if the prohibition is invalid upon the whole face of the deed, as to any of the particulars, it is invalid as to all. Now here it is invalid, because the pr hibition is not struck at by the irritant clause—not that there is anything in the prohibitory clause itself which makes it invalid; but it is invalid, because that which is necessary to give validity to the prohibition in the subsequent part of the deed is wanting.

The very few observations which I have thought it necessary to make upon the subject are probably so many too many, because one here may run and read. It is perfectly obvious that here is a deed of entail in which there is wanting an irritant clause upon one of the particulars prohibited, and Lord Rutherfurd's Act says, that in such a case the deed shall be void altogether. I have preferred to go thus far into the case rather than to rely upon the numerous previous decisions upon this subject, because I am glad to be able to say, that if these decisions had not taken place, and we had now to decide (what we have not now to do) this question for the first time, I think we ought to have decided it exactly in the same manner. It would, in truth, be sufficient upon this part of the case to say, that it is *res judicata* in at least half a dozen instances since the Act passed. I therefore move your Lordships, that this decree of the Court of Session be affirmed, and this appeal be dismissed with costs.

LORD WENSLEYDALE.—I am of the same opinion. I think it is a point perfectly clear in this case, that the prohibitory clause goes farther than the irritant clause. The prohibitory clause is a prohibition against disponing in any way; the irritant clause clearly applies only to one mode of disposition, that of selling. Therefore, as there may be many other modes of disposition short of altering the course of inheritance, it is clear, that the irritant clause is defective. Therefore I concur entirely in the motion of my noble and learned friend, that the judgment of the Court below be affirmed.

LORD CHELMSFORD.—I agree in every respect in the opinion of my noble and learned friends.

LORD KINGSDOWN.—I also entirely agree.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellant, Hooke, Street, and Gutteres, Solicitors, London; John A. Campbell, C.S., Edinburgh.—*For Respondent*, Robertson and Simson, Solicitors, Westminster; Dundas and Wilson, C.S., Edinburgh.

APRIL 20, 1860.

PETER DREW and MATTHEW DICK, *Appellants*, *v.* NATIONAL EXCHANGE CO., *Respondents.*

Appeal to the House of Lords—Company—Descriptive Name—Competency—Process.

HELD, *That an appeal to the House of Lords was incompetent, in respect the judgments submitted to review were interlocutory and unanimous, and leave to appeal had not been obtained from the Court of Session.*

Interlocutors as to the title to sue, as to the form of issues, and as to havers, and production of documents, are all interlocutory matters.[1]

A company by its descriptive name may sue and be sued in Scotland, it being a persona standi.

The defenders now appealed, maintaining in their case that—1. The pursuers had no title to insist. 2. The Court of Session ought to have granted one or other of the appellants' motions—either, *first*, to ordain the company to produce the detailed balance sheets and relative statements of the affairs of the company for the years 1846 and 1847; or, *secondly*, to grant warrant of imprisonment, otherwise called second diligence, against James Gourlay, one of the respondents, for not producing, when examined as a haver for the appellants, the detailed balance sheets and relative statements of the company's affairs for the years 1846 and 1847, which were traced into his possession, and have been fraudulently concealed or destroyed by him; or, *thirdly*, to absolve, *de plano*, the appellants from the action. 3. The issues settled by the Court were not the correct issues for the trial of the cause. 4. The interlocutor of 19th March 1858, which approved of the auditor's report, and decerned for a certain amount of expenses, was *ultra vires* of the Court below, in respect that, at the time when said interlocutors were pronounced, the whole cause was taken away from the Court of Session by appeal, and was then depending in this House.

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[1] See previous reports 20 D. 837: 30 Sc. Jur. 272, 484. S. C. 32 Sc. Jur. 482.

