No. 33.

WILLIAM MACAO, Appellant.—*Warren—Walker.* OFFICERS of STATE for SCOTLAND, Respondents.—*Gifford—Rae—Wedderburn.*

Foreigner.—Held (affirming the judgment of the Court of Session) that a foreigner who had acquired by transfer shares of the stock of the Bank of Scotland, has no right to the privileges of a naturalized Scotsman, in terms of a clause in the statute 1695 constituting that Bank.

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1ST DIVISION. Lord Alloway.

BY a statute of the Parliament of Scotland, passed on the 19th July 1695, for erecting a public bank, it was declared, that 'Our 'Sovereign Lord, considering how useful a public bank may be in 'this kingdom, according to the custom of other kingdoms and 'states, and that the same can only be best set up and managed 'by persons in company with a joynt stock, sufficiently endowed 'with these powers and authorities and liberties necessary and 'usual in such cases, hath therefore allowed, and with advice and 'consent of the Estates of Parliament, allows a joint stock, amount-'ing to the sum of twelve hundred thousand pounds money, to 'be raised by the company hereby established for the carrying 'on and managing of a public bank, under the title of The Bank 'of Scotland.' Certain persons were then named, who, or any three of them, 'shall have power to appoint a book for subscrip-'tions of persons, either natives or foreigners, who shall be will-'ing to subscribe and pay into the said joint stock;' and (after mentioning a limited period for doing so) that 'therein all per-'sons shall have liberty to subscribe for such sums of money as 'they shall think fit to adventure in the said joint stock, £1000 'Scots being the lowest sum, and £20,000 Scots the highest; 'and the two thirds parts of the saids stocks belonging alwise to 'persons residing in Scotland.'

After constituting the stockholders an incorporation,—making various rules as to the government and administration of the Bank,—and authorizing transfers of shares to be made, either by assignations or testaments, to be recorded in a book kept by the Bank, and subscribed by the assignee or legatee in token of his acceptance, it is declared, that for preventing 'the breaking of the said 'joint stock and company, according to the design thereof,'—'the sums of the foresaid subscriptions and shares may only be 'conveyed and transmitted by the owners and others, who shall 'become partners of the company in their place, in manner above 'mentioned, or by adjudication or other legal conveyance in fa-'vours of one person allenarly, who, in like manner, shall succeed 'to be a partner in his predecessor's place, so that the foresaid 'sums of subscriptions may neither be taken out of the stock, nor

'parcelled amongst more persons by legal diligence, in any sort, 'to the diminishing or disturbing the stock of the said company, 'and good order thereof.' The statute, after several other provisions, concludes with the following clause: 'And it is likewise 'hereby provided, that all forraigners who shall join as partners 'of this Bank shall thereby be and become naturalized Scotsmen 'to all intents and purposes whatsoever.' By the statutes 14. Geo. III. c. 32.—24. Geo. III. c. 8.—32. Geo. III. c. 25.—34. Geo. III. c. 19.—and 44. Geo. III. c. 23., various provisions in favour of the Bank were made; and it was by all of them declared that the statute 1695 should remain in full force, in so far as not thereby altered. By the latter of them it was enacted, that in future all sums relative to the affairs of the Bank should be stated in sterling money, and that the stock should be divided into shares different from those mentioned in the original statute; but no repeal of the above clause as to foreigners was made.

