to the conclusion that such a course is competent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Trayner—C. S. Dickson. Agents—Mason & Smith, S.S.C.

Counsel for Defenders (Respondents)—Balfour—Mackintosh. Agent—Thomas Carmichael, S.S.C.

Saturday, November 1.*

SECOND DIVISION.

[Lord Adam, Ordinary.

M'QUEEN OR REID AND OTHERS *v.* M'COLL.

Property — Bounding Charter — Effect of Prescriptive Possession where Lands possessed were outside Subjects bounded "by the Lands of A."

A bounding charter is one which identifies the property conveyed by its *boundaries*, as distinguished from one in which the identity and extent of the subjects depends only upon *description*.

Where a property was described in a charter as "bounded by the lands of A," and it was possible to prove the site of these lands—*held (rev.* Lord Adam, Ordinary, *dub.* Lord Gifford) that the limits of the property were thereby sufficiently defined to constitute the charter a "bounding" one, and that the proprietor could not prescribe beyond them.

This was an action of declarator raised by Elizabeth M'Queen or Reid, wife of Robert Reid, gardener, Johnstone, and her two sisters, against John B. M'Coll, Dunfermline, concluding for declarator that all and whole a certain tenement of land and houses, "with the yard belonging thereto at the back thereof, and pertinents lying near the West Port of Inverkeithing, upon the north side of the High Street, bounded by the lands sometime of John Gilmour, thereafter of Alexander Lawson, afterwards of David Lawson, and now belonging to the defender, on the west; the land sometime of the heirs of John Thomson, afterwards of John Gelly's heirs, now belonging to Durie, on the east; the way above the head of the yards on the north; and the High Street of Inverkeithing on the south parts, including the smithy, stables, and other erections, and whole garden ground and yard embraced within the said boundaries, and lying between the said High Street of Inverkeithing on the south and the way above the head of the yards on the north, are the exclusive property of the pursuers," and that the defender should be ordained to remove therefrom.

The pursuers made their claim as proprietors of the subjects in question in virtue of a writ of *clare constat* granted in their favour by the provost and bailies of the burgh of Inverkeithing, dated and recorded 26th October 1878, whereby they acquired the rights of their father or predecessor. They alleged also immemorial possession, and that the defender's author, notwithstanding that he held his own property under a bounding charter, had encroached illegally on the pursuer's property, enclosing and building a stable upon it, and that in *mala fide* and without authority or consent of the true owners. The defender, it was explained, represented the person who had encroached, and now held his property.

The defender, on the other hand, refused to give way, alleging immemorial possession, and that the buildings erected by his predecessor were put up in absolute good faith and in the knowledge of the pursuers or their authors.

The writs and documents founded on sufficiently appear from the Lord Ordinary's note.

The pursuers pleaded, *inter alia*—"(1) The whole of the subjects described in the summons being the property of the pursuers under and in virtue of their rights and titles libelled, they are entitled to decree of declarator as libelled. (3) The said David Lawson having taken possession of the foresaid portions of the subjects in *mala fide*, and without the authority or consent of the pursuers' predecessor, no right to or interest therein, or any part thereof, was acquired by him. (4) The defender having no right or title to any part of the said subjects, he is bound to remove from the foresaid portions thereof possessed by him, and cede possession thereof to the pursuers."

The defender pleaded, *inter alia*—"(2) The subjects in dispute being the property of the defender under his rights and titles, he should be assoilzied from the conclusions of the summons and found entitled to expenses. (3) The subjects in dispute having been possessed for over the prescriptive period by the defender and his authors, under and in virtue of their rights and titles, the defender is entitled to absolvitor. (4) The pursuers having no right to or interest in the subjects now in dispute, and *quoad ultra* the rights of the pursuers never having been questioned by the defender, and the action being therefore unnecessary, the defender should be assoilzied from the conclusions of the summons. (5) The defender and his predecessors having erected the whole buildings and others now existing upon the lands in dispute in *bona fide*, and in the full knowledge of the pursuers or their predecessors, the pursuers are, in any view, bound to indemnify the defender for the full value thereof."

The Lord Ordinary (ADAM) pronounced an interlocutor assoilzieing the defenders from the conclusions of the summons and decerning. He added this note:—

"*Note.*—The pursuers and the defender M'Coll are respectively the proprietors of two adjoining houses in the High Street of Inverkeithing, and of certain subjects lying behind these houses. The subjects are shown on the plan, No. 21 of process. The subjects coloured blue on that plan are the undisputed property of the pursuers. The subjects coloured pink are the undisputed property of the defender. The subjects in dispute are coloured yellow. All these subjects lie between the High Street of Inverkeithing on the south, and the way above the head of the 'yards,' or the old Roman Road, on the north.

