At the time of the execution of the entail Mrs Christian Stirling Moray or Home Drummond had arrived at the age of sixty-nine years, and she had no other children than those named in the entail, viz., the defender, his younger brother Charles Home Drummond, and his sister, now the Duchess Dowager of Atholl. Mrs Christian Stirling Moray or Home Drummond never had any other children.

The case further narrated that in the year 1809 the late Mrs Anne Moray Stirling of Ardoch executed an entail of that estate. The destination in the procuratory of resignation in this deed is to "myself, and the said Charles Moray Stirling, my husband, and longest liver of us, in liferent, and to the said William Moray, our second son, and the heirs male of his body, in fee; whom failing, to Charles Moray, third son procreated betwixt the said Charles Moray Stirling and me, and to the heirs whatsoever of the body of the said Charles Moray; whom failing, to any other son or sons to be procreated betwixt the said Charles Moray Stirling and me, successively in their order according to their seniority, and to the heirs whatsoever of the body of such son or sons respectively; whom failing, to James Moray, eldest son procreated betwixt the said Charles Moray Stirling and me, and the heirs whatsoever of the body of the said James Moray; whom failing, to Christian Moray" (the defender's mother), "eldest daughter procreated betwixt the said Charles Moray Stirling and me, and the heirs whatsoever of her body,' &c. At the date of that entail Christian Moray was not married. She was married in April 1812. The said William Moray, afterwards William Moray Stirling, died on the 9th November 1850, without heirs of his body. The said Charles Moray predeceased the said William Moray Stirling, without heirs of his body, and no other sons of the above marriage were born after the said Charles Moray. The said James Moray, the eldest son of the above marriage, also predeceased the said William Moray Stirling, without heirs of his body.

In 1849 William Moray Stirling disentailed the estate of Ardoch, with consent of Mrs Moray or Home Drummond, her husband for his interest, and her two sons, the defender and his brother, and then re-entailed it by the deed of which the destination is given above. The object of this transaction appeared to be to free the succession to Ardoch from a condition in the former entail, that in the event of the heir in possession of Ardoch succeeding to Abercairney, which was destined to the same series of heirs, he should convey Abercairney to his second son, which condition was omitted in the second entail.

By 16 and 17 Vict., cap. 51, sec. 2, the income of property to which a person becomes beneficially entitled by reason of a disposition, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person, are each a succession, and the predecessor is described as follows; "And the term predecessor shall denote the settler, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

The Lord Advocate now claimed succession-duty upon the defender's succession to the said lands of Ardoch and others at the rate of 3 per cent., according to his relationship to William Moray Stirling, on the authority of the judgment of the House of Lords in the case of the *Lord Advocate* v. *Baron Saltoun*, 3 Macqueen, 659.

The defender maintained that he was liable to succession-duty only at the rate of 1 per cent. on his succession, in respect that he took the succession by devolution by law from his mother; and that, even supposing the rule to be that in cases in which a substitute is called, either *nominatim* or by designation, as the head of a new stirps, the successor takes by disposition of property, yet that rule must be qualified so as not to be made to apply to cases of direct descent from parent to child. In every such case, although the child be called *nominatim* or by designation, the case is one of devolution from parent to child, and the duty must be assessed accordingly. Farther, if the defender had succeeded under the entail of 1809, in the destination of which he was called as heir of the body of his mother, Christian Moray, he would undoubtedly have taken the estate by devolution of law, and would have paid only 1 per cent. duty. By his consent that entail was broken, and the estate re-entailed on the same series of heirs, but the defender being now the ascertained nearest heir of the body of Christian Moray, the destination was altered in terms, and the defender's name was inserted. This ought not to prejudice the defender. He still succeeded as heir of the body, by *devolution of law*, and to hold that the mere fact of his being named in the new deed made him take by *disposition*, would be to decide entirely according to form, and to disregard entirely the substance of the transaction.

