his Lordship could, sitting as a juryman on the evidence, draw no other conclusion than that the pursuer knew perfectly well the terms of the agreement. If after this he intended to keep the defender bound, he should have made a claim against him at once. But instead of doing so he went on transacting as before with Dick; he took from Dick a renewal of more than one bill, and never made a claim on the defender till after Dick's bankruptcy, when the relief of the defender against Dick was gone, or materially impaired. Under these circumstances, his Lordship thought the just inference was, that the pursuer had liberated the defender by force of implied discharge.

Agent for Pursuer—R. P. Stevenson, S.S.C.
Agents for Defender—Murray, Beith & Murray, W.S.

Tuesday, June 21.

SECOND DIVISION.

LUMSDEN *v.* GORDON.

Property—March—Natural Boundary—Possession.
In a question of disputed marches between two conterminous proprietors, whose titles threw no light on the subject, the Court gave judgment in favour of the line claimed by the pursuer, in respect that the presumption from the natural features of the ground was in his favour, and that his contention was borne out by evidence of repute and possession.

This was an action of declarator of marches, at the instance of Hugh Gordon Lumsden of Auchindoir, against Carlos Pedro Gordon of Wardhouse, instituted for the purpose of having a certain line of march declared between the hill ground or pasture ground of the pursuer's property of Newmilne and the defender's property of Auchmullan. Newmilne and Auchmullan both lie in the parish of Auchindoir, in the county of Aberdeen, the former estate lying to the north of the latter, and both together forming a triangular district lying to the west of the main portion of the parish, with which it is connected by a narrow strip of land. The pursuer claimed a certain line of march, which he alleged was indicated by certain cairns in part of its course, and which during another part of its course followed the line of a burn until it reached a certain stone at the "March of Mar."

The pursuer, besides relying on repute and immemorial possession, founded on a document called a "boundary evident," and dated 1688. The original document was not produced, the pursuer alleging that it had gone amissing along with the rest of a Sheriff-court process, in which it had been produced in 1820; but in an inventory of titles of the pursuer's predecessors in 1794 there was mentioned an "Act of Court 1688:" and it was proved that in 1821 and in subsequent years there had been various copies circulated among the pursuer's tenantry of a document bearing to be dated 1688, and to be an Act of Court or boundary evident anent the marches between the properties in question, as settled in arbitration by the Earl of Mar, and containing the march now claimed by the pursuer. In reply to objections by the defender to this document, the pursuer admitted that the date 1688 was an error, and alleged that the true date was 1568, the other date having been inserted in the document by mistake.

The defender claimed a different line of march considerably to the north of that claimed by the pursuer, and stretching in such a way as to include in the defender's estate between four and five hundred acres of hill ground more than was conceded to him by the pursuer. He alleged that this line was formerly shown by certain march stones, some of which were still visible, while for two-thirds of the course it followed the sky of the hill. He relied on his proof of possession, especially by immemorial shooting up to the line claimed by him; and he produced a document written in 1822 by an old tenant in Auchmullan, who died in 1826, and who stated in the document that in 1794 he had been taken round the marches of the Kildrummy estates on the occasion of infeftment being taken in a part of them, he being "skelpit" on the occasion in order to strengthen his memory. He quoted historical documents to show that neither of the dates assigned to the boundary evident could be correct, and asserted that the document, being proved to be inaccurate in many respects, was valueless; and that the bulk of the pursuer's evidence, being given by persons who derived their information from the document, was equally valueless. Alternatively, the defender claimed a right of common property in the ground lying between the two lines of march, and otherwise claimed a servitude of pasturage and feal and divot, in which claim of servitude however he did not insist.

After a proof, the Lord Ordinary (MURE) sustained the claim of the pursuer.

The defender reclaimed.

SOLICITOR-GENERAL (CLARK) and SPITTAL (SHAND with them) for reclaimer.

MILLAR and BALFOUR in reply.

At advising—

LORD COWAN—The object of this declaratory action is to have the boundaries of the estates respectively belonging to the pursuer and defender, in so far as they lie contiguous, fixed by judgment of the Court. The line of march claimed by the pursuer is that coloured *red* on the plan in process, and the line contended for by the defender is coloured *yellow*. The disputed territory consists of rough hilly moorland ground, parts of which are only fit to be enjoyed for sporting purposes, and the rest of it is hill pasture for sheep. As might be expected in such a case, the evidence is mainly directed to support the allegation of possession on the one side and the other; and as there exists considerable discrepancy among the witnesses examined, *hinc inde*, the difficulty of arriving at a sound decision is not inconsiderable. But after careful examination of the whole proof, and on consideration of the able commentary upon its import by the counsel on both sides, I have arrived at the conclusion that the views of the Lord Ordinary are well founded.

