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.

Saturday, November 9.

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

man of skill, appointed by ourselves, to see the ground and to report to us the true line of wind and water shed, in order to the march being marked off in that direction.

It is impossible that we should adopt the line of the fence erected by the tenants, for it does not profess to follow the natural boundary but is fixed with a view to a compensation of ground at one place by ground given to the one property for ground taken from the other property at another, an arrangement to which the pursuer was no party and by which he cannot be bound—an arrangement which may or may not be fitting, but which cannot preclude the demand of the pursuer to have the true march marked out and fixed.

The questions raised in reference to the other portions of the boundary are of more difficult solution. Mr Ogilvy maintains, 1st, that, although there is a description of boundary, it is one which is made according to the conception of the clause itself, to be a line conform to use and wont. That use and and wont, as ascertained by universal possession, has fixed the line not in a straight direction between the two points mentioned, but in a line which, proceeding from the well of Procter's Wood, goes along a dyke to the pursuer's road, and thence by the stripe of water which flows out of Peddie's Craig well, forms now a green spot on the hill side, and is traceable for a considerable part of the way, but which is said to have gone down at one time to, or almost to, the Kirriemuir road itself. A difficulty is suggested, but there is nothing in the suggestion, as to the locality of the well of Proctor's Wood. That object seems to be ascertained beyond any doubt. The defenders contend that the universal possession, which they say has existed for greatly more than forty years, must be held to give such a construction of the boundary as is conform to that possession; and lastly, they maintain that by possession on a title in the person of the defender, Mr Ogilvy, and his predecessors, not bounded by limits in his title deeds, he has acquired, while by the operation of the negative prescription Mr Darling has lost, the right to the disputed ground.

The first question is as to the construction of the terms of the description of boundary. I hold that, according to the true construction of the clause, the reference to use and wont does not refer to the portion of the march below the well of Peddie's Craig, but exclusively to the portion of it which is above the well, and which had been mentioned in the immediately preceding part of the sentence. It is difficult to comprehend a line described as going straight up from one point to another as affected by a use of possession. If the expression had any reference to that portion of the clause, it would seem to me to contain an implied affirmance that the line which went straight up from the one well to the other was the march which, by use and wont, had been *de facto* observed. The pointing out of two ascertainable points in a line of march leads to the inference, in the ordinary case, of a line in a straight line, or a line as straight as circumstances admit, between these points, being the march; the description here goes farther, for it says that the march is to go straight from point to point. It is to go straight up. If the two points had been on the same level, the expression would no doubt have been held to import a straight line from point to point. In this case it happens that the levels are different, and the line to be taken is on the ascent of a hill. Therefore, reading the description and judging of it according to the expressions in it, I do not see how it can well admit of doubt that originally the march was a straight line between well and well. There is no case of physical obstacle interposed in the way of following such a line; there is nothing in the physical features of the hill side to prevent the observance of a line drawn from the well or from another point along the road in that locality, or the construction of a fence along it.

It is to be observed, further, that the line sought to be established by the defenders is not attempted in evidence to be made to come within the category of a straight line according to any latitude of construction. It is not said to be a line so deflected only from a straight line as to meet the exigencies of the ground; what is sought is to make out a march in one part following the line of a dyke, in the other that of a stripe or flow of water—it obviously is not straight—but it is in effect a different kind of boundary altogether, that is, a boundary by a natural object on the ground, viz., a run of water from a well.

But then whatever the line may have originally been, that line may have ceased to form the actual march. Both parties are agreed in this. It is conceded by the pursuer that if a different boundary has been observed for the period of the long prescription, and a clear unequivocal exclusive possession—a possession absolute and exclusive of any possession by the pursuer—Colonel Ogilvy and his predecessors will have acquired a good right to the disputed ground. Pleas are stated on the record to the effect that the superior could not acquire, in the face of an express grant, against his vassal, a portion of subject bounded and defined in the grant by a line capable of ascertainment by reference to natural objects; and that the predecessors of the defender in the superiority, having granted a renewal of the right with a repetition of the description and warrandice, against fact and deed, could not by the fact of possession go in the face of the grant and the warrandice; but these pleas, doubtless for sufficient reasons, are not insisted in. We are not called upon to give judgment on it, and we have, therefore, to deal with the case upon the question Whether, *de facto*, there has been such a possession for forty years and upwards in Mr Ogilvy and his predecessors, to the exclusion of any possession in the other party, as to alter the condition of the right.

Putting the question so, I am humbly of opinion that Colonel Ogilvy has satisfied the requirements which are necessary, and that he proved continuous, uninterrupted, and exclusive possession of that portion of the disputed ground lying to the westward of the dyke extending from the well to the Kirriemuir road, and, therefore, I feel it impossible to concur with the Lord Ordinary in so far as that portion of ground is concerned.