The respondents maintained that—1. It was not competent to bring such judgments under the review of this House in the present shape, and more especially was it incompetent to do so after so long an interval had elapsed since they were pronounced, and in the present state of the record. 2. The preliminary defence proposed by the appellants had no sound foundation, and the respondents had a sufficient title to insist in the action. 3. The interlocutor by which the issues were adjusted and settled was one against which no appeal was competent. 4. The judgment of the Court upon the issues was well founded, in respect, that the counter issues proposed by the appellants embraced matters not within their record, or under the judgment of the Court of Session and of your Lordships' House, as the issuable matter which they were entitled to submit to a jury. 5. The judgments for recovery of balance sheets were interlocutory and unanimous judgments of the Court of Session, and therefore, under the act regulating appeals from that Court, could not be appealed from without leave of the Court. 6. The judgments were in themselves well founded, in respect, that, in the particular circumstances, and at the particular stage of the cause, the appellants were not entitled to have the orders which they asked for pronounced by the Court. 7. The judgment dismissing the action was an interlocutory and unanimous judgment of the Court, to appeal from which no leave had been asked or obtained. 8. The judgment was well founded, in respect that the failure on the part of the respondents to produce the documents called for afforded no sound reason for the dismissal of the action.

The *Attorney General* (Bethell), and *R. Palmer* Q.C., for the appellants, argued the case on the merits, which afterwards became immaterial.

Rolt Q.C., and *Anderson* Q.C., for the respondents.—This appeal is not competent. 1. The judgments,, first, second, and third, related entirely to the preliminary defences. These were not appealable by 6 Geo. IV. cap. 120, § 5, inasmuch as the action was not dismissed, and no leave to appeal was given. Moreover, the subsequent interlocutors were not appealable; so the preceding interlocutors cannot now be brought up. 2. The judgment settling the issue was not appealable, there being no difference of opinion or leave given. So as to the interlocutors as to the production of documents, these being all interlocutory matters—48 Geo. III. cap. 151, § 13; *Scots Mines Co.* v. *Leadhills Mining Co. ante*, p. 852; 3 Macq. Ap. 743: 31 Sc. Jur. 567. 3. The ninth interlocutor appealed against could not be made the subject of appeal, being one merely upon costs—*Clyne's Trustees* v. *Dunnet*, M'L. & Rob. 28. The Court below had full authority to make that interlocutor, for an order of the House on the petition of appeal had not then been served on the respondents, and the power of the Court below was not taken away until service. The petition to the Appeal Committee, and what took place, did not stop the respondents, from insisting in their objection to the competency. The House remitted to the Appeal Committee to report whether the appeal ought to be received, and the House afterwards ordered the objection to competency to be argued with the merits. But the objection to the competency was reserved.

The *Attorney General* replied.—It is competent to appeal interlocutors settling issues—*Per* Lord Cranworth in *Melrose* v. *Hastie*, *ante*, p. 315; 1 Macq. Ap. 698: 25 Sc. Jur. 319; *Johnston* v. *Johnston*, *ante*, p. 895; 3 Macq. Ap. 619: 31 Sc. Jur. 764. The proceedings before the Appeal Committee excluded the respondent from now setting up the objection, that the appeal was incompetent.

LORD CRANWORTH.—My Lords, this case has been now for four days under the consideration of your Lordships, and it appears expedient to those of your Lordships who have taken part in the discussion, seeing that they entertain no doubt upon the result, to dispose of the question at once, instead of keeping the parties longer in suspense. This is one of those unfortunate cases which, if determined one way, would put an end to further discussion, and in which (as happens in most of those cases) it is extremely difficult, indeed I might almost say impossible, to discover beforehand, whether the preliminary matter is or is not so bound up with the general merits of the case, that it would be more convenient to take it separately, or to mix the two together. In point of fact, in this case the whole has been mixed up together, and the question, therefore, now comes to be decided not only upon the preliminary point, but upon the general merits of the case.

My Lords, in one sense, from the result at which your Lordships have arrived, that is an unfortunate state of things, because, as I believe from communication with those of your Lordships who have heard the discussion, we are all of opinion, that the preliminary objection is fatal, and that, therefore, might have stopped all further discussion.