"Both parties averred immemorial possession of the subjects, and a proof was accordingly led. There can be no doubt as to the result of that proof, viz., that it has very clearly established that, not only for the prescriptive period, but as

* Decided 25th October 1879.

far back as the memories of the oldest witnesses can reach, the defender and his predecessors have had exclusive possession of the subjects in dispute, and not only so, but also that the predecessors of the pursuers were for several years tenants and paid rent to the predecessors of the defender for a part of the subjects. Nevertheless, the pursuers after all these years now claim these subjects, on the ground that they are expressly included in their titles, that they are not included in the defender's titles, and that his titles are not habile to enable him to acquire a right to the subjects by prescriptive possession.

"As regards the pursuers' titles, in the absence of any competing title they would be sufficient to give them a right to the subjects.

"The oldest title produced by the pursuers is a disposition dated 4th July 1719, granted by David M'Leish for himself, and as taking burden on him for his mother, in favour of Daniel Drummond, of certain subjects described as 'All and Haill that tenement of ours, and the yard belonging thereto at the back thereof, lying near the west part of the said burgh, on the north side of the street, having the lands of John Gilmore on the west, the lands of the heirs of John Thomson on the east, the way above the head of the yards and the King's High Street on the other parts.' Daniel Drummond was on the same day infeft on this disposition. The subjects came into possession of the pursuers' grandfather John M'Queen, by disposition dated 19th May 1787, in which they are described as bounded by the lands sometime of John Gilmore, now of Alexander Lawson, on the west; the lands sometime of the heirs of John Thomson, now of John Gelly, on the east; the way above the head of the yards on the north; and the High Street of Inverkeithing, on the south parts. The lands which are described as the lands sometime of John Gilmore, now of Alexander Lawson, are the lands which are now the property of the defender. The lands which are described as the lands sometime of the heirs of John Thomson are now the property of a Mr Durie. The description is substantially the same in the subsequent titles, and in the pursuers' own title, which is a writ of *clare constat* in their favour as heiress-portioners of their father David M'Queen, dated 26th October 1878.

"It is clear that this is a description of the whole ground lying between the pursuers' house in the High Street on the south, and the way above the yards, or the old Roman Road, on the north; and therefore in the absence of any competing title would be sufficient to give them a right to the subjects in dispute.

"The question therefore is, Whether the defender can show a better title to the subjects?

"The oldest title produced by the defender is a disposition by John Gilmore to Robert Cock and his spouse, dated 21st November 1754. The description of the subjects thereby conveyed is as follows:—'All and haill that my tenement of land and houses, high and laigh, back and fore, with the yairds at the back thereof, corn barn and pertinents, lying within the libertys of the said burgh of Inverkeithing on the north side of the High Street, bounded by the lands sometime of Adam Deas, now of Thomas Chapman, on the west; the way above the head of the yeards on the north; the lands belonging to the heirs of Daniel Drummond on the east; and the King's High Street on the south parts: As also, All and haill that piece of ground, consisting of 10 roods, purchased by me from Adam Deas, and inclosed by me with a stone dyke, lying also within the libertys of the said burgh, bounded by the yeards above disponed and Daniel Drummond's yeard on the east; the lands sometime of James Bennet, yrafter of George Dishington, now of Colin Sharp, on the west; the way above the head of the yeards on the north; and the yeard sometime belonging to the said Adam Deas, now to the said Thomas Chapman, on the south parts.'

"The description is continued in the titles in similar terms until 1852, when in an instrument of sasine and cognition in favour of David Lawson, of date 3d July in that year, the first parcel of lands is described as being 'bounded by the lands sometime belonging to the heirs of Daniel Drummond, *now of John Durie* and David M'Queen, on the east;" and the second parcel of lands is described as 'bounded by the lands above described and *John Durie's yard* on the east.'

"The addition to the description of the words 'now of John Durie' was no doubt made with the view of bringing the description in the titles into conformity with the state of possession at the time, as undoubtedly the subjects then possessed by the granter of the disposition did extend in part to, and were bounded by, John Durie's yard.

"The pursuers, however, maintain that the lands which then belonged and now belong to John Durie never did belong to the heirs of Daniel Drummond; that the lands which belonged to the heirs of Daniel Drummond are the lands behind their tenement on the High Street, and described in their titles.

"So far as the titles produced are evidence of the matter, the pursuers would appear to be right in this contention.

"The defender's own title consists of a disposition by Archibald Thomson in his favour, dated 20th September 1875, and registered 15th February 1876. It contains a new description of the subjects in detail. But as prescription has not followed on this, or on the sasine of 1852, the terms in which the subjects are therein described would not appear to be material, and it will be necessary to consider the terms of the defender's older titles.