SOLICITOR-GENERAL MILLAR and RUTHERFURD for Lord Advocate.

FRASER and SPITTAL for defender.

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"*Edinburgh* 16*th July*, 1867.—The Lord Ordinary in Exchequer Causes, having heard counsel for the parties, and considered the argument and proceedings, Finds that the entailer, William Moray Stirling, is the predecessor of the defender within the meaning of the Act 16 and 17 Vict., cap. 51, and therefore that succession-duty is due by the defender at the rate of 3 per cent., and decerns accordingly in terms of the information, No. 4 of process: Finds the defender liable in expenses: Allows," &c.

"*Note*—The defender takes in the present instance not by devolution of law, but in virtue of the express nomination of the maker of the entail, by whom he is constituted a fresh stirps. It appears, therefore, to the Lord Ordinary that the decision in *Lord Advocate* v. *Saltoun* is a precedent in point, and must rule the present case. The circumstance that the defender happens to be an heir of the body of Mrs Christian Moray or Home Drummond cannot, in the Lord Ordinary's opinion, be allowed to affect the matter, and neither does he think that the former entail founded on by the defender can be competently taken into view."

The defender acquiesced.

Agent for Lord Advocate—Angus Fletcher, Solicitor of Inland Revenue.

Agents for defender—Jardine, Stodart, and Frasers, W.S.

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*Saturday, November* 9.

## SECOND DIVISION.

### RODGER *v.* CRAWFORDS.

*Lease—Assignation—Competition—Registration of Long Leases Act—Possession—Statutory Form of Assignation and Notarial Instrument.* 1. In

a competition betwixt an assignation of a lease not followed by possession and another subsequent in date, but recorded under the Registration of Long Leases Act, the latter preferred, registration being under the statute equivalent to possession. 2. Objections that the assignation preferred and a notarial instrument were disconform to the schedules in the statute *repelled.*

*Question*—Is a destination of liferent and fee in an assignation of a lease to be construed in the same way as in a conveyance of a proper heritable subject or a *feudum pecuniæ?* (See *Macalister* v. *Macalister*, 22d Feb. 1859, 21 D., 560.)

This was an action of declarator and removing, in which the question at issue was as to the right to a certain long lease of subjects in the town of Saltcoats, Ayrshire.

The pursuer was assignee to the lease in question under a series of assignations proceeding from the defender James Crawford, and all recorded, along with the lease itself, in the Register of Sasines, in terms of the "Registration of Long Leases (Scotland) Act." As such assignee, he sought to have it declared that he had the sole right to the subjects, and that the defenders were bound to remove and cede possession to him. The defence was, that Mrs Crawford had right to the subjects in virtue of an assignation, by a person named William Coulter, to her and her husband "in conjunct liferent, and to the survivor of them and his or her assignees in fee." This assignation was dated in 1847, and the lease had been assigned to Coulter by James Crawford in 1844. It was said that it was not in the power of the husband to defeat his wife's right under it; and it was further contended that the series of assignations founded on by the pursuer was inept in a competition with the defenders, because (1) the notarial instrument was not conform to Schedule C in the Long Leases Act, in respect that it omitted, in setting forth the transmissions of the lease, to set forth the assignation to Coulter and his re-assignation to the defenders; (2) one of the assignations was in security for future advances, and not for a definite sum of money, which was a thing not contemplated by the Act; and (3) it was neither an absolute assignation in terms of Schedule A, nor a bond and assignation in security in terms of Schedule B, but a combination of both.