In 1818, Mr. William Macao, a native of China, who had resided in Scotland during the greater part of his life, purchased certain shares of the Bank stock; and soon thereafter he raised an action of declarator against the Officers of State, in which, after narrating 'that the pursuer, a foreigner, became a partner 'of the said Bank by purchasing certain shares of the capital stock 'thereof, with a view that he might enjoy all the privileges and 'immunities of a naturalized Scotsman and British subject to all 'intents and purposes whatsoever;—that the pursuer having of 'late understood that some doubts are entertained how far his 'being a proprietor of the joint stock of the said Bank has the 'effect of bestowing upon him the privileges of a naturalized 'Scotsman and of a naturalized British subject, or freeing and 'relieving him from the disabilities, burdens, restrictions, and 'provisions imposed by the common law, or by the several acts 'of Parliament in respect of foreigners and aliens, as above mentioned, has become greatly alarmed;' and therefore he concluded, 'that the pursuer, although a foreigner, born in a country 'not under or subject to the laws of our realm, as a consequence 'of his having become a partner in the said Bank, by purchasing 'certain shares of the joint stock thereof, has become a naturalized Scotsman, and, as such, a naturalized British subject, to 'all intents and purposes whatsoever, in terms of the said statute 'before quoted, and that he is entitled to all the rights and privileges belonging or competent to any other naturalized Scots-'man and British subject.'

Against this action the Officers of State pleaded in defence, that the pursuer had no right to the privileges claimed by him; 1.

May 10. 1822. Because, under a sound construction of the statute 1695, the privilege of naturalization in Scotland was bestowed only on such foreigners as contributed to the original establishment of the Bank by joining as partners in it, and not on those who, like the pursuer, had acquired right by subsequent transfer;—that the object of the Legislature was to overcome the first difficulties in the institution of this Banking Company;—that it was with a view to that object that the privilege of naturalization was held forth to foreigners;—that accordingly it appeared, that in all the other statutes by which such a privilege was conferred on those who were engaged in manufactures or other public works, it was limited to those who had set up or established them;—and that it could never have been intended that all those who might at any future period acquire right to a share of the Bank stock, whether residing in Scotland, or in any other part of the world, should thereby become naturalized Scotsmen. 2. Because, on the supposition that the privilege could be so acquired by transfer, the provision of the statute 1695 became inoperative, and was repealed by the treaty of Union;—that, by that treaty, it was no longer possible for any person to be naturalized as a Scotsman, all distinction being taken away, so far as regarded allegiance and their respective public rights, between Scotsmen and Englishmen;—and that as it is impossible to bestow naturalization in Scotland, without necessarily inferring naturalization in England, effect could not be given to the clause of the statute 1695, without bestowing a right and privilege different from and more valuable than that which it contemplated, and without violating the sixth article of the Union. 3. Because by the statute 44. Geo. III. c. 23. the privilege claimed was by implication necessarily extinguished and repealed, seeing that the old division of the stock having been thereby abolished, there no longer existed that peculiar and defined statutory property on which the privilege was conferred. And, 4. Because the privilege claimed was contrary to the constitutional law of the kingdom, as established by a long course of British legislation;—that, accordingly, the clause on which it was founded had fallen into complete oblivion and nonuse;—that whether or not it was done away by the principles of desuetude, it was at least inconsistent with various British statutes;—and that, were effect to be given to the privilege under the statute 1695, a foreigner, even although a Roman Catholic, and not residing within the kingdom, might be qualified to hold the highest offices in the State.

In answer to these defences, it was contended by the pursuer, 1. That the clause of the statute was perfectly general, and

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that there was no authority for limiting the privilege thereby conferred to the original partners or subscribers, the words being of a prospective nature, ‘ That all foreigners who shall join as ‘ partners of this Bank shall thereby be and become naturalized ‘ Scotsmen, to all intents and purposes whatsoever.’ 2. That the clause was not affected by the treaty of Union, but that, on the contrary, (after enumerating various particular laws, among which the statute 1695 was not included,) it was declared by the eighteenth article, that ‘ all other laws in use within the king- ‘ dom of Scotland do, after the Union, and notwithstanding ‘ thereof, remain in the same force as before.’ 3. That the statute was confirmed by five British statutes, and that in none of them was there any repeal of the clause in question, and that the right thereby conferred could not be affected by the alteration on the amount of the shares; and, 4. That it was not abrogated by desuetude, nor was the privilege at all inconsistent with the principles of the constitution, or the course of legislative enactments, because a similar right was conferred by statute on sailors and others who had served for a specified period under the British Government, without reference to their religion or residence.