The titles of the two properties throw no light on the disputed question. The two estates bound each other,—the pursuer's lying to the north, and the defender's to the south, and both being within the parish of Auchindoir. Farther than this no light is to be gained from the title-deeds, for, although in both sets of deeds reference is made to common pasturage and commonties and mosses, it was conceded in argument that these subordinate rights do not relate to the disputed ground. And although, on the part of the defender, it was suggested that the ground within the two lines might in some views of the evidence be regarded as common property, I do not think there is any sufficient

ground on which this view can be satisfactorily vindicated. The real inquiry is, whether the pursuer has supported his alleged proprietory right southwards to the line of march set forth in the conclusions of the summons.

There are certain general principles to be kept in view in such questions as the present. Erskine (b. ii, t. 6, s. 2) remarks, that differences as to the line of march cannot arise "where the limits of the grant are pointed out by march stones, by the course of a river, or by other obvious and indubitable boundaries; and he adds that "where a charter, without referring to any boundary, describes the lands by special names or designations, it can only be known by the common opinion of the country what lands fall under the designations expressed in the charter, and by what limits those lands are circumscribed." In the case of *Whitson* v. *Ramsay*, 1813, Pat. App. 664, the House of Lords, where the proof of possession was contradictory, held the boundary contended for by the successful party made out from "the presumptive real evidence arising from the state of the natural marches and hill grounds;" and, adopting the same principle, Lord Redesdale, in the case of *Fraser* v. *Chisholm*, July 1814 (2 Dow, p. 561), alludes to the boundaries in Highland districts as being "tops of mountains, cairns, huge stones," and the like; and referring to usage and possession, states that the important matter always is to consider whether the usage was of a description clearly asserting an exclusive right, and not a mere trespass.

As regards march stones, some evidence has been led on the one side and the other; but the parole evidence as to this is quite unsatisfactory,—only one stone, or at most two, being spoken to by certain of the witnesses; and these containing no marks or appearance of having been placed where they were seen as such. There is, however, a document founded on by the defender, and much relied on by their witnesses for the defence, in which march stones are specified,—the effect of which on the case will be afterwards considered.

Again, as regards the course of streams, or other natural objects, from which presumptive real evidence of boundary may be derived, there is not a great deal to be found of that kind of proof in this case. On the one hand, the march contended for by the pursuer on the west runs for a considerable way along the course of what is called the Glenlaff Burn, which it reaches by descending from the hill of John's Cairn along the Lang Cairn; and on the east side of his march there is along the red line a small stream which runs from the Wife's Step to the Auldwater at the junction of the red with the yellow line; and there are other prominent points on the red line called Nelson Cairn and John's Cairn from which the line runs westward to the top of the hill of John's Cairn before mentioned. The yellow line, on the other hand, runs from the east point where the two lines diverge, westward by the Dryforkings, along the foot of the hilly ground to what is called the Well of the Wood, and thence skirting the rising ground to the north and westward till it joins the burn of Shiels, at that part of its course where it forms the parish boundary and is intersected by the blue line on the map. From this general outline of the marches respectively contended for, it cannot be said that there are here to be met with obvious and indubitable natural boundaries; at the same time, I cannot avoid the conclusion that, so far as natural marches go, the more weighty presumption to be derived from them is on the side of the pursuer. And when on this part of the case, I may refer to the statements of two witnesses which bear on the direction of the march westward from the point where the two lines diverge on the east. From the evidence of Keith Ross, a witness for the defender, it appears that in 1821 a march ditch between the two properties was contracted to be made in two straight lines; that this witness made this ditch from the burn on the east side of the Ordnance map in a straight line for about 400 or 500 yards; that the other part of the ditch was to be made from the termination of the first line in a direction towards the bottom of the hill—its proposed termination being about 30 yards north of the Peathillock. This second part of the ditch was not made; but it is referred to by a witness M'Intosh, examined for the defender, who had unsuccessfully competed for the job; and he describes the intended line from where it left the part of the ditch which was cut as proceeding "along very nearly in the tract of the burn which runs down from the Wife's Step past the south side of the Peathillock." This part of the ditch was not made, but it is material to observe that while M'Intosh's description of its course corresponds with the red line, the statement of Ross that it ran about 30 yards north of the Peathillock would still bring the march line quite near to the red, and at a considerable distance from the yellow line,—the distance at that point between the two lines being five or six chains, or from 110 to 130 yards, according to the scale on the Ordnance map.