The ground upon which I have come, and I believe the rest of your Lordships have come, to this conclusion is this, that these appeals are all upon interlocutory matters, and not upon the final disposal of the case, and that they were presented without leave of the Court, and without any difference of opinion among the Judges. I lay aside for a moment the appeal against the ninth interlocutor, which appeal I may dispose of at once by saying, that it is an appeal upon a subject on which your Lordships do not allow appeals to this House, namely, an appeal merely upon costs, I may almost call it a caricature of an appeal, for it is an appeal upon the ground that £10 7*s.* 5*d.* was too large a sum to be allowed for expenses, and that the Court was not compe-

tent to make the order. There is not the least foundation for that objection, because, in truth, they had perfect authority to make that order, the record was perfectly in the control of the Court below until a sufficient petition of appeal had been received by this House, and until the parties had been ordered to answer, and until that order had been served; but at the time this order was pronounced, the petition of appeal had not even been received by this House, and of course, the further proceedings had not taken place. The Court below had, therefore, perfect jurisdiction to make such an order; they have made it, and it is not a proper subject of appeal.

Now, with regard to the other interlocutors, they may be divided into three heads. 1st, the interlocutor relating to the title to sue; 2dly, the interlocutor relating to the form of the issues; and 3dly, the interlocutors relating to the havers and to the production of the documents. They are all interlocutory matters.

That the title to sue was an interlocutory matter there can be no doubt, because it did not dispose finally of the question; indeed, at one time, I entertained a doubt whether it was a subject that could be made the subject matter of an appeal at all, being a mere formal objection, of the nature of an objection to a misnomer. However, that does not appear to be so. At all events, like any other interlocutory judgment, it might be brought under review by this House with the general merits of the case.

Now, this objection is regulated by the 13th section of one of the earlier Statutes of Scotch Judicature, the 48th of George III. cap. 151, which declares—"That hereafter no appeals to this House shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the case, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division; nor shall any appeal to this House be allowed from interlocutors or decrees of the Lords Ordinary, except after they have gone to the Inner House, provided that, when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords."

Now that is an enactment quite clear in its meaning. Whether or not it is the wisest enactment that could be made, is not a matter on which your Lordships in your judicial capacity have to speculate. But upon the whole probably it is. It was pointed out very forcibly by the Attorney General, that the refusal of the right of appeal in some interlocutory proceedings, for instance in settling the form of issues, may lead to very unnecessary and ruinous and discreditable expense. It may do so, but the remedy which the legislature has provided for such a case is this, that if the Judges differ in opinion as to the form of the issues, or as to any other interlocutory matter, or if, upon being applied to, they give leave to appeal, (as in a reasonable case it may be supposed that they would,) in such cases an appeal against an interlocutory proceeding may be had to your Lordships' House. It may be that sometimes, even where there has been no difference of opinion in the Court below, it would have been convenient, that leave to appeal should have been given where it has been refused. That may possibly happen, but, as in all other human questions, you have to strike the balance of convenience and inconvenience, and the convenience that results from stopping interminable appeals against interlocutory proceedings has been thought by the legislature to outweigh the possible inconvenience of an occasional defect or delay of justice by shutting out appeals against interlocutory proceedings in common cases. Whether, however, that enactment be right or wrong, it seems perfectly clear that these proceedings are all interlocutory. That, I think, admits of no doubt. With regard to the first class of interlocutors I have already stated my opinion.

With regard to the interlocutors settling the form of the issues, that is obviously interlocutory, because it is only something which is done, as is said in courts of common law, *in ordinem;* it is something which is to be done in order to get at the real merits of the case.

It was very ingeniously argued to-day by the Attorney General, that the proceedings against the havers were not interlocutory, but final proceedings; because he said, that the proceedings against the havers were in substitution for the old cumbrous proceedings, before the year 1695, of an action of exhibition against the persons in whose hands documents important for any case were lodged. In that case, up to that time, the course of proceedings, if you wanted to get a docu nent that was in the hands of third persons, was this:—You must institute a sort of collateral suit, not a supplemental suit, but collateral, for the purpose of getting at the documents; and, no doubt, whatever the Court decided in such a case, as to the production or non-production of the documents, was a final decision in the case. Whether that proceeding is abolished I do not know; but if it is not abolished, and if such a proceeding is ever instituted, no doubt where the Court decide, that the haver is or is not to produce documents, if that is wrongly decided, such a decision, I presume, may be brought up as a final decision to your Lordships' House. But this peculiar form of proceeding, for this purpose by a separate suit, was considered so unreasonably cumbrous, that the legislature interfered, and, I think, with the concurrence of the Courts, made an alteration in the course of proceedings, so that that which has hitherto been a