"It is evident that by the disposition of 1752, above quoted, two separate subjects are described—the first extending all the way between the High Street on the south, and the way above the yards, or the Roman Road, on the north; and the second consisting of 10 roods lying to the west of this, bounded by the Roman Road on the north, but not extending to the High Street on the south, being there bounded by the yard then belonging to Thomas Chapman.

"It is extremely difficult now to understand or to reconcile the descriptions of these two parcels of ground. There would not be so much difficulty with reference to the ground last described, which seems to be sufficiently identified as the piece of ground coloured pink, and marked 567 Y on the plan. The size corresponds with that in the description, and the north-west and south boundaries also correspond. The difficulty, however, arises with reference to the east boundary, which is described as the yard above disponed

and Daniel Drummond's yard on the east. Room must therefore be found for the ground first described to the east of the ground second described. But turning to the description of the ground first described, it would appear to be a part of the same ground, because its eastern boundary is described as being the lands belonging to the heirs of Daniel Drummond—that is, the line 5 Y on the plan—and its western boundary the lands sometime of Adam Deas, now of Thomas Chapman. On the other hand, a 'corn barn' is conveyed, which is clearly the stable at the north end of the disputed ground, which is proved to have been formerly a corn barn.

"But however that may be, the Lord Ordinary is of opinion that the defender has a sufficient title on which to prescribe the whole of these subjects, and that he has prescribed a right to them.

"The defender has a grant of a tenement of land and houses, with the yards at the back thereof, corn barn and pertinents, lying on the north side of the High Street, bounded by the lands of Adam Deas, now of Thomas Chapman, on the west; the way above the head of the yards on the north; the lands belonging to the heirs of Daniel Drummond on the east; and the King's High Street on the south parts.

"It is maintained by the pursuers that this is a description by boundaries, and that, according to the principles applicable to bounding charters, the defender cannot prescribe beyond these boundaries.

"A bounding charter is described by Mr Erskine (ii. 6, 2) as one 'which points out the limits of the grant by march stones, the course of a river, or other obvious and indubitable boundaries.' This definition applies to two of the boundaries in this case, viz., the way above the yards on the north, and the High Street on the south; and it may be admitted that the defender could not prescribe beyond these limits. But none of the disputed ground lies beyond these limits.

"But the east and west boundaries are not obvious and indubitable boundaries. There is nothing on the ground, or referred to in the disposition, to indicate what were the boundaries of the lands belonging to the heirs of Daniel Drummond on the east. The defender and his predecessors have possessed the lands in dispute from time immemorial, and it does not appear to the Lord Ordinary that the defender is now bound to go into any inquiry with the view of ascertaining what was the extent or boundaries of the lands which belonged to the heirs of Daniel Drummond in the year 1754, when the description in question appears in the defender's ttiles. The defender and his predecessors have possessed these lands for time immemorial under their titles, and that appears to the Lord Ordinary to be sufficient. It cannot be said that the defender is endeavouring to prescribe a right against his own title. The Lord Ordinary was referred to the cases of *Magistrates of St Monance* v. *Mackie*, March 5, 1845, 7 D. 582, and *Ker* v. *Dickson*, 18th July 1842, 1 Bell's App. Ca. 499—but these were both cases of bounding charters—*Lord Advocate* v. *Hunt*, 5 Macph. 1; see also *Young* v. *Carmichael*, Dict. 9636; *Countess of Moray* v. *Wemyss*, Dict. 9636; *Fife's Trustees* v. *Cuming*, Jan. 16, 1830, 8 Sh. 326."

The pursuers reclaimed, and argued—There was no good title set forth by the defender on which he could found prescription. The charter under which he held was a bounding charter, and prescription could not run on subjects outside the limits thereby imposed. Besides, the proof of possession was not made out.

The respondent answered—The Lord Ordinary's judgment was sound. The proof of possession for half a century was very clear. The argument of the other side was really reduced to the proposition that the writs founded on did not constitute a habile title upon which to prescribe a right of property in the subjects in dispute. These subjects lay immediately to the east of those undoubtedly included within the respondent's title. Unless, therefore—for the question must so resolve itself—the respondent's title was a bounding one, acquisition by prescriptve possession was possible. The eastern boundary, however (on which the dispute turns), was in the respondent's titles said to be "the lands belonging to the heirs of Daniel Drummond." The cases of bounding charters did not really touch such a description as that. This was not a bounding charter—the bounding being only a name, "heirs of Daniel Drummond." It would be a strong thing to say that a proprietor holding such a title was obliged to investigate and keep in view what extent of subjects belonged to Daniel Drummond's heirs, and thus had the duty of ascertaining by means of a difficult inquiry what Erskine said must be an "obvious and indisputable boundary." Further, it seemed to be admitted that acquisition of a small part of the breadth of "Daniel Drummond's" property was possible; but that acquisition of the whole breadth thereof, so as to be bounded by some one else, was incompetent. The moment, however, acquisition to any extent beyond the bounds of the respondent's own title was admitted, the question of a bounding charter was at once solved in favour of the respondent. Were the title in question really a bounding one, acquisition of anything whatever beyond its scope was legally impossible.