The Lord Ordinary found that ‘ it is provided by the statute ‘ 1695 for erecting a Bank in Scotland, ‘ That all foreigners who “ shall join as partners of this Bank shall thereby be and become “ naturalized Scotsmen to all intents and purposes whatsoever;” ‘ and that as this statute applies not only to the subscription, ‘ but to the conveyance or transference of that subscription, ‘ by no rule of interpretation can this privilege, which is contained ‘ in the last clause of the statute, be limited and restricted to ‘ original partners, as foreigners might join as partners of the ‘ Bank, as well by transference as by original subscription: That ‘ no part of this act can be held to be in desuetude, as not only ‘ are all the privileges at present possessed by the Bank conferred ‘ by the statute, but it has been five times renewed by British ‘ acts of Parliament since that period, increasing the capital of ‘ the Bank, in all of which it is provided that the said act of the ‘ Scottish Parliament in the year 1695 shall remain in full force ‘ as to every particular, except in so far as the same is altered by ‘ these different acts, and shall operate with regard to the increased ‘ capital in the same manner as in the old capital: That this ‘ statute 1695 was not repealed by the articles of Union, but that ‘ all persons who had acquired rights under that statute, or who ‘ might afterwards acquire them, were not thereby affected, ex- ‘ cept in the same manner that other Scotsmen were: Therefore

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'found that the pursuer, having joined as a partner of the Bank, 'is, while he remains a partner thereof, a naturalized Scotsman 'to all intents and purposes whatsoever, and decerns and declares 'accordingly.'

Against this interlocutor the Officers of State presented a petition to the Court, who, after ordering the opinions of Mr. Sergeant Lens, Mr. Sergeant Copley, Mr. Scarlett, and Mr. Warren, to be taken as to how far certain 'acts of the Parliament of Eng-'land, referred to in the petition and answers, are considered to 'be affected by the articles of Union, and how far they are now 'in force,' appointed a hearing in presence before the whole Judges of both Divisions, including the Lords Ordinary. After the hearing was concluded, the following questions were ordered to be laid before the consulted Judges:—

'1. Is the privilege of naturalization conferred on foreigners 'joining as partners of the Bank, by the act 1695, confined to 'such as were original subscribers; or does it extend to such fo-'reigners as might afterwards acquire shares of the Bank stock 'by purchase, succession, or otherwise?

'2. In either of the above cases, is the privilege limited, in 'point of time, to the period during which the foreigner conti-'nues to hold such share of Bank stock?

'3. Can the pursuer, under the act 1695, be now found to be 'a naturalized Scotsman, in contradistinction to a naturalized 'British subject?

'4. Is the act 1695 abrogated or superseded, in its operation 'quoad the principle of naturalization, by the treaty of Union 'between Scotland and England in 1707?

'5. Supposing it not to be abrogated by the Union, is it abro-'gated by the 44. Geo. III. c. 23. which breaks down the amount 'of shares to which it was originally attached, and allows the 'divisibility of stock ad infinitum?

'6. Is the act 1695, quoad this privilege, fallen into desuetude; 'or is the admitted disuse only to be taken as an argument in the 'interpretation of the statute?

'And, 7. Is the privilege in question reserved by the 18th, or 'any other article of the treaty of Union; or is it reserved by 'any of the British statutes passed for increasing the capital of 'the Bank?'

Lords Justice-Clerk, Cringletie, and Meadowbank, and Lord Craigie, (subject to an explanation as to the third question,) returned the following answers:—

Question 1.—We, the undersigned, are of opinion, upon due consideration of the act 1695, which authorizes a book to be opened for re-

ceiving the subscriptions of persons, either natives or foreigners, who shall be willing to subscribe and pay in to the joint stock of the intended Bank, according to the amount of shares therein mentioned, under the provision of two-thirds of the said stock always belonging to persons residing in Scotland, that the privilege conferred by the last section of the statute, 'That all foreigners who shall join as partners of this Bank 'shall thereby be and become naturalized Scotsmen to all intents and 'purposes,' was confined to those who should originally join as partners in subscribing for the joint stock, and that it did not extend to others who might afterwards purchase, or otherwise acquire shares, and who, in order to prevent the breaking of the said joint stock company, it is provided by the act, shall become partners in the place of the former holders of the shares so acquired.. May 10. 1822.