substantive suit should henceforth be a proceeding of an interlocutory nature in the cause, in which the documents are wanted. Of course, when that alteration was made, all the orders as to the production or non-production of documents became necessarily incidental and merely interlocutory proceedings. That being so, it is perfectly clear, that these are interlocutory proceedings, against which appeals have been received by your Lordships' House, and for which appeals there was neither the foundation of a difference of opinion among the Judges in the Court below, nor was leave given by the Judges to appeal. Therefore, if the matter is untouched by anything that your Lordships have done, there is no doubt that these appeals are incompetent. But then it was contended, that, although that might have been the case if nothing had been done, your Lordships have done something in this case by which you have concluded yourselves, and have determined, that these are competent appeals. Now that matter required a little investigation, but, on looking at what took place, I am clearly of opinion, that your Lordships have done nothing of the sort. Three petitions were presented by the respondents, one as to the original appeal against the eight interlocutors, another as to the second appeal against the ninth interlocutor, and afterwards another petition was presented praying your Lordships not to receive either of the petitions of appeal, and praying further, that they might both be declared incompetent, and that your Lordships would abstain from issuing any process to compel the respondents to appear. And there was then some prayer as to costs. That third petition, together with the other two petitions, I suppose was heard before the Appeal Committee. Now, what took place there is a matter of which we have no *constat* from any record; and, in deciding upon this case, I think, that all that your Lordships ought to do with reference to this point is, to look at what order the House made upon the report of the Appeal Committee. And it is observed, that the petition having prayed three things—*first*, that your Lordships would not receive the petition of appeal; *secondly*, that you would declare it incompetent; and *thirdly*, that you would declare, that no process ought to issue, (or something to that effect,)—the only order that the House made was this, giving the go by to all the rest, "That the appeals be received." What effect has that? It did not say, that they should be received without prejudice to the question, whether they were competent or not; but I think it is perfectly obvious, that that is what must have been meant when you look at that record. When you look at the petition, and you find, that it asserts two things, and the tribunal to which it refers says, "We will make answer only on one," it is evident, that they meant to leave the other undisposed of, and therefore to say nothing about it. But, whatever might be meant, it is obvious, that it does not touch that second branch of the prayer of petition. The order of the House, adopting that report of the Appeal Committee, saying, that the petition shall be received, puts the petition, when it is received, precisely in the same position as it would have been in if there had been no reference to the Appeal Committee. It does no more, and it does no less. The result therefore is, that here are two petitions of appeal in your Lordships' House, which you have heard, and are of opinion, upon the hearing, that they are incompetent petitions of appeal, and therefore ought to be dismissed.

That being the case, your Lordships have, in truth, no authority to say anything conclusive upon the merits of this case. But I believe it is the opinion of all your Lordships, certainly it is mine, that it may be convenient to the parties in this apparently interminable litigation, in which they are tearing one another to pieces by most ruinous costs for a very inadequate object, to know what is the decided opinion of such of your Lordships as have heard this case.

Now, in the first place, with regard to the first point—the title to sue—I entertain not the least doubt in the world, that this suit is instituted in a mode in which, by the law of Scotland, it was competent, and is competent, to institute such a suit. That there have been doubts upon that subject is plain,—doubts not perhaps created but exaggerated, and sanctioned by something which fell from Lord Gifford in the case of the *Commercial Bank* v. *Pollock*, in the year 1825, 3 W.S. 365; when he held the office of Master of the Rolls. In that case it is true the question was not, whether the parties could sue as these parties are suing, but whether they could be so sued. The question was not disputed in this House till some two or three years afterwards, when Lord Lyndhurst held the Great Seal, when, in a very short judgment of that very learned Judge, sitting here as Lord Chancellor, he advised your Lordships, that such a suit might, according to the law of Scotland, be instituted in that form.

Now we must consider what was the reason of that decision. The decision went upon this ground, that by the law of Scotland a descriptive company is a *persona standi in judicio*. But when you once arrive at that conclusion, there can be no distinction made as to whether the judgment in the suit was on the one side or on the other,—whether it was the plaintiff or the defendant. It seems to me, that the decision in that case substantially decided the whole question.