The Lord Ordinary (MURE) allowed a proof on the following three points:—(1) whether the assignation to Coulter had been followed by possession; (2) whether the existence of it and of the assignation by Coulter was known to the pursuer and to his predecessors, Robert King Barbour and John Rodger, at the dates of the assignations in their favour respectively; and (3) whether in 1847, when the assignation in favour of the defenders was granted, James Crawford was in solvent circumstances. On a consideration of the proof, his Lordship found that the negative of the first two questions and the affirmative of the third had been established. Thereafter he pronounced the following interlocutor:—

"23*d January* 1867.—The Lord Ordinary having heard parties' procurators on the special findings in fact, and whole process, and made avizandum, and thereafter considered the closed record and productions; Finds, 1st, That in the year 1858 the defender, James Crawford, assigned the tack to which the present action relates to Robert King Barbour, writer in Saltcoats, by an assignation in which he granted absolute warrandice, and described himself as having right to the said tack by and through an assignation granted in his favour on the 25th of May 1832, by James Ritchie, who had acquired right to the tack from John Finnie, the heir of the original lessee: Finds, 2d, That after the date of the said assignation in favour of Robert King Barbour he expede a notarial instrument in his own favour under the provisions of the Registration of Long Leases Act, and which instrument, together with the original tack, was recorded in the Particular Register of Sasines for the county of Ayr, on the 26th day of March 1858, as required by section 5th of the said Act: Finds, 3d, That in the month of April 1859, Mr Barbour, with the special advice, assent and consent of the defender James Crawford, executed an assignation of the said tack in favour of John Rodger, farmer in Bawlies, in consideration of the sum of £60, 6s. sterling therein mentioned: That in this assignation, also, the defender granted absolute warrandice, and that it was recorded in the Particular Register of Sasines for the shire of Ayr on the 14th of April 1859: Finds, 4th, That the said assignation contained a provision to the effect that although it bore to be an absolute assignation, yet it was in reality granted in security for the repayment by the defender of the consideration money therein mentioned, and such other sums as might be advanced to the defender by the said John Rodger, and of the interest becoming due thereon, coupled with a declaration that the said John Rodger should have power to sell the said tack-right and subjects by public roup if the said sums were not paid up at the expiration of three months from the date of intimation made to the defender in terms of the provisions therein contained: Finds, 5th, That in the year 1864 the said defender having failed to make payment to the said John Rodger of the sums advanced by him, with the interest due thereon, after a demand and requisition, of date the 24th of March 1864, had been duly made upon him for payment, the said tack and subjects therein contained, were exposed to sale by public roup, in virtue of the powers to that effect contained in the assignation granted by Barbour and the defender, and were purchased on behalf of the pursuer on the 17th of November 1864: Finds, 6th, That by assignation of date the 11th and 12th of January 1865 the said tack was assigned by John Rodger to the pursuer, and that the same was thereafter registered in the Particular Register of Sasines for Ayrshire on the 17th of January 1865: Finds, 7th, That whether the pursuer's right is to be dealt with as one acquired under the provisions of the Registration of Long Leases Act or by assignation at common law, the pursuer has, in respect of the above titles, which were all duly intimated to the landlord, acquired, as in a question with the defender James Crawford, a valid right and title to the tack in question, and to the subjects thereby let, and that the said defender is bound to cede possession thereof to the pursuer: Finds, 8th, That prior to the date of the assignation in favour of Mr Barbour, viz., in the year 1844, the defender James Crawford had assigned the said tack to William Coulter, watchmaker in Saltcoats, which assignation, though intimated to the landlord, was never followed by possession: Finds, 9th, That the said assignation, though *ex facie* absolute, appears to have been granted for the purpose of enabling the defender to enter into certain transactions re-

