

[15th August 1834.] *

ALEXANDER WATSON, Appellant.— *Dr. Lushington* — No. 30.
A. M'Niel.

ANN WATSON and ISABELLA WATSON, Respondents.—
Sir Wm. Follett—Pyper.

Service.—After a party had been served heir, another party obtained a service as heir by a nearer degree, and brought an action of reduction of the service of the party first served. The latter having brought a counter reduction, the Lord Ordinary, in that process, allowed the party second served a supplementary proof, and sisted the other action; and the Court, on advising the proof and supplementary proof, assoilzied from the counter reduction. But the House of Lords remitted to frame an issue or issues to try the propinquity of the parties respectively to the deceased.

ALEXANDER Watson and Mary Marshall, residing in Greenock, had three sons, John, James, and William. John had an only son, Alexander, who was a writer in and town clerk of Port Glasgow. James, who was a messenger in Edinburgh, died in 1789 without issue. Alexander the town clerk died on the 11th of September

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* This case was decided on 27th August 1835.

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1825, also without issue, possessed of heritable and moveable property of considerable value. William M'Naught, writer in Port Glasgow, was appointed judicial factor on the estate. On the 17th of November 1827 the appellant, Alexander Watson, weaver in Houston, obtained himself served, before the Magistrates of Renfrew, heir to the town clerk, as descended from a grand uncle. On the 11th of December 1827, and 4th of October 1828, caveats were lodged in chancery by the appellant, requiring notice to be given to him in case any other party should apply for a brief to be served. The respondents, on the 8th of April 1829, obtained a brief from chancery to be served heirs portioners of Alexander Watson the town clerk, on the allegation that they were daughters of William Watson, a weaver at Moneddie, in Perthshire, who they averred was the son of old Alexander Watson and Mary Marshall. No notice was given to the appellant that such a brief had been issued; and the respondents, in his absence and without his knowledge, obtained themselves served before the sheriff substitute of Perth as nearest lawful heirs of Alexander Watson, the town clerk.

In the meantime the appellant had expedite an edict as executor, for the purpose of obtaining possession of the moveable funds, but he was opposed by the judicial factor on an allegation that he was not the nearest heir; and on the respondents being served, appearance was made by one of their aunts, who claimed the character of next of kin. Two other aunts were adduced, and admitted as witnesses in the service before the sheriff of Perth.

Immediately on obtaining their service the respondents raised an action of reduction of the service of the appellant, on the ground that as he had been served heir in a more remote degree than the respondents his service was necessarily excluded by their service in the nearer degree; and they also made certain formal objections to the regularity of his service. The appellant raised a counter action of reduction of the respondents service, on the ground, first, that the respondents were in no way related to the town clerk, as the William Watson from whom they were descended was not a son of Alexander Watson and Mary Marshall, that the pedigree which they had framed was false, and had been manufactured by them, with the assistance of certain other parties, that their service had been obtained by the testimony of their own near relations, who, if successful, would have right to the executry, and also by other incompetent evidence; and, second, that the service was incompetent, in respect that it had been expedite posterior to that in favour of the appellant, and that, notwithstanding the caveats, no notice had been given to him of the issuing of the brief.

The Lord Ordinary, after the record was closed, pronounced this interlocutor in the action at the instance of the appellant:—“ Before answer as to any points in
 “ the cause, in respect that the defenders offer to sup-
 “ port the proof of their propinquity as set forth in
 “ their claim in the service under reduction by other
 “ and supplementary evidence, finds that it is compe-
 “ tent for them to lead such additional proof in this
 “ reduction; allows them a proof accordingly, and to
 “ the pursuer a conjunct probation, and grants com-

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“ mission, &c., reserving all questions as to the other
 “ grounds of reduction, and reserving all questions as to
 “ the competency and effect of the evidence already ad-
 “ duced.” His Lordship at the same time pronounced
 the following interlocutor in the action at the respon-
 dents instance:—“In respect of the interlocutor pro-
 “ nounced of this date in the counter action of re-
 “ duction betwixt the parties, sists farther procedure
 “ in this process hoc statu.”

