solely in order to enable him to exercise the functions of his office, and so as in no way to usurp any higher authority in this matter. If he has to deal executively with questions of precedence, it would seem more appropriate that he should determine such *ab ante* and after hearing claimants rather than summarily and in course of the execution of his office. Whether he has or has not such limited jurisdiction I do not know, and I would not wish to prejudge. But I think it is clear, first, that so far as this case goes, there has not been at all clearly made out to this Court what are the functions of the Lyon's office which require that he should determine, even *ad hoc*, questions of precedence; and second, that, *prima facie* at least, there does not seem to be any precedent.

I state the case thus, because the present question must be disposed of without a full examination into the history of the matter, which might adduce information which is not before us at present.

But I have examined the Scots Acts of Parliament which throw a good deal of light both on the office of Lyon and on the question of precedence, and I am able to say that I find nothing at any rate in them, and in the Rolls of Parliament, in which they are embedded, as printed in Thomson's Acts, to support the case for the Lyon's jurisdiction.

The Lyon appears at first on Thomson's page in the position of a herald merely. But by the middle of the sixteenth century he had become responsible for the exercise of their duties by messengers-at-arms. In 1567, cap. 80, provision is made for reformation of the Office of Arms, in terms evidently pointing to irregularities, both in the appointment and in the actings of messengers-at-arms, and, to that end, for definition of the Lyon's duties thereanent. This led to the Act 1587, cap. 30, which, as far as I can find, first establishes the Lyon Court. The Act reduces the number of messengers, places or at least recognises their appointment as in the hands of the Lyon King, and directs him to hold two courts in the year to inquire into complaints against them for malversation of office. This court is made a court of record. There are several confirmatory Acts, *e.g.*, that of 1669, cap. 95.

Then in 1592, cap. 29, there is found what appears to be the origin of another branch of the Lyon King's functions and jurisdiction. He may have had some such powers by prior usage, but this is the first recognition thereof by Parliament, and it has all the appearance of a new departure. I need not dwell on the matter in detail. It is sufficient to say that this Act originates the jurisdiction of the Lyon King in the matter of bearing arms. Duties of an inquisitorial nature are imposed upon him and his subordinates, and power to determine the right to bear arms and "to distinguish and decern them with congruent differences, and thereafter to matriculate them in their books and registers." This Act is also confirmed in later Acts, as, for instance, 1672, cap. 47. The Lyon's jurisdiction in this matter was partly quasi-judicial and partly ministerial. But it seems to spring from statutory authority.

But there is another phase in Parliamentary history which brings the Lyon King somewhat nearer to the question of

precedence. In the last two centuries of the sitting of the Scots Parliament there is constant evidence in the proceedings in Parliament of questions of precedence. But these are questions of parliamentary precedence — of precedence in what was termed the "riding"—that is, in the cavalcade which was in use to escort the king or his commissioner from the Palace of Holyrood House to the Parliament House—and of precedence in voting in Parliament, where the votes apparently were taken by calling the roll. I think the first instance of legislation on the subject is found in 1587, cap. 17, where an Act was passed against the disputations occurring about precedency of place and voting in Parliament, which were described as frequently leading to unseemly breaches of the peace on the floor of the House. This led to the Act 1587, cap. 18, which appointed a Commission to inquire into and determine the proper order of precedence. In this Commission the Lyon King of the day was included, but the president and *sine quo non* was the Earl Marshal. Subsequent Acts renewed the Commission, but nothing seems to have been done until 1606, when King James, after his accession to the throne of England, made a remit to a Commission of his Privy Council to the same effect. This resulted in the decree of ranking of 1606, of which I understand copies only are extant, and which contained this curious saving clause, reserving the right of all persons finding themselves prejudged by the ranking "to the recourse to the ordinare remede of law be a reduction before the Lords of Council and Session of this present decreet, for recovery of their own due place and rank be production of mair antient and authentic rights, nor has been used in the contrare of this process, and summoning thereto all such persons as they shall think wrongously ranked and placed before them." The sequel of this decree of ranking was, *inter alia*, the litigation which proceeded in the Court of Session between the Earls of Glencairn and Eglinton, and was still pending as late as 1649.