Question 2.—We are of opinion that the privilege, when once acquired, was not limited to the period during which the foreigner continued to hold a share of Bank stock.

Question 3.—We are of opinion that, under the act 1695, the pursuer cannot be declared to be a naturalized Scotsman, in contradistinction to a naturalized British subject.

Questions 4. *and* 7.—We are of opinion that the privilege conferred by the act 1695, being confined to the original partners, was not taken away by the treaty of Union from any of them; but if that privilege could be considered as conferred upon all foreigners who might *acquire shares*, and thereby become partners of the Bank subsequently to the date of the act, we are of opinion that the Union did abrogate the privilege, as establishing a mode of naturalization inconsistent with the terms of the articles of that treaty.

Question 5.—We are of opinion that the 44. Geo. III. c. 23. cannot be held to have made any alteration upon the privilege, if it then existed, as the 13th section provides that the former acts should remain in full force, 'except in so far as any of them have been altered by any 'subsequent act, or by the present act.'

Question 6.—We are of opinion that as no sufficient evidence, establishing a practice in opposition to the privilege, has been laid before us, the admitted disuse is only to be taken as an argument in the interpretation of the act 1695.

Lords Glenlee (subject to an explanation as to the third question) and Pitmilly gave the following answers:—

We concur in the above opinion, with the following exception as to the first question, and explanation as to the fourth.

As to question first, we do not think that the terms of the act 1695 warrant the conclusion that the privilege conferred by that statute was confined to such as were original subscribers.

And, in answer to question fourth, we think the act 1695 is superseded, in its operation quoad this principle of naturalization, by the act of Union, in the case of all foreigners who have purchased or may pur-

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chase Bank of Scotland stock since the Union,—but that it was not superseded in the case of foreigners who made such purchase before the Union.

The explanation referred to by Lords Craigie and Glenlee was in these terms:—

Although we concur in the answer which has been made to question third, in the terms in which it has been conceived, we wish to be understood as not anticipating the result of a declaratory action for having it found that the act 1695 is still effectual to confer on such foreigners as (if it were not for the Union) would have been naturalized by it, any advantages in Scotland which it can be shown are not inconsistent with the true spirit of the Union, considered as a mutual contract between the two nations.

Lords Bannatyne, Gillies, and Alloway answered:—

Question 1.—We do not think that the privilege conferred on foreigners by the act 1695 is confined to such as were original subscribers.

Question 2.—This question appears to us to be attended with much difficulty; and not having heard it fully argued, as in truth it does not arise in the present case, we are hardly prepared to make an answer satisfactory to our own minds on the subject. At present, we rather think that the privilege is limited to the period during which the foreigner continues to be a holder of Bank stock.

Question 3.—We do not think that the pursuer can be found to be a naturalized Scotsman, in contradistinction to a naturalized Briton; but we think that it is competent for a Scotch Court to find that he is a naturalized Scotsman, or a naturalized subject of the King in Scotland, leaving it open to other tribunals to determine whether he has thus acquired the whole privileges of a naturalized British subject.

Question 4.—We are of opinion that the act 1695 is not abrogated or superseded in its operation by the treaty of Union, as it does not appear to us to be contrary to, or inconsistent with that treaty. If the treaty of Union has abolished, so far as regards the rights of citizenship, all distinction between Englishmen and Scotsmen, and if it is to be held that, in consequence of the treaty of Union, the two nations now compose only one united nation of Britons, we think that the effect of that treaty is not to abrogate or supersede the act 1695, but to extend its operation to the United Kingdom, so as to communicate the rights of naturalized Britons to those who, prior to the Union, were declared by this act of Parliament to be and become naturalized Scotsmen.