The materiality of this evidence lies in the support which it gives to the elements in the proof referred to in the note of the Lord Ordinary, with regard to the possession had by the witness Archibald of a small farm or croft at the east end of the disputed march. This croft, called Braeside, was held by him for about thirty-one years, and although now a tenant from year to year, he states that he had a lease at the commencement for nineteen years, granted to him by Lumsden of Clova, to whom he has all along paid his rent. The possession is not large, but the fact stated by the witness shows that not the yellow line, but the red line, was at this point the understood boundary, meaning along the stream from the Wife's Step to the Auldwater.

The Lord Ordinary has observed on the question of possession, that the parole evidence in support of the pursuer's line of march is distinct and consistent; and assuming that evidence not weakened by the reference made in the depositions of several of the witnesses to what is called the "boundary evident of New Mill, 1688," it certainly presents a body of testimony, the effect of which it is difficult to resist. As to that document in itself, it was successfully demonstrated by Mr Spittal to be quite unworthy of credit, and in so far as the witnesses state that their means of knowledge was derived more or less directly from it, and from no other sources, their testimony can be of little avail. But, in the first place, there are witnesses whose testimony to the boundaries is in noways connected with the document: Take, *e.g.*, James Cook (p. 65), the origin of whose means of knowledge he states to be his wife Janet Ellis, and her father Robert Ellis, the latter of whom died nineteen years previously, a very old man, which carries his evidence back to the end of the eighteenth century; or Alexander Gow, who derived his information from his father

the tenant of Wester Clova, and whose sheep and cattle he herded on the hill when he was a boy, and who in 1824 became shepherd at Clova, and continued to be so for thirty-three years, herding the Clova sheep on the disputed ground during all that period; and James Archibald, and at least three others, are in the same situation. In the second place, the "evident," though it or some similar writing is mentioned in an inventory dated in 1795, does not appear to have been seen or known by any one before 1821, so that the many statements by the witnesses as to the boundary, which go back beyond that date, are in no way affected by this "boundary evident; and in the third place, there are others of the witnesses, 10 or 12 in number, whose statements, although in part having reference to the document, yet speak to their knowledge of the boundary as derived from other sources if not from their own personal acquaintance in herding or otherwise. While, therefore, the document in itself is not of any weight, there is a mass of parole evidence unaffected by it; and all this testimony is confirmed by that of Alexander Souter, one of the oldest witnesses examined by the defender, and whose statements, for the reasons given by the Lord Ordinary, are certainly entitled to peculiar weight.

As opposed to this evidence on the part of the pursuer, there is, first, founded on by the defender what is called a "list of marches by John Strachan;" and, second, the testimony of several witnesses, who support the defender's boundary of the yellow line. The statements of these witnesses, however, are dependant for their effect to a great extent on the credit to be attached to the paper to which I have referred, and to the oral statements by Strachan as to the marches. And the case of the defender thus comes to depend very much on this document and on the credibility of Strachan as a witness.