I agree with Mr. Rolt in his observation, that the way in which this has been acted upon by the Scottish Courts has not been the most satisfactory; because, logically, given a *persona standi in causâ*, you want only, that the *persona* should so stand in Court. But it has always been the custom, on what ground we need not inquire, to require that, in order to make the matter clear to those who are sued, or who are suing, you shall bring before the Court not only

a fictitious *persona*, but three other actual members, so as to constitute this corporate *persona*. But, that that can be done by the plaintiff as well as by the defendants, appears to me clear not only upon principle, but also upon authority.

I shall refer only to one authority—that which was last cited by Mr. Anderson, and referred to at great length by the Attorney General in his argument—*Baird* v. *Buchanan*, 17 D. 461; but that appears to me to be one of the strongest cases that can well be imagined to shew, what the doctrine is in Scotland. It was a case in which the suit was brought by a company by its descriptive name by four of its directors,—the case being, that the company had ceased to act as a company, except in the winding up of its affairs and enforcing calls, and other matters that were necessary for finally clearing up the accounts. The argument was, that such a suit was not properly constituted, and it was decided that it was. The Lord President in his judgment says: "If this had been a suit thus instituted by the company through the directors during the existence of the company, no doubt could have then existed;" and he argued very reasonably upon that, to shew, that the circumstance of that being merely a proceeding for the purpose of winding up the company, made no difference. Therefore I think, after that judgment we may well understand how it was, that the matter was treated as we find it was in that very learned report, which was referred to not as being an authority here, but as rather indicating what the general understanding of those who practise in the Courts of Scotland upon the subject of the law was,—I mean the Second Report of the Mercantile Law Commissioners, which treats it as a matter admitting of not the least doubt in the world. I quite concur in the observation which fell from Mr. Anderson, that he would not cite more authorities, but that, if he wished to do so, he might cite them to any number and extent. Then that being so, the first objection, if we had now to decide upon it, would, I believe, in the opinion of all your Lordships, be entirely untenable.

Now, with regard to the interlocutors directing the form of the issues, I strongly incline to think—and I believe, that is the opinion of all or of most of your Lordships—that the pursuers' issue would have raised everything. It is, "Whether the defenders, or either of them, are indebted and resting owing to the pursuers in the sums contained in the account set forth in the schedule, or any part thereof?" I very much incline to think, that that issue would raise everything, because it would be a good defence to shew, that they were not indebted; to shew, that they had never entered into any contract; or that, if they had entered into a contract, it was a contract induced by the fraud of the persons with whom they had contracted. I believe that would raise everything.

If it would not raise everything, then comes the question, whether the other issues leave out anything that ought to have been introduced. The question raised by the issue is, "Whether the pursuers did, by false and fraudulent misrepresentations," do something, without saying "or by fraudulent concealment?" Now upon that subject, without going into the question whether "fraudulent concealment" would or would not, in this particular case, have been necessarily involved in fraudulent representations, the observation lies quite upon the surface, that the way in which the defenders put these issues was inaccurate, and the issue therefore was well rejected by the Court. And they proposed, that it should be, "Whether the pursuers did, by false and fraudulent misrepresentations, or fraudulent concealment?" Now that, your Lordships have several times decided, cannot be a right form of issue; because, as was pointed out by LORD TRURO in the case of *Marianski* v. *Cairns*, 1 Macq. Ap. 212, *ante*, p. 146, which met with so much discredit and expense, there may be six jurymen who think, that there was fraud and misrepresentation, but no fraudulent concealment, and six the other way.

Therefore you cannot know whether they have unanimously agreed upon something upon which it was necessary, that they should unanimously agree before final judgment can be pronounced. Therefore what ought to have been done (if anything) was, that there should have been another issue, Whether there was fraudulent concealment. And it appears that Lord Deas suggested that to the parties, but they did not choose to act upon it; therefore they cannot complain, that fraudulent concealment is not in terms included in the issues.

Therefore upon these grounds also, if there had not been a preliminary objection for want of competency, I should have been prepared to advise your Lordships to dismiss this appeal.

Now I come to the only other question in the case, the question with respect to the havers. This was argued with very great learning and ability by Mr. Palmer some time ago, and since by the Attorney General, but they have both failed to convince me, that they have any case upon the point.