Question 5.—We think that the act 1695 is not abrogated by the act 44. Geo. III.; but we think it extremely doubtful whether the privilege conferred by the act 1695 would belong to a foreigner holding a share of Bank stock, smaller than that share to which the privilege was originally attached.

Question 6.—We are of opinion that the act 1695 has not fallen into desuetude.

Question 7.—We think that the privilege in question is reserved by the article in the treaty of Union, and the British statutes here referred to. May 10. 1822.

Lord Banhatyne subjoined this explanation :—

In explanation of my signature to the above, I think it right to add, that my opinion concurs with that of the other two Judges who sign it, respecting all the questions but the second, as to which I rather incline to hold that the privilege acquired under the statute by a foreigner purchasing Bank stock would be permanent, and continue to be held, notwithstanding its being afterwards disposed of.

Thereafter the Court, on the 14th of November 1820, on advising these opinions, 'Altered the interlocutor reclaimed against, 'sustained the defences, and assoilzied the defenders from the 'whole conclusions of the libel, and decerned and declared ac-'cordingly.'* The pursuer having entered an appeal against this judgment, the House of Lords 'Ordered and adjudged that 'the interlocutor complained of be affirmed.'

Lord Chancellor.—In this case, my Lords, in which William Macao is the appellant, and his Majesty's Officers of State are the respondents, the appellant's summons, after mentioning that a private act of Parliament passed in 1695, and which was the original act, states the particular objects of that act of Parliament,—particularly that certain persons therein named, and, in the case of the decease of any of them, the persons to be chosen by the survivors, 'shall have power to ap-'point a book for subscriptions of persons, either natives or foreigners, 'who shall be willing to subscribe and pay into the said joint stock; 'which subscriptions the foresaid persons, or their quorum, are hereby 'authorized to receive in the foresaid book, which shall be open every 'Tuesday or Friday from nine to twelve in the forenoon, and from three 'to six in the afternoon, betwixt the first day of November next and 'the first day of January next following, in the public hall or chamber 'to be appointed in the city of Edinburgh; and therein all persons shall 'have liberty to subscribe for such sums of money as they shall think fit 'to adventure in the said joint stock, one thousand pounds Scots being 'the lowest sum, and twenty thousand pounds Scots the highest, and 'the two third parts of the said stock belonging always to persons re-'siding in Scotland.' Their capital, it is declared, is to amount to

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* See Fac. Coll. Nov. 14. 1820, where reference is made to the opinions of the Judges as being bound up with the session-papers. From these it appears that Lords President, Balmuto, and Succoth held,—1. That the privilege was limited to the original subscribers, and was not transferable;—2. That even if it were transferable, the statute was, quoad hoc, virtually repealed by the Union;—3. That, such being the case, the subsequent statutes did not affect the question;—and, 4. That although the principles of desuetude were not precisely applicable, yet the disuse formed an argument to show that the privilege was not transferable. Lord Hermand dissented on each of these points.

May 10. 1822. twelve hundred thousand pounds; and it then goes on to provide for a certain portion of the sums subscribed being paid at the time of subscribing, and to erect the subscribers into a body corporate and politic by the name of 'The Governor and Company of the Bank of Scotland.'

Then, by one of the clauses, and with the view of encouraging foreigners to become purchasers in this joint stock company, it is enacted and provided as follows: 'And it is likewise provided, that all foreigners 'who shall join as partners of this Bank shall thereby be and become 'naturalized Scotsmen to all intents and purposes whatsoever.' The appellant takes no notice of the subsequent acts of Parliament; and though the subsequent acts of Parliament may in some respects be considered as private, yet upon the whole they are public, and therefore I take it for granted they were judicially to be taken notice of in the Courts of Scotland. He then states, 'That the pursuer, a foreigner, 'became a partner of the said Bank, by purchasing certain shares of the 'capital stock thereof, with a view that he might enjoy all the privileges 'and immunities of a naturalized Scotsman and British subject, to all 'intents and purposes whatever.'