Authorities (besides those quoted by the Lord Ordinary)—*Scot* v. *Ramsay*, 15th Feb. 1827, 5 S. 367; *Stewart* v. *The Greenock Harbour Trustees*, 12th Jan. 1866, 4 Macph. 283; Stair, ii. 2, 26—3, 73; *Lumsden*, 21st June 1870, 42 Scot. Jur. 530; Ersk. Inst. ii. 6, 3; *Gordon* v. *Grant*, 12th Nov. 1850, 13 D. 1; *Suttie* v. *Gordon*, 26th May 1837, 15 S. 1037; *Ewing* v. *Lennox*, 22d Jan. 1878, 6 S. 417.

At advising—

LORD JUSTICE-CLERK—The nature of the dispute between the parties is, as usual, very clearly and succinctly stated by the Lord Ordinary, and I need not explain it in detail. They are adjoining proprietors of tenements in Inverkeithing fronting the High Street, and of back ground behind—a kind of holding very common in the immediate neighbourhood, and indeed in most of the villages or towns in Scotland. They are at issue about certain parts of the ground and buildings thereon which lie immediately behind the pursuers' tenement, and are claimed by the defender.

The property of the pursuers was acquired by a person of the name of Daniel Drummond in 1719, and is thus described in his disposition—[*reads as in the Lord Ordinary's note*]. The way beyond the head of the yards here mentioned is

an old Roman road running parallel to the High Street, and forming the northern or north-eastern boundary of a series of holdings of the same description. This subject came before 1787 into the hands of a person of the name of Smart, and was by him in that year conveyed to the ancestor of the pursuers by the following description—[*reads as above*].

I am very clearly of opinion that taking these titles apart from possession there is no question or reasonable doubt as to the extent of the subjects conveyed or the boundaries thus specified. The High Street and the Roman Road still exist, and of course fix the longitudinal extent of the ground conveyed. It is quite certain also that Thomson's feu to the east now belongs to Durie, and Gilmore's feu to the defender, under rights to which I shall immediately advert. It follows that the frontage to the Roman Road contained in the disposition to Drummond was bounded by what is now Durie's on the east and what is now the defender's on the west.

As regards the extent in breadth of this frontage to the Roman Road, the presumption arising from the configuration of the ground is very strong that this quadrilateral was of the width of the tenement fronting the High Street throughout its whole length, and this receives the clearest confirmation from certain march stones still existing which form Durie's western and M'Queen's eastern boundary, as he himself tells us, and the ruins of an old wall still traceable which runs up from the western gable of M'Queen's front tenement in a straight line to the Roman Road. I have no doubt whatever that these indicate conclusively the boundaries specified in the titles.

As to the titles of the conterminous proprietors, those of Durie describe his subject as "lying on the west side of the King's High Street thereof" (the enclosures did not run due north and south), "containing six ells all the front in breadth," —showing that the adjoining stripe of ground was throughout of the breadth of the frontage—"bounded betwixt the lands sometime of David Drummond, now of David M'Queen, on the south," &c. So that this title of Durie's is bounded by measurement and the breadth of the frontage, and thus fixes the eastern boundary of M'Queen beyond dispute.

The titles of the western boundary are equally conclusive, with the exception of two transmissions framed after this dispute commenced. It seems that the defender's author Lawson never acquired the whole continuous stripe of ground from the High Street to the Roman Road running backward from his front tenement, but that an intervening portion of it had been conveyed to another, and is now the property of Horn. Thus Lawson in 1780 acquired the ground in two portions, which are thus described in his disposition in that year —[*reads as in* 1754 *title quoted above*]. It thus appears that Lawson acquired no ground which was not bounded by Drummond's ground on the east; and the same description is contained in the 1754 and 1794 titles.