There are other instances of this question of Parliamentary precedence in the disputes between the burghs, which in 1579 and 1581 were referred to the Convention of Burghs. Yet, notwithstanding a decree of the Convention, there is evidence in the proceedings of Parliament that in 1584 the Earl Marshal had displaced Perth in favour of Dundee, by the King's command.

Similarly, questions of precedence between high officers of state—as the Lord Register and the Lord Advocate—were frequent in the latter end of the seventeenth century, and in 1685 there is a unique instance of a reference by Parliament to the King to settle the question of precedence between the Earl of Roxburghe and the Earl of Lothian. Again in 1625 there is found a petition by the lesser barons of Scotland against the precedence granted by the royal warrant to baronets of Nova Scotia.

I have stated these details with a view of showing that the matter of precedence was not one in which the Lyon King had any original function or jurisdiction, although he was called in expressly to assist where commissions to inquire and to determine a ranking were issued. This appears to me to be entirely against the contention of the Lyon King and the respondents. But the considerations I have adduced are, I think, useful also in enabling one to understand the bearing of the terms used in the final paragraph of the recent Royal Warrant of 1905 regarding precedence in Scotland, which at first sight occasion some difficulty. His Majesty intimates his royal will and pleasure that the Lyon King of Arms do see this order observed and kept, and he does so on the ground that to the Lyon King "the cognisance of matters of this sort in Scotland do properly belong." This makes it clear that the Lyon King has some functions in the matter, but precisely what I have failed to ascertain, or how his intervention is made effectual. There is, however, a side-light on the point to be found in a copy of "the method and manner of riding the Parliament, with the orders and rules appointed thereanent," of date 1703, which is to be found in certain heraldic and antiquarian tracts published in 1837 from MSS. in the hands of the Faculty of Advocates, by, I think, Mr Maidment. The Lyon King, "to whose charge the order of the riding is committed," is to ride in his vestments with certain attendants. It would rather appear, therefore, that the Lyon King's function is to see that established order of precedence is complied with in state ceremonials. For the exercise of his functions it may therefore conceivably be that he requires to ascertain what is the established order of precedence. For even the table of precedence of 1905 does not cover all questions. But that is a very different thing from his judicially establishing such order of precedence on a permanent basis as he is asked to do here.

While I do not think that this judgment is based on sufficient inquiry to foreclose the question as I stated it at the outset, I agree with your Lordships in thinking that the above considerations require that this appeal be sustained and the petition dismissed, as its prayer is of no limited character, but craves a decerniture that the petitioners are entitled in all time coming to a certain precedency, or otherwise a grant of such precedency. To comply with such prayer is clearly beyond the power of the Lyon King.

LORD MACKENZIE — I am of the same opinion. No statute has been referred to which confers such a jurisdiction; no institutional writer says that such a jurisdiction exists; and, as the Lord Lyon states in the note appended to his interlocutor, there is no instance on record of a case in which such a jurisdiction has been exercised.

The reason for this is that a right of precedence by itself is not a legal entity which can properly be made matter of a judgment that can be enforced by a court of law.

The king determines by the exercise of the royal prerogative the scale of precedence. The duty of the Lyon King of Arms is ministerial—to see that the order is observed and kept.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Lord Lyon King of Arms dated 12th April 1911: Find that he has no jurisdiction: Therefore dismiss the petition, and decern."

Counsel for Petitioners (Appellants)—Clyde, K.C.—Horne, K.C.—J. H. Stevenson. Agent—A. Gray Muir, W.S.

Counsel for Respondents—Dean of Faculty (Scott Dickson, K.C.)—Macphail, K.C.—Hamilton Grierson. Agent—James Robertson, Solicitor.

Friday, June 9.

SECOND DIVISION.

CURRIE'S EXECUTORS *v.* CURRIE'S TRUSTEES.