This "list of marches" purports to have been written out in July 1822, four years before Strachan's death, which occurred in 1826. It was found amongst his papers after his death. For what purpose it was prepared, or on what authority, nowhere appears in the proof. It may probably have been for his own use in herding, as he was tenant of a sheep farm in the locality. And certainly it cannot be entitled to any greater weight than if he had made the same statement as a witness. It purports that he had gone round the marches with some others on the employment of Gordon of Avochie, "and was shown all the marches conform to the charters." This seems to be the source of his knowledge; but, as the charters themselves contain no description of boundaries, his information must have been taken from the parties by whom he was employed. Various march stones are then specifically set forth as having existed substantially along the line contended for by the defender, but this does not with any certainty appear from a comparison of the names given in the papers with those on the map. Had evidence been led to support this statement of Strachan's that there were existing march stones, or that there had been such, it would have gone far to settle the question. But, as already said, any evidence to be found either on the one side or the other as to march stones is quite vague and unsatisfactory. Thus, one of the witnesses for the pursuer says, on being examined as to this matter for the defender, that "on the line of march sworn to (*i.e.*, pursuer's line) I am certain there is one march stone still visible, but I am not sure if there are more," and he adds that he had made a search for march stones, but had found none. And Alexander Lawson, a witness for the defender, says that Smith, a land surveyor, with Strachan's paper in his hand, told him in 1840 that he could trace the marches stated in the paper, and that one part of the march was indicated by a stone shaped like a heater. This is the kind of evidence that is to be found about the march stones; and it is evident that in the face of the proof of possession brought forward by the pursuer the different march described in this document of Strachan, dated in 1822, can be of little weight in any view; and yet it is upon this document that the evidence of the defender's witnesses, with one or two exceptions, as to possession up to his line of march, essentially rests. And then as to the credibility to be attached to Strachan, there can be no doubt that the two facts specially noticed by the Lord Ordinary,—viz. (1) that some years before his death he pointed out to Dow the line contended for by the pursuer as the true march; and (2) that his sheep were frequently challenged as beyond the march when on the disputed ground, and on one occasion at least seized and restored to him only on condition that they should not again be found beyond the true march, —go far to neutralise his unsupported written statement as to the march stones.

There is still a branch of the evidence in reference to shooting upon the disputed ground which requires notice. The three witnesses for the pursuer, Dow, Ledingham, and Dow junior, state positively that the Clova people shot on the hill close up to the march they describe, *i.e.*, up to the red line, and never were interrupted. And farther, it appears from the evidence of Sowden and of M'Intosh that parties having the shootings of Kildrummie observed the line of march pointed out by Shanks, being that of the pursuer, as described by this last witness. No doubt there is other evidence to the effect that Colonel Gordon, a relative of Kildrummie, and parties having right from him to the shootings on that estate, appear to have occasionally gone beyond the red line, and shot on the disputed ground; but the statements as to this matter throughout the proof are such as to afford a probable explanation of their having done so, and are such as in no material degree to affect the contrary evidence which has been led for the pursuer.

There are other matters referred to in the evidence which it is not necessary to notice specially, with the exception of the portion of the disputed ground forming a triangle on the west, the apex of which is the top of the Buck Hill, and the base the blue line running from the Corry-stone to the north-west to the boundary of the parish of Auchindoir. I concur with the Lord Ordinary in thinking that, having regard to the decreet-arbitral in 1740, it is difficult to understand the ground upon which the defender can in any view contest the pursuer's right to that portion of the disputed territory. But, if so, the fact of Clova having right to the ground on the east of the red line, as in a question with the Duke of Richmond, from the Corry-stone to the Buck, renders it at least improbable that the right of Clova up to the Buck is limited to the yellow line, and tends not a little to strengthen the pursuer's case.

On the whole, for the reasons I have thus generally stated, I am satisfied that the interlocutor of the Lord Ordinary ought not to be disturbed.

The other Judges concurred.

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

Agent for Defender—William Mitchell, S.S.C.

Wednesday, June 22.

FIRST DIVISION.

WILSON *v.* LECKIE.

Bankruptcy—Proving the tenor—Casus Amissionis *—Expenses—Mandate—Slump Sum.* B purchased from C his shop, stock, outstanding debts, &c., at a slump sum. The debts were stated by C to amount to £100. They did not. *Held* (1) B was not entitled to rank on C's sequestration for the difference; (2) that it was competent to prove the tenor incidentally of a mandate authorising a payment; (3) that the *casus amissionis* and tenor were for this purpose sufficiently instructed by the deposition of the mandatory that he had received the authorisation before paying the sum, and thought he had then destroyed the document, but certainly had not returned it to the mandant; and (4) that each party should bear his own expenses throughout, as both parties had been partially successful, as the pursuer was a trustee who had to extract information from the defender, and had modified his claim on receiving it.