If they had obtained an admission—say, that not only he once had, but that he actually then had, in his possession, the documents that they want to obtain a sight of—that might have formed a ground for compelling the pursuers to produce them. But that is a matter that we need not speculate upon, for there is no such admission. It is true, that it was proved by the certificate of Gourlay, that he once had the documents in his possession. Indeed, we need not inquire what a third person could have proved against him, because he supplies all defects of proof upon that subject by himself, when his attention is called to it, saying, "When I look upon that certificate, I am satisfied, that I must once have had, and I admit that I once had, those documents

in my possession. But I have not them now." The parties do not carry their inquiries further; they do not ask him what has become of them. If they had done so, it might have been that he would have said, "I have them, but I handed them over to somebody else," who probably has them at the present moment. It is quite clear, that, if admission would be sufficient, there is no admission on the part of Gourlay, or any other of these havers, that they have the documents in their possession. Therefore I think, that all the interlocutors, of the 5th, 6th, 7th, and 8th, which are founded upon the inability of the Court to act against the havers except where there was an admission, that the documents were in their possession, are interlocutors that cannot in any respect be questioned. My Lords, I have thought it right to step in some degree perhaps out of my way, to state my view of the merits of the case. After all, the appeal must be dismissed upon the question of competency, because although your Lordships would have been very glad to have acted upon the merits, disregarding the question of competency, if we could have done so, yet when your Lordships are satisfied, that the appeal is incompetent, the meaning of that is, that your Lordships have no jurisdiction upon the subject, and it would therefore be a bad precedent for your Lordships to take upon yourselves to make an order affirming the interlocutors in a case in which your Lordships are of opinion, that you have not jurisdiction to act. I regret that we have not an opportunity of doing so. All that I can do, therefore, is to conclude by simply moving your Lordships, that these appeals be dismissed with costs.

LORD WENSLEYDALE.—My Lords, I have had an opportunity of conferring with my noble and learned friend who has just addressed your Lordships, and with my other noble and learned friends who are present, and my noble and learned friend has so completely expressed the view that I take of this case, that it is quite unnecessary for me to add a word either by way of addition or qualification to what he has said.

LORD CHELMSFORD.—My Lords, agreeing as I do with my noble and learned friend on the woolsack, I only wish to address a very few words to your Lordships upon the subject of the incompetency of this appeal. I agree with my noble and learned friend, that the appeal is incompetent with respect to all the nine interlocutors. It has been contended, that your Lordships are precluded from going into the question, by the order which the House made for the reception of these appeals. It has been argued, that inasmuch as the petition against receiving the petition of appeal contained within it an objection with regard to the competency of the appeal, and as the Appeal Committee reported upon the whole of that petition, and as their report was adopted by the House, and an order made upon it, therefore everything comprehended within the terms of that petition are decided upon and included within that order. It has appeared to me, my Lords, that the circumstances of the competency of the appeal being made a question in the petition against the reception of the appeal, taken in connexion with the report of the Appeal Committee upon the petition, is a strong circumstance against this argument, because we find, that the petition prayed, that the original and supplemental petition of appeal might not be received, nor any order of service made, or either of them, and that the same might be found incompetent. And when upon that petition the House decides merely, that the appeal shall be received, it is quite clear, that they distinguish between that portion of the petition which prays, that the appeal may be found to be incompetent, and that portion which prays merely, that they may not be received; and, therefore, the House has only determined that the appeals may be received, and the question of their incompetency is left entirely open to your Lordships. My Lords, with regard to this question of competency, my noble and learned friend has shewn, that, of the nine interlocutors, there are eight which unquestionably must be considered to be merely interlocutory judgments. No question can arise upon any of them, except with regard to the first three, which relate to the title to pursue. Now, upon that subject the question would be, whether the defences were dilatory, or whether they were peremptory. I have no doubt in my own mind, that the defence with regard to the title to pursue was a dilatory defence; and I am confirmed in that opinion by the judgment which was delivered by LORD TRURO, with his usual clearness and force, in the case of *Geils* v. *Geils*, 1 Macq. 39; *ante*, p. 1. His Lordship said, "Where the defence presents no answer to the pursuer's case, but consists merely in objecting to some irregularity, or some circumstance, which may well consist with the pursuer's being entitled to all the relief or advantage which he seeks to obtain by his suit in some other form, or at some other time, such a defence I conceive to be dilatory; but where a defence is pleaded which professes to shew, that the plaintiff has no case which entitles him at any time, or in any form, or in any Court, to the object of his suit, such a defence I consider to be clearly peremptory."