lative to his affairs, the statement of which is set out in the assignation, No. 30 of process, as the inductive cause for the said tack being re-assigned in 1847, and that in the said assignation William Coulter grants warrandice only from his own fact and deed: Finds, 10th, That when the tack was so re-assigned by Coulter, the conveyance was granted not to the defender James Crawford alone, but at his request 'to and in favour of the said James Crawford and Jane Rodger or Crawford, his spouse, in conjunct liferent, and to the survivor of them, and to his or her assignees in fee:' Finds, 11th, That the existence of the assignations executed by the defender James Crawford in favour of Coulter in 1844, and by Coulter to the defenders in 1847, was not made known to Robert King Barbour or John Rodger at the date of the respective assignations in their favour: Finds, 12th, In these circumstances that there was not conferred on the defender Mrs Crawford any such right as can entitle her to compete or maintain possession of the subjects embraced in the tack in a question with the creditors of, or onerous purchasers from the other defender, and that the defender Mrs Crawford is also bound to cede possession of the subjects in question to the pursuer: Therefore repels the defences to the declaratory conclusion of the summons: Finds, declares and decerns in terms of that conclusion, and appoints the cause to be put to the roll with a view to farther procedure in regard to the plea of *lis alibi pendens* stated in defence; and in the meantime reserves all questions of expenses.

(Signed) "DAVID MURE.

"*Note.*—I. The Lord Ordinary has not felt much difficulty in disposing of this case, in so far as regards the defence pleaded on the part of the defender James Crawford—Because (1) by the assignation executed in 1858, by which the defender made over the lease in question to Robert King Barbour, he describes himself as having acquired right to it from the party who had purchased it from the heir of the original tenant, and not through any reconveyance from the party to whom the defender had himself assigned it in 1844; and it is now proved that the existence of any such assignation and reconveyance was not made known to Barbour by the defender. When therefore, a notarial instrument was expede in 1858, in terms of the provisions in the Registration of Leases Act, with a view to the registration of the original tack, all that could be expected was, that there should be set forth in that instrument the various titles by virtue of which the defender had described himself as having acquired right to the original lease. This was accordingly done; and the notarial instrument and original tack were thereupon duly recorded. There was thus, as the Lord Ordinary conceives, a valid statutory title created in favour of Barbour, at all events as in competition with the defender; and which the defender had, it is thought, no right to challenge on the ground of an alleged omission from the notarial instrument of a connecting link which had not been set forth in the assignation granted by him, on which the notarial instrument had proceeded, and which was in reality a latent deed. (2) The assignation again granted by Barbour in favour of John Rodger, in 1859, bears to have been granted with the special advice and consent of the defender. It was subscribed by him, and contains the provisions and conditions under which the property might be sold if the money advanced to the defender was not paid. That assignation was also recorded in the Register of Sasines by consent of the defender; and although it may not be framed precisely in the form pointed out in the Registration of Leases Act, that is an objection which, even if well founded, cannot, it is thought, avail the defender, because the assignation was duly intimated to the landlord, and was thus a good assignation at common law, and apart from the provisions of the Leases Act, as between the defender and his assignee.

"So standing the title in 1860, the defender, when examined upon oath under his sequestration, deponed, that the property in question was assigned to Rodger in security of £60, and any further claims which might be advanced to the defender; and that Rodger afterwards "advanced me £28, 6s. 6d., for which I granted a bill; and in respect of that assignation the creditors in the sequestration appear to have given up any benefit they might otherwise have derived from the property in question, and the sequestration was wound up. When in these circumstances, therefore, the defender afterwards failed to pay the sums advanced, upon a demand being made to that effect, it appears to the Lord Ordinary to be clear that the holder of the assignation had, as in a question with the defender, a good right and title to bring the property to sale, and that the pursuer, as the purchaser at that sale, has now a good title to the lease. If, as alleged, but not instructed on the part of the defender, the property was sold with a view to pay a larger sum than was actually due, that is a matter for accounting between the seller and the defender under the provision of the assignation, and cannot, it is thought, affect the rights of an onerous purchaser.