A supplementary proof was accordingly adduced before the commissioner; and the respondents having objected to a particular line of evidence proposed to be entered on by the appellant, the Lord Ordinary pronounced this interlocutor:—“ Finds it is competent
 “ for the pursuer, under the conjunct proof allowed
 “ to him, to prove all facts embraced by his conde-
 “ scendance, tending to show that the alleged pedigree
 “ or line of propinquity founded on by the defenders
 “ is false, and was got up by fraudulent contrivance
 “ and collusion with other persons, or that their service
 “ was prepared and carried through by them or their
 “ agents, in the knowledge that the pursuer had been
 “ previously served heir to the deceased, and with the
 “ design of concealing the proceedings from him, in
 “ order that he might have no opportunity of appear-
 “ ing to investigate the proof or oppose the claim:
 “ Finds that the proof now proposed to be adduced by
 “ the pursuer, as explained in the first part of this
 “ minute, though it may have a particular application
 “ to other substantive grounds of reduction libelled,
 “ has yet a sufficient pertinency and relevancy to the
 “ question, as to the truth or falsehood of the pedigree
 “ put forward by the defenders, and to the credit and

“ value of the proof adduced in support of it, and has
 “ also a farther relevancy to meet the inference dedu-
 “ cible from the proof already led and admitted on
 “ the part of the defenders: Therefore finds the course
 “ of proof proposed generally competent, and remits
 “ to the commissioner to proceed accordingly.”

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The proof having been concluded, and reported to the Lord Ordinary, his Lordship appointed the questions to be argued in Cases, and at the same time issued this note: —“ The Lord Ordinary has not been able, since the
 “ debate was concluded, to consider the proof, and the
 “ various points of argument applicable to it, in such
 “ a manner as to form an opinion on the merits of it.
 “ It may be necessary, however, to call the attention of
 “ the parties particularly to one point, on which the
 “ ultimate extrication of the case may, in a certain event,
 “ very much depend. The record was prepared, and
 “ the additional proof allowed in this reduction, at
 “ the instance of Alexander Watson, while the counter
 “ reduction, at the instance of the defenders, stood
 “ sisted mainly on this principle, that if it should appear
 “ that the propinquity of the defenders, Ann and
 “ Isabel Watson, was made out, there would be an end
 “ of the cause, and it would be unnecessary to discuss
 “ the merits of the pursuer’s claim or service, seeing
 “ that the former claim was in a nearer degree. But
 “ if it should be the opinion of the Court that the
 “ propinquity of the defenders is not proved, it may
 “ not necessarily follow that their service is to be re-
 “ duced at the instance of the pursuer without trial of
 “ the merits of his service, and allowing him, if he
 “ desires it, in the other action to lead additional proof,
 “ or the pursuers in that action to impeach his propin-

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“quity by evidence. The Lord Ordinary does not
 “mean to give any opinion on that question; he only
 “thinks that it is very material that it should be at-
 “tended to in preparing the cases. The Lord Ordinary
 “would also suggest that the point urged on the part of
 “the pursuer, concerning the ages of old William Wat-
 “son and his sons, has appeared to him to be of great
 “importance, and he doubts whether it was sufficiently
 “obviated in the able argument for the defenders.”

On advising the Cases the Court, on the 25th of February 1835, repelled the reasons of reduction, assoilzied the respondents, but found no expenses due.*

Alexander Watson appealed, and resumed in detail the argument maintained by him in the Court below, that the service obtained by the respondents ought to be set aside as irregular; and that at all events the evidence by which it was supported was incompetent and insufficient.

* 13 S. & D. 543. The following statement as to what occurred at the advising was made by the appellant in his Case laid before the House of Lords:—“The Court seemed to think that the case just resolved into
 “a competition of brieves,—that both parties should be placed on an equal
 “footing,—that a supplementary proof might still be allowed to the ap-
 “pellant in the action at his instance if desired, as the sist could not pre-
 “vent the Court from having that action before them, if necessary,—
 “that although the respondents proof might be found to be insufficient,
 “the appellant’s might be worse; and their Lordships delayed the case
 “till next day, that this view of the case, as well as the bearing of the
 “proof, might be considered, and the appellant’s counsel heard in point
 “of form, if necessary. On the 25th, accordingly, the cause was called
 “again, when, much to the surprise of the appellant, and without any
 “farther discussion from the bar, the Court being of opinion that the
 “respondents, who claimed as nearer heirs than the appellant claimed to
 “be, had made out their propinquity, it became unnecessary to discuss
 “farther the suggestions as to the form of proceeding.” On the 3d of March thereafter the sist in the other action was recalled, and decree pronounced in favour of the respondents.

The respondents, on the other hand, maintained that they were not bound to notify their intention to expedite a service; and that the evidence was competent and sufficient.