So stand the defender's titles with two exceptions, and they are significant and instructive. In 1862, after these alleged encroachments had commenced, Lawson sold this property to Thomson, and the conveyancer, altering the description in his own title, described the subjects in both portions as bounded by the lands sometime belonging to the heirs of David Drummond, now of John Durie, and of David M'Queen's heirs on the east. This was entirely erroneous, for Durie never acquired any part of Drummond's lands. The next transmission betrays the source of the inaccuracy, for in the defender's own title the words "the heirs of David Drummond" are entirely omitted, and the eastern boundary is boldly stated to be the lands of John Durie, which as has been seen it never was or could have been.

I am therefore of opinion on the titles—and here I concur with the Lord Ordinary—that the pursuers have right to the whole of the ground in dispute, and that the defender has no right to any ground not bounded on the east by Drummond's land. But the defender alleges that even if this be so, he has possessed the ground fronting the Roman Road, and forming the northern extremity of Drummond's tenement, for more than 40 years, and that although by his title he acquired no ground which was not bounded by Drummond's property, he has by prescription, as part and pertinent of his own feu, acquired at this point the whole of Drummond's land by which he himself is bounded, and has acquired a boundary by Durie's land, which was the eastern boundary of Drummond's. I am of opinion that no amount of possession would enable him to do so.

The boundary by Drummond's property on the east specified in the defender's title constituted a bounding title at this point—and indeed the whole title is a bounding title in the strictest sense. A bounding title is one in which the property is identified by its boundaries, as distinguished from one in which the identity and extent of the subject depends only on description —one in the old legal phraseology of the civilians was termed "*ager limitatus;*" the other "*ager arcifinius.*" In the first possession beyond the boundary was of no avail. In the second possession was the measure of the right. Our own law has adopted the distinction, which is founded on the clearest principle, for where the boundary is expressed, possession beyond it cannot be in good faith, and can raise no presumption of previous grant. I think the Lord Ordinary has drawn an erroneous inference from the illustrations given by Mr Erskine of a bounding charter. The true question is, whether the boundaries are specified? and if they are, whether they can be identified? If these two concur, they will receive effect, and the proprietor cannot prescribe beyond them. It is not necessary that the boundary shall be some physical demarcation visible on the surface of the ground. An imaginary geographical line, if specific and certain, such as the limits of a county or burgh or parish, has been held quite sufficient to constitute a bounding title. I refer to Lord Moncreiff's opinion in the Corennie case—*Gordon* v. *Grant*, Nov. 1850, 13 D. 1—and the authorities cited by him, and to the previous case of *Hepburn* v. *Duke of Gordon*, Nov. 25, 1823, 2 S. 525, in both of which it was held that the proprietor of lands described as lying in a particular parish could not acquire a right to a commonty as part and pertinent as it lay in another parish. Neither is it necessary that the boundary shall be denoted by some enduring or permanent line. There can be none such. A title will remain none the less a bound-

ing title although every trace by which it was recognised has disappeared. A wall, a fence, a road, a building, even march stones, may long have been removed or destroyed, but as long as it is possible to prove their site they will be the limit of the property of which they have been described as the boundaries. Even the seashore alters and rivers change their course. The limits even of counties, burghs, and parishes may change. A railway might have obliterated the Roman Road, and an Act of Parliament might have effaced the High Street of Inverkeithing, and if no boundary were sufficient but one which was immutable the doctrine never could be applied.

Lastly, on this head I believe the titles before us to be amongst the most familiar and ordinary examples of a bounding charter. They relate to a series of parallel and contiguous plots of village and burgh ground, the limits of which were and must have been notorious, in which each proprietor is described as bounded by his two conterminous neighbours. No better or more specific boundary could be imagined. A conveyance to a house and back garden on the north side of Charlotte Square in this city, bounded by Charlotte Square on the south, St Colme Street on the north, the property of A on the east, and that of B on the west, would in point of fact be as precise a boundary as could be expressed, seeing that the stone and lime which divides them is still patent; nor would it alter the character of the right that in process of time the walls disappeared altogether. In these cases the boundary is not the title, but the ground or physical object denoted by it—a designation as specific as the house or the garden of A B would be; nor would it affect the question of boundary although it turned out that the ground so denoted was not the property of A B but that of another. It is a mere demonstration, and in the case we have in hand one attended with no ambiguity. Doubtless in process of time, when the original notoriety became faint, possession might be very material in ascertaining the original boundary, but we have no such question here, because the defender's is a claim to have acquired as part and pertinent of his own possession the whole breadth of the ground at the Roman Road, by the western extremity of which his property is bounded under his title, and this, I think, renders all his possession illegal, because adverse to his title.