My Lords, what the privileges and immunities of a naturalized Scotsman are, I am not quite aware of. I think that should rather appear from the act which was passed with respect to the original shareholders. But I should think it has not been the constant course, when persons have been naturalized in Scotland, to give them all the privileges and immunities of native-born subjects; but that, when persons have been naturalized there, the privileges they were thereby entitled to were somewhat short of those enjoyed by native-born subjects. It is perfectly clear, however, I think, that if the person naturalized in Scotland has all the privileges of a native-born Scotsman since the Union, that he is privileged beyond any person who is naturalized here: For we know that persons who are naturalized here, notwithstanding such naturalization, have certain disabilities about them which do not belong to British-born subjects, being incapable of being members of the Privy Council or of Parliament, or of holding office, and so on. The summons then states, 'That the 'pursuer, having of late understood that some doubts are entertained how 'far his being a proprietor of the joint stock of the said Bank has the ef-'fect of bestowing upon him the privileges of a naturalized Scotsman, and 'of a naturalized British subject, or freeing and relieving him from the 'disabilities, burdens, restrictions, and provisions imposed by the common 'law, or by the several acts of Parliament in respect of foreigners or 'aliens, as above mentioned, has become greatly alarmed: That, therefore, 'and in order that the said doubts may be removed, and the true intent 'and meaning of the provisions of the said statute, entitled 'An Act for "erecting a Public Bank,' may be fully known and declared, the pursuer 'has been advised to institute the present action of declarator.' By which passage in the summons, I suppose they mean by 'the true in-'tent and meaning of the provisions of the said statute,' as they can be

collected not only from the contents of the particular statute for erecting a public bank, but also from the other statutes which have been made since the Union, and which are pari passu ; and then it proceeds: 'Therefore, and for other reasons to be proponed at the discussing here-'of, it ought and should be found and declared, by decree of our Lords 'of Council and Session, that the pursuer, although a foreigner, born in 'a country not under or subject to the laws of our realm, as a conse-'quence of his having become a partner in the said Bank, by purchasing 'certain shares of the joint stock thereof.'—Then I must take it for granted that he became a partner in that Bank subsequently to the Union. The inserting of that would have been considered, perhaps, as so much surplusage ; but I think we may supply that ; I dare say it was pleaded. The summons then goes on, 'has become a naturalized 'Scotsman, and as such a naturalized British subject, to all intents and 'purposes whatsoever, in the terms of the said statute before quoted, 'and that he is entitled to all the rights and privileges whatsoever be-'longing or competent to any other naturalized Scotsman and British 'subject.' Here, again, we may observe the difficulty which occurs from our not having a more particular statement of what are the privileges of a naturalized Scotsman and of a naturalized Englishman. Then they are to pay some damages, which I suppose is a mere matter of form. May 10. 1822.

Now, my Lords, before I approach the merits of the case, it does appear to me to be a matter of consequence to consider, whether a case upon such a summons is maintainable ; and though I cannot presume to say the summons may not be maintainable according to the laws of Scotland, yet I feel extremely unwilling to admit that it is a summons which can be maintained here. I should like to know whether there is any instance, since the Union, of a declarator against the Officers of the State. I am not informed. I am ignorant of that fact. There have been summonses of declarator subsequent to the Union, but I very much doubt whether there has been an action of declarator against the Officers of State with respect to a public right such as this, and where the direct object of the action of declarator is to have it determined by the Court of Session of Scotland, whether a person naturalized in Scotland is to have the rights and privileges of a British subject. Incidentally and collaterally, according to our forms of proceeding, I must admit they would have had a right. If, for instance, this gentleman had brought an action against the corporation of which he was a partner, desiring to have his share of the profit, and they had alleged that he had not the national character of a British subject, as he ought to have had ; then, with a view to determine his right with regard to benefit, they might have determined whether he was or was not a British subject. But whether, on a declarator of this sort, they can determine that he is a British subject, or not a British subject, is a question upon which I entertain considerable doubts.