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At the termination of the argument a suggestion was made by Lord Brougham that the case should be extrajudicially arranged, and for this purpose judgment was delayed. On a future day, it having been stated from the bar that no arrangement had taken place, the following observations were made:—

Lord Brougham.—I have looked into the case. I differ from the judgment. I think it is a wrong decision. I am clear, indeed, that it is a wrong decision; it does not go upon the evidence. The parties must have an issue to prove their propinquity; there must be two issues.

Dr. Lushington.—There is one observation which I feel it necessary to make, with respect to the examination of one or two of our principal witnesses. One of them, who was examined in 1829, a person of the name of Gloag, was of the age of eighty at that time, and he is now, of course, eighty-six.

Lord Brougham.—You may apply, and obtain the usual order; it is frequently made in courts of equity, where it appears that any of the witnesses previously examined are dead, or they are proved, to the satisfaction of the Court, to be unable, from bodily infirmity, to give evidence; their depositions in that case may be read; but then the Court must be satisfied that it is a deposition made on an inquiry in which both parties were present.

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Sir William Follett.—Does your Lordship think that should be done by this House?

Lord Brougham.—In England it would rest with a court of equity, in directing an issue, to give that direction; and the evidence of a witness who had died, or who had become incapable from bodily infirmity, would be receivable under such direction, the fact being proved. I do not know whether that is the case in the Scotch courts. I think the case requires that there should be such a direction here.

Dr. Lushington.—Then, supposing it proved that any of the witnesses are incapable of being examined in consequence of death, or being utterly incompetent from bodily illness or mental infirmity, we are to have an order to read their depositions.

Lord Brougham.—It is the frequent practice of the Court of Chancery; therefore, as we are directing the issue, I do not see that there is any harm in that being provided for.*

Sir William Follett.—With respect to the form of the issue, my learned friend assumes that the issue is to be as to the right of each party. The appellant is interested in opposing the pedigree of the respondents; for they claim as nearer relatives of the party deceased than the appellant.

Lord Brougham.—Is your action an action of reduction of their service?

Sir William Follett.—Yes, my Lord.

Lord Brougham.—Then, if you show that they are not propinquior hæres, or rather if you show that you

* It will be observed that the proposed order was not inserted in the judgment.

are, (and; indeed, unless you do that you have no locus standi in judicio, you have no right to be in court, but under the character of being propinquior hæres,) you may prevail.

Sir William Follett.—Does your Lordship mean to say it is an issue directed by this House?

Lord Brougham.—We remit from this House, with directions to the Court below to direct an issue.

Sir William Follett.—As to who is to be plaintiff and who defendant, and so on, that is to be left to the Court below.

Lord Brougham.—We always leave that to the Court below in this country. The Court below ought to consider, as we do in the Court of Chancery, not who, formally speaking, is the actor, but who in substance and reality is the actor; and the proof must be thrown upon him.

Sir William Follett.—Does your Lordship think that the costs ought to be paid out of the fund?

Lord Brougham.—Yes; they have directed that in the Court below.

Sir William Follett.—Your Lordship means the costs of both parties?

Lord Brougham.—Yes, certainly; but when we are charging the fund with the costs, they must be taxed by the proper officer.

The House of Lords ordered and adjudged, That the said cause be remitted back to the Court of Session in Scotland, with instructions to recall the interlocutor complained of, and to direct one or more issue or issues to be framed to try the propinquity of the parties respectively to the deceased Alexander Watson, town clerk of Port Glasgow, and that such issue or issues be tried accordingly:

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And it is further ordered, That the costs of both parties of the appeal, as the same shall be taxed and certified by the proper officer of this House, be paid out of the fund under charge of the judicial factor on the estate of the said Alexander Watson, deceased; and that the said Court of Session do grant warrant accordingly for payment of the sums, to be taxed and certified as aforesaid, to the solicitors and the parties respectively: And it is further ordered, That the said Court of Session do proceed further in the said cause as shall be just, and consistent with this judgment.

* In consequence of this remit issues were sent to a jury, who, on the 10th of May 1836, 14 D. 734, found a verdict for the appellant. The respondents having presented a bill of exceptions, the Court, on the 7th of March 1837, 15 D. 753, allowed the bill, and set aside the verdict. The question, it is believed, was afterwards settled by a decree arbitral.

THOMAS DEANS—ANDREW M'CRÆ, Solicitors.