It may no doubt be surmised that between the original grant to the defender's author and the possession on which he founds, some contract or arrangement took place by which the frontage to the Roman Road was transferred to the author of the defender by the owner. But there is no trace whatever of any such transaction; the story is contradicted by the defender's titles. His frontage to the Roman Road is described in his title of 1794 as bounded by Drummond's land, and even the title of 1862, which endeavours to identify Drummond's land with Durie's, while they were in reality conterminous, proves that no such transference could have taken place.

It has also been said that the original conveyance to the author of the defender contained among the subjects conveyed a corn-house or granary, which is said to be identical with the building now fronting the Roman Road. But as this is described as bounded by Drummond's land, and as the building now in dispute is built on Drummond's land, and is bounded by Durie's, it is clear that the erection referred to in the titles, which has since disappeared, must have stood on some other part of the ground. But if the defender has not acquired as part and pertinent of his own property the whole of the pursuers' frontage to the Roman Road, which I think under his title he could not do, this solves the whole case, for the other portions of ground in dispute are bounded by Durie's ground, and fall under the same principle.

I abstain from going into the proof of possession, with which I understand Lord Ormidale proposes to deal. It has its difficulties, but the tenor of it satisfies me—what the manipulation of the titles and the general history of the case had very early suggested—that the present case discloses a very flagrant attempt on the part of the defender's authors to appropriate what they well knew to belong to their neighbour.

Lord Ormidale—As stated in the first part of the Lord Ordinary's note, the disputed question to be decided in this case is, Whether the pieces of ground coloured yellow on the plan there mentioned belong to the pursuers or to the defender? and this question may, I think, be considered with reference, first, to the natural lie and configuration of the ground, as well that which is claimed to be the property of the present litigants respectively as that which belongs to adjoining proprietors; secondly, to the title-deeds of the parties; and thirdly, to the nature and extent of the possession which has been had by them.

In regard to the lie and configuration of the ground, it is not doubtful, I think, that any inference thence arising is favourable to the pursuers and adverse to the defender. Each of the parties has a house or building fronting and on the north side of the High Street of Inverkeithing. These houses also adjoin each other, having merely a pend or passage between them. It is also necessary to bear in mind that the defender's house lies to the west of the pursuers'. So far there is no dispute between the parties. Neither is it disputed that the pursuers as well as the defender have some ground, with the buildings or erections thereon, behind the houses extending northwards towards and in the direction of what is called the way above the head of the yards. But what the pursuers maintain and conclude for in their summons is that "All and whole that tenement of land and houses, with the yard belonging thereto at the back thereof, and pertinents lying near the West Port of Inverkeithing, upon the north side of the High Street, bounded by the lands sometime of John Gilmore, thereafter of Alexander Lawson, afterwards of David Lawson, and now belonging to the defender, on the west; the land sometime of the heirs of John Thomson, afterwards of John Gelly's heirs, now belonging to Durie, on the east; the way above the head of the yards on the north; and the High Street of Inverkeithing on the south parts, including the smithy, stables, and other erections and whole garden ground and yard embraced within the said boundaries, and lying between the said High Street of Inverkeithing on the south and the

way above the head of the yards on the north," are their exclusive property. If the pursuers are right in this, the disputed pieces of ground coloured yellow on the plan must belong to them. But the defender denies this, and maintains that the pieces of ground coloured yellow are his property. That may possibly be the case, and whether it is to be so held or not depends on the titles along with the possession—points which will presently be examined. Looking, however, merely at the lie and configuration of the ground, the inference—and it appears to me to be a very obvious one—is that the pursuers must be right and the defender wrong. It is difficult to understand how the defender could come to have right to detached pieces of the stripe of ground stretching back from not his own but the pursuers' house. In regard, indeed, to the two southmost disputed pieces of ground, it is all but impossible to conceive that they should belong to the defender, seeing that they not only intervene between portions of what is admittedly the pursuers' property, but do not even adjoin the defender's.

It is in this state of matters as regards the lie or configuration of the ground that the title-deeds of the parties come next to be examined. The question on these is, first, Whether the disputed pieces of ground are included in the pursuers' titles? Now, the Lord Ordinary has himself stated in his note that the disputed pieces of ground are included in the pursuers' titles, and that this is the case is shown by his Lordship so very clearly as to render it unnecessary for me to dwell on the point. Assuming, then, in the language of the Lord Ordinary, that the pursuers' titles would, in the absence of "any competing title," be sufficient to give them a right to the subjects in dispute, the controversy so far as the titles are concerned is narrowed to the question whether the titles of the defender are such as to destroy the effect which would otherwise attach to the pursuers'? I am very clearly of opinion that they are not; and looking merely at the defender's older titles, apart from those recently made up by him, and the possession which has been had by the parties, which will afterwards be spoken to, I did not understand that this was disputed. There could, indeed, be no dispute on the subject, for, as explained in the note of the Lord Ordinary—and it is unnecessary for me to repeat the explanation—it was only in the disposition taken by the defender so recently as 28th September 1875, from his immediate author Archibald Thomson, that any description is to be found which could possibly be held expressly to comprehend the subjects in dispute. But it need not be observed that a title so recent in date—only three years before the present action was instituted—and certainly a description not derived from any previous title, but entirely new, is entitled to no weight, and can be given no effect to in the decision of the question which has now to be determined. Were it otherwise, the defender, in place of the description adopted by him, might have so enlarged it as to include not merely a part of the disputed pieces of ground, but the whole of the pursuers' property without any exception. Clearly, therefore, no title so made up, and so recent in date, can afford any aid to the defender, and he did not argue that it could.