If it be admitted that a variation of boundary can be effected by the joint operation of the positive and negative prescription, I can figure no case stronger than that which the defenders present. A dyke has existed beyond the memory of living men in the line in which it exists now, It has been treated as a march dyke in the matter of repairs and in the matter of reconstruction. It has been kept up by the tenants mutually, and rebuilt in 1834, at the joint expense of the two conterminous proprietors. Mr Ogilvy and Colonel Ogilvy's tenants have surely this to say, that by this mutual contribution for repair and

building, continuing for greatly longer that forty years, any assertion of such right in the subject was negatived, and a mutuality of right and interest fully admitted. It could not be dealt with except as a march fence. The state of possession has been, I think, most satisfactorily proved to have been in accordance with the line of the dyke, the Lednathie sheep or cattle pasturing up to the one side, and the Dalinch sheep or cattle pastured up to the other. There was no passage formed for the Lednathie sheep going through it to the ground beyond. The evidence arising from the very existence of such a dyke points to its use as a division of pasture ground. It certainly formed the march (in pasturing) for, from the time when the inclosed ground ceased to contain wood capable of being injured by pasture, the dyke was certainly used as the fence between the grounds in that position.

I think it probable that the dyke was originally built in its actual line with a view to the inclosure of the ground to the eastward for plantation, and it may be that the line was chosen with a view to its greater ease of construction in the hollow and along the curve; but the dyke did, according to my view, unquestionably become, and for greatly more than forty years remain, the boundary wall of the two estates; and I cannot see ground for withholding effect to a possession clear and unequivocal in its character in Colonel Ogilvy, coupled with a total cessation of use in the proprietor of Lednathie.

The result is, that the straight line has been departed from up to the end of the dyke, and we have carried on the march from that point.

If the defenders are right in their view of the proof, the cases are identical, for they contend that they have proved a possession as clear and as continuous in reference to the portion above the road and up to the well as in reference to the portion of the boundary below the road. I do not think that the defenders have made out that proposition in point of fact. There is a good deal of strong evidence as to the stripe being reputed as the march, and as to possession in accordance, but, on the other hand, the pasturage on that hill side, with no fence to divide the one portion from the other, does not seem to me to be sufficient to establish a right which demands clear and unequivocal possession, on the one hand, and absolute cessation of possession, on the other. I state the import of the proof as it presents itself to my view, without citation of special passages; the result is, that the march of the stripe is not made out to my satisfaction.

Failing that march, we have, I think, to deal with the case upon the footing of following the line as nearly as we may consistently with the conclusions come to in reference to the lower portion of the boundary. We have ascertained a point from which we are to start in our course towards the other defined point in the line of march. The line starting from the end of the dyke will go straight to the well, and thus, as it appears to me, the true march will be ascertained.

We should therefore, I think, find that the dyke forms the boundary between the well and the road; that a line from the point at which the dyke touches the road straight up to Peddie's Craig well, is the line in that portion of the boundary; and that the ridge, as wind and water sheer, is the line of boundary above, and with these findings we should remit to a man of skill to lay down the march.

The other Judges concurred.

A remit accordingly was made to a man of skill to fix the line.

Agent for Pursuer—James Webster, S.S.C.

Agents for Defenders—Mackenzie & Kermack, W.S.

Wednesday, November 13.

FIRST DIVISION.

MILNE, PETITIONER.

Judicial Factor—Petition—Competency. A petition for recal of factory, the appointment having been made by the Lord Ordinary—*Held* competently presented to the Inner House.

This was a petition for partial recal of a factory, so far as regarded certain heritable subjects mentioned in the petition, and for exoneration and discharge of intromissions *quoad* these subjects. The appointment of factor had been made by the Lord Ordinary.

It was doubted whether the petition was properly presented in the Inner-House.

BIRNIE, for petitioner, in support of the competency, cited *Lawson*, 19th December 1863, 2 Macph., 355; *A. B.*, 20th July 1861, 33 Jurist, 686; *White*, 17th July 1860, 22 D., 1473; *Noble*, 25th June 1859, 21 D., 1053.

The Court ordered intimation and service.

Agents—Henry & Shiress, S.S.C.

COURT OF JUSTICIARY.

Wednesday, November 13.

ALEXANDER *v.* LINDSAY.

Jurisdiction—Customs Consolidation Act 1853—*Exchequer Act—Justice of the Peace—Court of Review—Relevancy.* In a suspension of a conviction in a Justice of Peace Court, under the Customs Consolidation Act 1853, on the ground that the information and summons on which conviction proceeded did not specify time and place of offence charged, *Held* that the Justiciary Court had no jurisdiction, and that the Court of Exchequer was the proper Court of Review.

An information was lodged against John Alexander, before a Justice of the Peace of the county of Kincardine, in these terms:—"Be it remembered that Henry Lindsay, an officer of customs, under the direction of the Commissioners of Customs, informs me, James Christian, Esquire, one of Her Majesty's Justices of the Peace in and for the county of Kincardine, that John Alexander obstructed one William Finnigan, employed for the prevention of smuggling, contrary to section 247 of 'The Customs Consolidation Act 1853,' whereby the said John Alexander has become liable to be imprisoned as is therein directed."

A summons, containing an exact copy of this information was served upon Alexander. After due trial before three Justices at Stonehaven, on 29th October 1867, Alexander was convicted, the conviction and warrant of imprisonment being in these terms:—"To Henry Lindsay, an officer of customs, and to the gaoler or keeper of the prison at Stonehaven in the county of Kincardine. John