Succession—Construction of Testamentary Writings—Erroneous Belief of Testator—Provision in Will for Executors to Receive Price on an Arranged Sale of Heritage Held by Separate Testamentary Trustees when, as Matter of Fact, no such Arrangement.

A testator, by separate trust-disposition confirmed by his will, conveyed to trustees a certain heritable estate. His will conveyed his general estate to his executors, and in a codicil to it he directed them—"I direct and empower my executors to pay for the fishing rights which I have agreed to purchase from Mr Ian Bullough of Meggernie, and I authorise them to receive for my estate the amount to be paid by Mr Ian Bullough for the farms of Cashlie and Dalchoirlich." The fishing was wanted for, and the farms were part of, the heritable estate conveyed by the separate trust-disposition, which, however, contained no reference to the proposed transaction. The testator was in the belief he had completed a binding agreement for it. As matter of fact he had not done so. The other party to the proposed transaction remained, however, willing to carry it out, and the trustees holding the heritable estate under the separate trust-disposition subsequently did so with the consent of the Court.

Held, in a question between the executors and the trustees of the heritable estate, that the former were not entitled to the balance fund receivable on the completion of the transaction, but that the latter were bound to hold it as a *surrogatum pro tanto* for the farms disponed.

A Special Case for the opinion and judgment of the Court was presented by (1) David Martin Currie and others, as executors under will in English form and two relative codicils of the late Sir Donald Currie, *first parties*, and (2) the said David Martin Currie and others, as trustees under a certain trust-disposition by the said Sir Donald Currie, *second parties*, dealing with a fund received by the second parties on the completion of a purchase of fishings and the sale of certain farms forming part of the trust estate administered by them.

The following *narrative* of the *facts* is taken from the opinion of Lord Dundas—"Sir Donald Currie died on 13th April 1909 possessed of large estate, both heritable and moveable. He was survived by his widow and by three daughters, one of whom is Mrs Wisely. His testamentary writings consisted of (1) a will in English form, dated 1st June 1908, and two codicils, of which only the later, dated 2nd April 1909, is material to the case; and (2) four *mortis causa* dispositions of separate heritable estates, which were expressly confirmed by his will, only one of which, dated 24th August 1904, need here be considered. It conveyed to trustees (who are the second parties—the first parties being Sir Donald's executors under the will and codicils) the truster's estate of Chesthill in Perthshire, and directed them to pay the free annual rents and income thereof to his widow during her lifetime for her liferent alimentary use allenarly, and on her death to Mrs Wisely during her lifetime; and on the death of the longest liver of these ladies, and on the only son of Mrs Wisely attaining twenty-one, to convey the estate to him and the heirs of his body, whom failing as therein set forth. Sir Donald acquired the estate of Chesthill in 1903 from its then proprietor, Mr Stewart Menzies, and he afterwards re-sold to Mr Menzies the mansion-house and certain ground in its immediate vicinity, subject to a right of pre-emption in favour of himself and his heirs in the estate of Chesthill, if Mr Menzies should come to offer these subjects for sale. Reference is made to Chesthill in two clauses of the codicil of 2nd April 1909, which may here be mentioned. Clause 6 narrates the said option to re-purchase, and directs the trustees under the will, in the event of such opportunity arising, to raise and pay the price of the subjects to be repurchased out of the trust funds in their hands forming part of the residuary estate, on the footing that the subjects should be conveyed to and vested in the trustees acting under the disposition of the Chesthill estate. The seventh clause (to be more particularly afterwards referred to) is as follows—'7. I direct and empower my executors to pay for the fishing rights which I have agreed to purchase from Mr Ian Bullough of Meggernie; and I authorise them to receive for my estate the amount arranged to be paid by Mr Ian Bullough for the farms of Cashlie and Dalchoirlich.' These two farms were part of Chesthill. It seems, therefore, that in one contingency Sir Donald intended (by the sixth clause) an enlargement of the Chesthill estate at the cost of