"II. The case of the other defender is attended with more difficulty. It is rested on the clause in the assignation, No. 30 of process, in which the reconveyance is taken to the defenders 'in conjunct liferent, and to the survivor of them and his or her assignee in fee;' and in respect of which provision it is contended that the defender Mrs Crawford acquired such a right or interest in the lease as precluded the other defender from disposing of it without her consent, and afforded her a good defence against the declaratory conclusions of the summons. The Lord Ordinary has, however, been unable to find any sufficient reason for giving effect to this defence: for although by the conception of the clause it appears to have been the intention to confer a right upon the defender that was only to be contingent upon her survivance; and although it might in that event have been good against the heir, or any gratuitous disponee of the other defender, it appears to the Lord Ordinary that during the joint lives of the husband and wife the fee, which originally belonged to the husband, and was settled in the above terms by his direction, remained with him to the extent of being attachable by his creditors, or disposed for onerous causes. In the leading case of *Ferguson* v. *M'George*, 22d June 1739, Dicy., p. 4202, in which it seems to have been first settled that a conveyance in substantially the same terms as here occur, gave the fee to the wife upon her survivance, the report bears that 'there was no doubt but the husband was so far fiar as not only to have the disposal of the money during his life, but that it was also affectable by his creditors.' And in respect of this authority, which is approved of by Professor Bell, Comm., vol. i. p. 56), and has not, in so far as the Lord Ordinary is aware, been set a side by any subsequent decision, it appears to him that the interest which the wife took under the above

clause, in a deed which was never made public, cannot be founded on by her to cut down conveyance executed by her husband for onerous causes.

(Initialed) "D. M."

The defenders reclaimed.

Scott and Brand, for them, argued—1. The male defender had no right to assign the tack in question in 1858, because it had been previously assigned by him to William Coulter, who had, in reconveying it, assigned an important interest in it to the female defender, and this assignation had been intimated to the landlord. 2. The interest so conveyed to the female defender was a reasonable postnuptial provision in her favour by her husband when he was solvent, which therefore he could not revoke. 3. The notarial instrument and the assignations in favour of Barbour, John Rodger, and the pursuer, were null, not being in conformity with the schedules appended to the Long Leases Registration Act.

Solicitor-General (Millar) and Burnet, for the pursuer, argued—1. The latent assignation in favour of Mr and Mrs Crawford had never been followed by possession, while the pursuer's assignation had been recorded in terms of the Long Leases Registration Act, section 16 of which provided that such registration should be equivalent to possession. 2. The objections to the form of the pursuer's title were unfounded. 3. The conveyance to Mrs Crawford was truly a revocable donation by a husband to his wife *stante matrimonio*, and it had been revoked by the husband's subsequent assignation to Barbour. 4. The said conveyance conferred no right whatever on Mrs Crawford during her husband's life, and until his death he had, notwithstanding thereof, full power to assign the tack for onerous causes.

The Court recalled the Lord Ordinary's interlocutor, but of new declared in terms of the declaratory conclusion of the summons, on the ground that the assignation to James Crawford and his wife had not been followed by possession, while that in favour of the pursuer had been recorded in the Register of Sasines, which was by statute declared equivalent to possession.

At Advising—

Lord Justice-Clerk—In this case, the pursuer Robert Rodger, affirming that he has full and complete right to a long lease of certain subjects in Saltcoats, held under the Earl of Eglinton, seeks to have his right declared, and to have the actual occupants, Mr and Mrs Crawford, decerned to cede possession in his favour.

His title, as disclosed in statement and established in proof, proceeds upon an assignation of the lease in his favour, in January 1865, by a person of the name of John Rodger, which assignation is registered in the Register of Sasines, as he says, in conformity with the provision of the Leases Registration Act 1857. The assignation was granted for a price paid by the pursuer.

The title of John Rodger rests upon an assignation from a person of the name of Robert King Barbour, with the special advice and consent of the male defender, Mr Crawford, in 1859.

This assignation bears to have been granted for a consideration presently given, but in the same deed it is narrated that the right of Rodger is truly that of a party holding the assignation in security of an advance made and of advances to be made. The state of the fact appears to be, that Rodger, not being able to recover his advances, realised his right and assigned it to the pursuer.

The assignation in favour of Rodger, granted by Robert King Barbour, with consent and concurrence of Crawford, contains absolute warrandice by Crawford.