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I have looked at this act of Parliament as an act of Parliament which is to be construed by seeing what the effects of it would be, if the construction contended for were to be considered as the true one, and also by seeing what the Parliament has done in various subsequent acts; and then I have endeavoured to ask myself this question, What must have been the notion of the British Legislature in passing these subsequent acts of Parliament? And having so done, in order to see whether this person was or was not to have the benefit of that act of 1695, I have no doubt, after looking over the various acts of Parliament, that he was not; and I cannot help thinking the passage which the pursuer has last referred to makes more against him than for him. I think that it was only meant to apply to the original subscribers. In looking into the first act of Parliament, the capital is limited to £1,200,000, and it provides that no subscriber should have more than twenty shares, or less than one of £1000 each; but, even in that state of things, with this limitation of the mischief which might accrue by the introduction of subsequent purchasers, it would be infinitely less scaring to the public than the matter is now left without any limitation which can possibly be looked to under the subsequent acts. I confess it does seem impossible that the Legislature, in the three or four subsequent acts of Parliament which it passed, when those clauses were introduced as to the amount of shares, could have intended that any man holding a share of £1 or £15, or whatever share he might think proper to purchase, should be entitled to such privilege. I think that the Legislature, when it passed this act of Parliament at the Union, did it with the greatest caution, intending that no persons but the original subscribers should receive that benefit; for the Legislature must have seen that if it was not so, the effect of it might be, that naturalized foreigners, by the means of property, and the circulation of property, might be multiplied to any extent whatever by the subdivision of this million of money —an effect which could hardly have been the intention of the Legislature. But I think there are expressions in the act which show, in some measure, that the Legislature really intended it only to extend to the original subscribers, unless you put it in another way, and infer that the Legislature were satisfied that the act of Union had destroyed the effect of the clause; so that, putting it either way, it does appear to me, either that the effect of the act of 1695 was confined to the original proprietors, or that the act of Union has taken away the effect of the clause in the act of 1695; and therefore I think that the interlocutor of the Lord Ordinary cannot stand, and that the judgment of the Court of Session must be affirmed. There are a great many important observations which might be made respecting the act of Union, but it is not my intention to go any further, unless any of your Lordships should disagree with me.

Lord Redesdale.—My Lords, I would observe, that whatever the Court of Session may have done, unless I receive information different

from what I have done, I think it is perfectly clear that the Court of Session had no jurisdiction on the subject of such an action as this. This is an action of simple declarator. Now, all the reservation to the Court of Session by the act of Union is the power which they had before, and before the Union they had no power to declare in such an action of declarator. From what was the law of England on the subject, both before and since that Union, I cannot conceive they had any power so to declare when they became a part of the United Kingdom, for all that was reserved to them was a reservation of the same power in Scotland which they had before expressly confined to Scotland, and therefore confined to the local law of Scotland. Throughout the whole of the argument, it appears to me that there has not been a sufficient distinction taken between the public law of a country and the local law. The public law is that which is the law of the whole country; and when you apply to the local jurisdiction, that local jurisdiction can have no power to act, with respect to the public law, except incidentally. It can have no power of declaring, as it seems to me, on principle, what is the public law of the whole empire. May 10. 1822.