This was an appeal from the Sheriff-court of Lanarkshire of an action in which John Wilson, accountant in Glasgow, trustee on the sequestrated estate of Robert Crichton, tea merchant and grocer in Glasgow, was pursuer; and John Leckie, grocer in Kirk Street, Glasgow, was defender. Wilson claimed payment (1) of the sum of £220 as the price of the stock in the shop 1 Kirk Street, Glasgow, which the defender had bought from Crichton, and which was by agreement fixed by a valuation; (2) of the sum of £292, 12s. for the shop furniture, as per inventory, for outstanding debts, as per list, and the goodwill of the business. He also sought delivery of the valuation and inventory. The pursuer said he had frequently requested the defender to return the inventory and valuation, but had always been refused. The defender said that Crichton had represented the book debts as amounting to £100, and that they were all due by persons able to pay. Eventually it proved they were only worth £82, 3s. 2d., and the defender claimed a deduction of the difference, viz., £17, 16s. 8d. [10d.] This the pursuer admitted, as also that Crichton had been paid £300 to account by the pursuer, as also £5; and eventually the pursuer acquiesced in the defender's statement that the sum realised by the sale of the shop, &c., was not £512, 12s., but £465, 9s. 7d. The defender also consigned £60, 10s. 3d. as admittedly due. The summons was signeted on 7th Jan. 1868, and a proof was led on the 20th June following. The following productions were, *inter alia*, put in by the pursuer:—

"*Glasgow, 9th November* 1867.

"I have bought from Mr Robert Crichton the shop furniture as stated in book, also goodwill and outstanding debts, amounting in all to £292, 12s. sterling. Stock at valuation on Tuesday.

JOHN LECKIE.

"*N.B.*—This on condition that I get a lease of the shop or landlord's consent.

"*Glasgow, 9th November* 1867,
1 *Kirk Street, Townhead.*

"Mr John Leckie,—I hereby accept of your offer of this date for my shop, 1 Kirk Street, you paying me £292, 12s. sterling per book inventer as initialed by us. Stock on hand to be taken at value on Tuesday first. Rental and taxes payable by you from this date. ROBERT CRICHTON.

"£300 *Glasgow, 14th November* 1867.

"Received from Mr John Leckie £300 sterling, to account of stock, plant, and goodwill of business at shop Kirk Street, Townhead.

ROBERT CRICHTON.

"Mr Leckie—I. O. U. £5, sterling.

R. CRICHTON.

"Lewis & Tod, Sugar Merchants,
"76 *Wilson Street,*
"*Glasgow, 18th Nov.* 1867.

"Received from John Leckie, High Street, £70 sterling for Robert Crichton. WM. BROWN.

"Paid by Lewis & Tod. JOHN LECKIE."

Mr Lewis deponed—"I know the defender quite well. He deals with us. On the 18th November 1867 he asked us to pay Mr Brown £70 on his account. I knew that he had purchased Crichton's shop, and that this sum was to go towards payment. I paid the money and got the receipt, No. 7-6. I got repaid that advance. I got at same time that I paid the money an order by Crichton upon Leckie for £70; but, notwithstanding every search, I cannot find it, and I am certain it is lost.

"*Cross-examined*—I am not quite positive, but I believe it was an order upon Crichton I got. I cannot positively say on whom the order was drawn, nor in whose favour, but at the time I was quite satisfied it was sufficient authority for me to pay the money on Leckie's behalf to Bailie Brown. I do not know whether it was stamped or merely a letter, and I do not know in whose handwriting it was.

"*Re-examined*—I am quite certain I did not hand over that document to defender."

Crichton was also examined on the 27th October 1869 on commission, as he expected soon to leave the country; but no stress was by any of the courts laid on his evidence, as, on 11th March 1869, he was found guilty of theft, and received sixty days' imprisonment; and at last Circuit was again tried for theft, and sentenced to seven years' penal servitude. The Sheriff-Substitute (GALBRAITH) found the defender liable in (1) £12, 2s. 8d., as there was no evidence that the defender was authorised by Crichton to pay the account for which it was incurred; (2) £17, 16s. 8d. [10d.], as the amount of the debts had not been guaranteed to be £100; and (3) £70, as it had not been proved that Crichton had granted any order upon Leckie that could be sustained as a valid mandate to pay the money—Brown's evidence being insufficient to prove the tenor of the lost document; and that the mandate to pay money could only be proved by the pursuer's writ or oath.

The defender appealed, but the Sheriff (GLASSFORD BELL) adhered in the following interlocutor:—

"*Glasgow, 26th January* 1870.—Having heard parties' procurators on their respective appeals, and considered the proof, productions, and whole process, Finds, as regards the defender's appeal, that it was stated at the bar to be directed against the