Robert King Barbour, who assigned to John Rodger with consent of Crawford, got his assignation from Crawford in 1858. In that assignation Crawford granted absolute warrandice in favour of Robert King Barbour.

At the time when Crawford assigned to Barbour, he stood *ex facie* in right of the tack in virtue of an assignation by a person named Ritchie in 1832. Ritchie was assignee of John Finnie, the heir of the original grantee.

It turns out that previous to his transactions with Barbour and with John Rodger, and so far back as 1844, the defender Crawford had executed an assignation of the lease in favour of a person of the name of Coulter. The object of this assignation, as disclosed in the deed by which Coulter denuded himself of his right, appears to have been to give facility in the carrying out of certain arrangements, which arrangements are said to have been completed. Coulter, in 1847, executed, by desire of Crawford, a deed by which, instead of a simple retrocession, he assigned to Crawford and his wife in conjunct liferent, and to the survivor of them, and his or her assignees, in fee. Coulter plainly held in trust for Crawford, and acted by his direction.

It is upon the supposed effect of this assignation that the case in defence is rested.

The case of the defender Crawford is not stateable. In the face of absolute warrandice granted by him of the rights conferred on Rodger, it is impossible that his contention can be listened to for a moment.

On the part of Mrs Crawford, it is contended that the right was conferred to secure her in a provision which she had not otherwise secured. And she maintains that, having an assignation intimated to the landlord, she is entitled to compete with the right of Rodger, and, in respect of the priority of her right, to prevail in the competition.

Various constructions were given by Mrs Crawford herself and by the pursuer of the effect of the destination; and it was contended that *esto* a grant was made, it was revocable as a donation. But the leading contention of the pursuer as against the existence of any right in competition is, that the right was never completed in her person; that it was not followed by possession, and, although intimated to the landlord, was latent, not being followed by any public act; and that his right being complete, while hers is incomplete and imperfect, his claim falls to be sustained.

The first point to be determined, as it appears to me, is as to the *ex facie* completeness of the right of the pursuer. It is objected to its validity (1) that, contrary to the terms of the Registration of Leases Act, there has been a failure to enumerate in the register all the steps in the progress of assignations; and (2) that, in reference to the right of John Rodger, there has been no statutory assignation at all.

On the first point, the omission is said to be that of deducing the title fully, because the conveyance to Coulter and the deed by Coulter are not stated. It has been found that the knowledge of the existence of these was not known to the parties, and it is plain that if the omission of a latent and unknown deed were to vitiate such a transaction, the Act of 1857 would be totally annulled. Any latent

trust-deed in that view would vitiate any progress. In reference to the right in John Rodger, it is said that his right is not in accordance with the statute, which does not recognise any other description of writ than one which is either for a price paid or an advance of money. I think that the statute may availably constitute a right which is *ex facie* absolute, yet in reality for advances made and to be made. If there had been a right *ex facie* absolute, with a separate deed acknowledging that the conveyance was truly in security only, it would be good, and the right is not, I think, bad, because the explanation is in the assignation itself.

If so, then the pursuer has, as it occurs to me, made out an effectual and complete right.

The Act, section 16, enacts that registration of all assignations shall complete the right to the effect of establishing a preference in virtue thereof as effectually as if the grantee had entered into actual possession.

The pursuer has by registration completed his right as effectually as if he had followed out and completed his right by actual possession.

Mrs Crawford's right is incomplete. It was not followed by possession; this is part of the case as ascertained; because, although Mrs Crawford averred, that possession had followed on her assignation, she did not prove that statement and she has renounced probation. I think that the intimation of the assignation to the landlord, is a latent act, and without possession is unavailing in competition. If there had been possession following thereafter, the case presented would have been different.