But what the defender maintained, and what has been given effect to in the judgment of the Lord Ordinary, is, that although the defender's title-deeds may be, as undoubtedly they are, by themselves insufficient to comprehend and give him right to the disputed subjects, they are rendered sufficient for that purpose by the possession for the prescriptive period which has followed upon them. As this was in reality the chief, if not the exclusive, ground upon which the defender relied at the debate, and upon which the Lord Ordinary has rested his judgment, it demands, as it has received from me, the most careful consideration. Besides the question thus arising, viz., whether the defender has proved in point of fact that he and his authors have had the exclusive and unchallenged possession of the disputed subjects for forty years, or time immemorial, before the institution of the present action, there is the preliminary and equally important question, whether the defender and his authors had during that period the title requisite to render their possession effectual in competition with the pursuers and their authors? for it need scarcely be remarked that possession, however long, of heritable estate without a habile and appropriate title cannot give or constitute any good or valid right. In the words of Mr Erskine (ii. 6, 3)—"In a bounding charter no possession can establish to the vassal a right of lands without the bounds specified in his charter; for he is circumscribed by the tenor of his own grant, which excludes whatever is not within these bounds from being pertinent of the lands disponed."

Now, by looking at the excerpt from the defender's titles, it will be observed that except in his title recently made up, as already spoken to, the defender's subjects are, in the description of them, very specifically bounded. It is so in the disposition by Gilmour to Cock in 1754, and also in the disposition by Cock to Lawson, one of the defender's predecessors and authors, and so on downwards. Take, for example, the description in the disposition by Cock to Lawson, dated 13th November 1780, close upon one hundred years ago. The defender's subjects are in that deed described as "All and Haill that my tenement of land and houses, high and laigh, back and fore, with the yards at the back thereof, corn barn and pertinents, lying within the liberties of the burgh of Inverkeithing, on the north side of the High Street, bounded by the lands sometime of Adam Deas, now of Thomas Chapman's heirs, on the west; the way above the head of the yards on the north; the lands belonging to the heirs of Daniel Drummond on the east; and the King's High Street on the south parts. As also All and Haill that piece of ground consisting of ten roods, enclosed with a stone dyke, lying also within the liberties of said burgh, bounded by the yards above disponed and Daniel Drummond's yard on the east; the lands sometime of James Bennet, then of George Dishington, thereafter of Colin Sharp, and now of Captain Deas, his heirs, on the west; the way above the head of the yards on the north; and the yard sometime belonging to the said Adam Deas, now to the said Thomas Chapman's heirs, on the south parts." It cannot be doubted, I think, that a deed of such description is of the nature of a bounding charter, and if so, it follows

that the defender could not by possession, however long, prescribe beyond his own bounds. No principle is better or more firmly established on the law and practice of Scotland than this. Besides the passage in Mr Erskine's Institutes already referred to, there is Lord Stair, who is equally explicit to the same effect in his Institutions (ii. 3, 26). And the case of *Young* v. *Carmichael*, 17th Nov. 1671, Mor. 9636, referred to in Stair, is, as regards one of the questions decided by it, very much in point, for it was there pleaded that "the defender's infeftment is bounded and bears his tenement to lie upon the east side of King's Close, and so can be no title to possess this waste ground lying upon the west side of the close;" and in reference to this plea the Court found "that the defender's infeftment could be no title for the prescription of this waste ground lying without the bounding." So accordingly the late Professor of Conveyancing, Mr Montgomerie Bell (Bell's Lectures, 2d ed. 590) states—"The effect of the use of boundaries is to confine the disposition to what is within the boundaries; and when lands are described as situated in a particular parish, the same effect arises to this extent, that nothing is disponed in property which lies beyond the parish. The same effect would of course follow the specification of the county within which the lands disponed are situated. We shall presently see that where boundaries are not specified, even discontiguous lands may be acquired by the disponee as parts and pertinents of his grant, supposing always that the specification of the parish or county does not exclude the acquisition. But in order to such acquisition two things are necessary —(1) a title; and (2) uninterrupted possession for 40 years. If, however, the lands are described as lying on the north side of the public road leading from Edinburgh to Glasgow, the charter cannot be quoted as giving a title in property to lands lying on the south side of that road. The road is the utmost point southwards to which upon such title possession can be ascribed; and possession for one hundred years would leave the party (as regards lands lying south of the road) just where he was at the first. But if the disposition contains simply the lands of A, and in virtue of that title only the lands south of the road have been possessed for forty years, then the lands south of the road are held to be parts and pertinents of the lands of A, and to pass with these lands whether originally they were proper parts and pertinents or not. The possession in the first case is in Lord Wood's words 'in the face of title;' in the second case 'in support of title.'" And in support of the statement of the law Mr Bell gives an ample citation of decided cases varying in their circumstances, but all to the effect that when the bounds of an individual's property are specified in his title, no possession however long can give him a right to anything beyond these bounds.