It appears to me to be immaterial, whether these defences are to be considered as peremptory or dilatory, looking at the interlocutors alone, because I apprehend, that they would be out of time under the 25th section of the 6th of George IV., unless they were drawn down by some of the nine interlocutors. In the first place, I doubt very much indeed, whether, supposing the appeal was competent upon that interlocutor, it would have the effect of bringing down the other interlocutors, and enabling your Lordships to entertain the appeal against them; because it appears to me, that the 15th section of the 48th of George III. only permits preceding interlocutors

to be brought up to this House upon a final judgment being pronounced in the case; for it provides, that "no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be only allowed from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division." And then there is a proviso, that "where the judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords, from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords." Now I apprehend, that this does not apply to the case of separate and independent interlocutory judgments, where no interlocutory judgment is allowed to be appealed from, or where the party has the power to appeal; but that it means that, when the cause has been finally determined, every part of that cause may be brought before your Lordships by appeal.

Whether that is so or not is wholly immaterial in the present case, because I apprehend, that the ninth interlocutor is one which clearly, according to the rules of this House, and the decisions upon the subject, could not have been appealed from, it having been on the subject of costs. It was contended, with regard to the ninth interlocutor, that it was an excess of jurisdiction on the part of the Court of Session, because the case had been removed from the Court of Session by means of the appeal. But I apprehend, that that question is decided by the standing order of your Lordships' House of the 19th of April 1709. The state of the proceeding was such, that there had not been, at that time, any service of the appeal, and therefore undoubtedly the cause remained in the Court of Session. Under these circumstances, therefore, it appears to me clear, that, with regard to the first eight interlocutors, there could be no appeal from them, because there was no difference of opinion among the Judges. And that, with regard to the ninth, although there was a difference of opinion, yet the subject matter of that interlocutor prevented an appeal to your Lordships. My Lords, upon the subject of the merits, upon which my noble and learned frend has addressed the House, inasmuch as it is not competent to your Lordships to decide finally this case, I think it will be better for me to say merely, that I entirely agree in all that my noble and learned friend has said upon the subject; and I am glad that he has made the observations to your Lordships which he has made, because it may possibly have the effect of preventing further litigation in this long protracted proceeding.

LORD KINGSDOWN.—I quite agree with my noble and learned friends.

Appeals dismissed as incompetent, with costs.

For Appellants, Deans and Rogers, Solicitors, London; Wotherspoon and Morison, S.S.C., Edinburgh.—*For Respondents*, Grahame, Weems, and Grahame, Solicitors, London; James F. Wilkie, S.S.C., Edinburgh.

APRIL 24, 1860.

JAMES ORR and Others, *Appellants*, *v.* THE GLASGOW, AIRDRIE, AND MONKLANDS JUNCTION RAILWAY CO., and PETER BLACKBURN and Others, *Respondents.*

Railway—Liability of Directors of—Ultra vires—Process—Relevancy—Count and Reckoning—*Several shareholders of an abortive railway company, whose statutory powers had expired, raised against the company and the directors an action, concluding for reduction of minutes making certain calls, and for repetition of so much of the deposit and calls already paid as should be found due in an accounting. They alleged against the directors acts of mismanagement and malversation.*

HELD (affirming judgment)—1. *That there were no relevant averments to support either the reductive conclusions, or those for count and reckoning, against the company; and* 2. *That the directors were only liable to account for their management to the company, and could not be called upon to hold count and reckoning with individual shareholders, though the latter might, in certain circumstances, have an action of damages directly against a director, as an individual, based upon averments of fraudulent mismanagement.*

The meaning of ultra vires *is, where the corporation does something which is expressly or impliedly forbidden by their act of parliament:* Per *Lord Cranworth.*[1]

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[1] See previous reports 20 D. 327; 30 Sc. Jur. 176. S. C. 3 Macq. Ap. 799; 32 Sc. Jur. 486.