This seems to me to dispose of the case. I do not think it necessary to enter upon the question as to the nature of the right in Mrs Crawford, whether the conjunct liferent and fee is in a case of a lease to be construed as in a case of a heritable subject or a *feudum pecuniæ;* or as to the right of the husband to revoke the assignation as a gift *inter virum et uxorem.* It is enough for the disposal of the case that the right of the pursuer is complete, and the right of Mrs Crawford incomplete and ineffectual. I should propose, therefore, to find that the pursuer's assignation has been followed by registration, now equivalent to possession, and that the defenders' has not been followed by either, and in respect of that finding to recal the Lord Ordinary's interlocutor, but of new to decern in terms of the declaratory conclusion of the summons.

The other Judges concurred.

Agent for Pursuer—John Thomson, S.S.C.

Agents for Defenders — Macgregor & Barclay, S.S.C.

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*Saturday, November 9.*

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DARLING *v.* OGILVY AND OTHERS

*Property—Conterminous proprietor—March-fence—Continuous possession.* In a case of disputed boundary, a remit made to a man of skill to fix a line of march in accordance with certain findings by the Court.

This action relates to a disputed boundary between the estate of Lednathie, belonging to the pursuer, and the farm of Dalinch, the property of the defender Mr Ogilvy of Clova. In 1712 Mr Ogilvy's predecessor conveyed the estate to the pursuer's predecessor, and the boundary was thus described in the charter—"To the well of Proctor's Wood, and from that straight up to the well of Peddie's Craig, and from that keeping the top of the hill west, conform to use and wont." A wall has recently been built, jointly by the tenants of both proprietors, upon a line between the two wells, which is not straight. The pursuer has brought the present declarator against Mr Ogilvy and the tenants to have it found that the straight line is the true boundary. The defenders contended—1. That the expression "straight up" in the charter is capable of constructon and explanation by usage; 2. That Mr Ogilvy had had possession up to the boundary of the wall built for the prescriptive period. The Kirriemuir road runs between the two wells, and between Proctor's Wood well and that road the defenders' line follows an old march dyke. Upon a proof, the Lord Ordinary affirmed the pursuer's contention.

The defenders reclaimed.

Clark and Lee for them.

Shand and Asher in answer.

At advising—

Lord Justice-Clerk—The summons in this case, which was instituted by the late Mr Stormont Darling of Lednathie, and is now insisted in by his son, seeks to have it declared [reads conclusions.] It seeks to have it found that a fence lately erected by the tenant in conjunction with the tenant of the neighbouring property does not truly represent the line of march but encroaches on the pursuer's property; it concludes for interdict against the use of the ground intervening between what is described as the true line of march, and the line of fence actually erected. The defenders are the proprietor of the adjoining lands of Dalinch and his tenants in these lands, and the tenants in the portion of the farm adjacent to Dalinch.

The pursuer founds upon the description of the boundary as contained in his titles, and, in particular, upon the terms of the original contract of alienation under which the right in his predecessor is constituted. The granter of the charter was the then proprietor of the lands of Lednathie, and the grantee wus the predecessor of the pursuer. The pursuer holds of the defender Mr Ogilvy, as Mr Ogilvy's predecessor acquired the right of superiority by singular title from the proprietor of Dalinch along with the property of Dalinch. The description of the boundary in and near the locality in dispute is as follows:—[reads.] Mr Darling says that he has pointed out the two points mentioned, the well of Proctor's Wood and the well of Peddie's Craig. So far as relates to the first portion of the march, he takes a straight line from the one point to the other, and, ascending the hill side from the one well in a straight line to the other, he maintains that there the boundary line must be drawn. So far as the remaining portion of the march is concerned, it is contended to be a wind and water march.

In so far as relates to the portion of the march above the well of Peddie's Craig, the parties differ, not in respect of the nature of the march, but as to the actual line; as to the line of march being along the ridge of the hill they are agreed, according to wind and water shed—but as to the true line of wind and water shed they differ. There are two gentlemen of skill examined, one on the part of the pursuer and the other on the part of the defender. The course which suggests itself to be followed, and that is in perfect conformity with the conclusions of the summons, is, that we should remit to a