My Lords, the importance of this question is certainly very great; because, if this power is inherent in the Court of Session, the consequence is, that there is no matter of public law affecting the whole kingdom which the Court of Session may not declare on, and if it cannot declare on the general law of the land, it is totally inefficient. If it had the power to make such a declaration with respect to public law before the Union,—that is, the public law of Scotland before the Union,—yet it does not follow that that power can properly be vested in the Court of Session subsequent to the Union, when the Court of Session became a Court of local jurisdiction, and not of general jurisdiction. But if it is a local jurisdiction only, it is inconsistent with the constitution of the country; for there can be no general declaration of the public law but by the public Parliament, consisting of King, Lords, and Commons assembled. It is therefore a great constitutional question, and a question which never can be decided by the Court of Session, as, since the Union, it must be decided on just public grounds. And I therefore feel bound to declare my opinion, and, as far as I am at present informed, I do declare a clear opinion, that the Court of Session, on a simple action of declarator, had no jurisdiction on this subject. There is nothing can convince me more clearly than this, for who are the persons called to support this action? What right have the Officers of State in Scotland to decide that question, which involves the right of all the persons in England? I conceive such an action of declarator must be brought, as the law of Scotland is, against persons who are competent to sustain the question. But how can the Officers of State of Scotland sustain a question which concerns the whole United Kingdom? My present opinion is, that the Court of Session had no such jurisdiction on the subject of an action of simple declarator.

May 10. 1822. This question may come under what the Noble Lord alludes to with respect to Americans (in consequence of what has passed particularly in the United States by the independence of the United States). in this country who are not British subjects. The Court of Session in Scotland would have an equal right to declare in that case as it has in this case, if this case can be sustained. I conceive it is a question of the utmost importance, and every thing which has been done by the Court of Session on the subject cannot in my mind establish such a jurisdiction. It would be establishing a great principle which cannot stand in this case, and nothing more fully confirms me in my view of it, than that the learned counsel have not at all grappled with that argument.

Pursuer's Authorities.—1.—1. Ersk. 1. 55.; 2. State Trials, p. 594; 22. Geo. II. c. 45; 7. Anne, c. 5; 10. Anne, c. 5; 4. Geo. II. c. 21; 13. Geo. III. c. 21.—(2.)—1. Term. Rep. p. 44; 15. Cha. II. c. 15; 11. and 12. Will. III. c. 6; 25. Edw. III. c.—; 3. Ersk. 10. 10.—(3.) —4. Term. Rep. p. 2. 4.—(4.)—3. Ersk. 7. 10.

Defender's Authorities.—(1.)—1. Voet. 4. 17; 1. Ersk 1. 53. 55; 1. Coke, 129; 1669, c. 7; 1661, c, 39; 1661, c. 40; 1681 c. 12—(2.)—1. Bank. p. 61—63; Leslie, June 8. 1749, (4636—4641, and Elch. 45. Foreigner.)—(4.)—1. Geo. I. c. 4; 13. Geo. II. c. 7; 20. Geo. II. c. 44; 4. Geo. III. c. 25; 14. Geo. III. c. 84; Muir and others, Jan. 15. 1791,* (Bell on Election, p. 484.)

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 20.)

No. 34. Hon. MARY F. E. STEWART MACKENZIE and Husband, Appellants.—*Warren—Clerk—Adam.*

Hon. FRANCIS C. E. S. K. MACKENZIE and Others, Respondents.—*Jeffrey—Moncreiff.*

Entail.—An entail having been made in favour of A. and his heirs,—whom failing, B. and his heirs,—whom failing, C. and his heirs,—and the fetters applied nominatim to A., but only by the descriptive terms 'heirs and substitutes of entail, and successors' to the others; and A. and B. having predeceased the granter, on whose death the entail was to take effect—Held that C. was bound to make up titles, subject to the limitations of the entail.

May 13. 1822. FRANCIS LORD SEAFORTH had two sons, William Frederick Mackenzie and Francis John Mackenzie, and six daughters, of

2D DIVISION. Lord Craigie.

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* This case is only noticed by Mr. Bell in his Book on Election, who mentions that he had been unable to obtain the interlocutor pronounced by the Court. It was in these terms: 'The Lords having, &c. Dismiss the complaint in so far as concerns 'William Muir; sustain the objection to the election of Khlein, and find that, as being 'an alien, he was ineligible; and therefore reduce his election as a councillor of the 'burgh of Burntisland, dismiss the complaint, and decern.'