APPENDIX.

[The Collection of Appeal Cases in the Advocate's Library, of which the Compiler has availed himself, is defective in some parts, and hence omissions will occur, which can only be supplied from other Collections. The most perfect Collection of Appeals, for the period it embraces, is one in the possession of Lord Murray, which his Lordship was pleased kindly to place at the Compiler's disposal.]

GABRIEL NAPIER of Craig Annet, Sheriff-Depute of Stirling, ... } *Appellant;*

GEORGE M'FARLANE, Drover, *Respondent.*

House of Lords, 14th April 1749.

WAIF AND STRAY—PRICE OF AN OX—COMPETENCY OF ACTION BEFORE THE COURT OF SESSION.—

THIS was an action raised before the Court of Session by the respondent, for the sum of £8 Sterling, as the price of an ox belonging to him, and which had been taken possession of by the appellant as waif and stray, he being, as alleged, entitled as Sheriff-depute of the county, to claim all such property so found; and the respondent's ox having so strayed, was put into the Sheriff's own parks, and, after a certain time, killed and used for his own family.

The respondent's allegations in regard to the ox were, That having brought a great number of black cattle to Falkirk Tryst, with the view, if not sold, of taking them on to the English markets, "among other cattle brought to the market of Falkirk in 1744, "there was one remarkable grey ox, which being of a size much "larger than usual, and therefore improper to be mixed with the "smaller country cattle, the respondent resolved to leave it at home, "and to turn him to grass in his parks at Kilsyth. That this animal being young, of high spirits, and full of flesh, took a fancy to "separate from his companions, and, terrified by the noise and clamour which generally prevail on these occasions, where such numbers of cattle are crowded together, became a little unruly, and "sallying forth, endeavoured to break in upon the next drove; but "being checked by his keepers, who had a watchful eye over him, "was immediately brought back to his proper station, there to remain until he should be sent back to the parks at Kilsyth. Mean-

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"time he and his other servants went over to England with the re-
"mainder of his cattle." The man who was left in charge to take home the ox to the Kilsyth parks had driven it part on the way home, but was obliged to give it to a neighbouring farmer of the respondent, to be delivered by him to the keeper of the Kilsyth parks, which he undertook to do. "It thus happened that the ox, a "stranger to these grounds, and unacquainted with his new compa-
"nions, strayed in upon a neighbouring farm, the property of the "appellant, whereupon the appellant, as claiming right to waif and "strayed goods, by virtue of his temporary grant of the Sheriffship "of the said county, took the ox into his own custody, and put him "to grass in his own parks, intending, as it afterwards appeared, to "make use of him for winter provision for his family."

To this action the appellant pleaded two special defences: 1st. That the cause was not competent in the Court of Session, by the showing of the libel itself, which charges the ox "or stott" libelled to be worth £8, which, though treble its true value, was still less than 200 merks Scots (the lowest sum that by law can be brought in the first instance in that Court); 2dly. That the defender conducted himself agreeably to the law and the duty of his office as Sheriff-depute in respect of the stott libelled.

The respondent further alleged and proved, that he had claimed delivery of the ox by written letter, and also by a message sent through his servant, before it was made use of by the appellant.

The Lord Ordinary repelled the dilatory defence to the competency of the action brought before him, and allowed a proof to the respondent of his libel, and the property of the stott, and all facts and circumstances in relation thereto; and allowed the appellant to prove, on his part, the several intimations made by him as to the stott at the church doors in the neighbourhood, and at the market cross of Stirling, "and of the appreciation of the said stott, and the extent "of said appreciation."

After the proof was closed, and various interlocutors were pro-
Nov. 3, 1748. nounced, the Court finally pronounced this interlocutor: "Find the "defender (appellant) liable in three guineas, as the value of the "stott (ox) in question, and in the expense of the process, and or-"dain the pursuer to give in an account of the same against next
Dec. 1, 1748. "day." Thereafter, and upon considering the account given in, the Court modified the expenses to £15 Sterling, and decerned therefor,
Dec. 9, 1748. and for the value of the stott, &c. And, upon reclaiming petition, the Court adhered.

Against these several interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. That the cause was not competent in the Court of Session. 2. That the appellant, by his conduct, has done nothing illegal or injurious to the respondent, or deserving of any censure or penalty. 3. The respondent's behaviour has been

highly unjustifiable, vexatious, and oppressive, by neglecting to bring proof of the property when he ought to have brought it at first, and by wilfully disdaining to apply to the Sheriff for that end, as others in the like cases have done, in order to recover their strayed cattle, and also from his insisting upon prosecuting, after the appellant offered to make satisfaction for the value, if the stott really belonged to him. 1767. ROSEBERRY v. CREDITORS OF LORD PRIMROSE.

Pleaded by the Respondent.—The respondent did enter his claim to the property of the ox in due time, which he notified to the appellant, praying redelivery, and offering payment of whatever sum might be demanded in name of grass mail and other expenses; and the evidence then given that the ox belonged to him was such as ought to have satisfied the appellant.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *W. Grant, W. Murray.*

For the Respondent, *Alex. Lockhart, A. Forrester.*

NOTE.—This case, from the peculiar nature of the dispute, and the trivial sum involved, produced a good deal of noise in Westminster Hall. It is mentioned in Blackstone's Commentaries, 8vo. Edit. vol. iii. p. 393.

(Mor. 14,019, *et* Lord Monboddo's Remarks, 5 Brown's Sup. 926, *et* Bell's Com. p. 659.)

THE EARL OF ROSEBERRY, . . . *Appellant;*

THE CREDITORS OF HUGH LORD VISCOUNT PRIMROSE, Deceased, ... } *Respondents.*

House of Lords, 3d April, 1767.

ENTAIL—REGISTRATION—ACT 1685—PASSIVE REPRESENTATION.—(1.) An entail was made, and charter and infeftment passed thereon some years before the Act 1685, regarding the recording of entails, Held, that in order to protect against creditors, such an entail must be recorded. (2.) An heir succeeding, not by an universal title, but as heir under a particular destination, and not *hæres alioquin successurus*, found only liable to the extent of the value to which he succeeded.

Sir Archibald Primrose, Bart., executed a strict entail of his estate of Carrington, or Primrose, in 1680, in favour of his eldest son, Sir William Primrose, and the heirs male of his body, with several remainders over. Charter under the great seal passed on this entail, of this date, and the infeftment taken thereupon was recorded in the proper register. 1681. Apr. 29, 1682.

The prohibitory, irritant and resolutive clauses of the entail, which were directed against selling, alienating, wadsetting, and the contraction of debts, were repeated in the charter and infeftment, and also in all the subsequent investitures of the estate.