If therefore I am right in the view I take of the titles of the parties as now explained, the state of the possession which has been had under them is of little or no consequence, as I have shown that no possession by an individual however long can transfer to him heritable estate beyond the bounds in his title. But independently of the question of titles, it will be found that the proof when closely examined does not establish that the defender, his predecessors, and authors, have had possession of the disputed ground for 40 years, or for time immemorial, before the institution of the present action. It is not every slight trespass or encroachment beyond their boundary or property that can be held to amount to possession by the pursuers. Considering the nature of the ground and its comparative worthlessness, it is easy to understand how a neighbour might trespass or encroach on it beyond his own boundary without any intention on his part to appropriate what did not belong to him, and without rendering it incumbent upon the true owner to extrude him *via facti* or by legal process. And in regard to the buildings which appear to have been erected by the Lawsons, authors of the defender, upon the disputed ground, which was certainly more than a slight or unimportant trespass or encroachment, it is sufficient to remark that such erections were only made about 1853 or 1854—that is to say, about twenty-five or twenty-six years ago, and of course much within the prescriptive period. This appears very clearly from the evidence of Ann M'Queen and Mrs Elizabeth M'Queen or Reid, two of the pursuers. It was a matter in regard to which they could not be mistaken, and so their testimony on the subject may very well be held as conclusive. But they are corroborated in their testimony by Alexander Henderson, who is not a pursuer, and, so far as appears, has no interest in the matter. Not only so, but there is also the corroborative evidence of more than one of the defender's own witnesses. Thus, his witness Murdoch Cantion in his cross-examination says—"Behind the stable that was immediately at the back of the house" (*i.e.*, the pursuers' house in the High Street) "there was a byre for cows. I could not say how long it was occupied as a byre. I have seen cows in it. I remember of the smithy being erected there, but I could not give the date when it was done. I think it will be more than twenty-five years ago." And all doubt on the point is removed by the evidence of David Lawson, the defender's author, by whom the erection was made. He says in the course of his cross-examination that he obtained an infeftment in favour of himself and his wife in 1852, and that the smithy beyond M'Queen's house was put up by him after the infeftment was obtained. "It was done after 1852." So much for the disputed ground immediately behind the pursuers' house.

And in regard to the disputed ground at the north end, next "the way at the head of the yards," the state of possession, although perhaps more obscure, cannot, I think, be shown on the proof to have been with the defender and his authors for the prescriptive period. It will be observed from the plan that there is a stable at the northernmost point, and it must be held to be included within the pursuer's title, which gives him everything behind his house in the High Street up to the "way at the head of the yards." Nor is it possible, I think, for the defender to say that it was he, or any author of his, who built the stable, because according to the proof it appears to have been as old as the pursuers' house fronting the High Street, and accordingly must have been erected anterior to the date of the defender's titles. In conformity with this view, Pollock, the joiner who prepared the plan, says in reference to

the stable at the north, that "it is an old building; I dare say it is nearly as old as the rest of the buildings on the ground." But what is conclusive on the point is the evidence of the defender's immediate author David Lawson, who is also one of the defender's witnesses. He expressly states in reference to the ground at the north—"I did not build a stable there; the building was there long before my time;" and he says he was seventy-two years old when he gave his evidence. Again, what appears to me to be very important, as well in reference to the stable at the north as the stable at the south, and indeed to the whole ground from the High Street to "the way at the head of the yards," is the evidence which has been given by witnesses for both parties in relation to the walls which divided the pursuers'—that is to say, M'Queen's—from the defender's or Lawson's ground. In regard to this important matter, Ann M'Queen, one of the pursuers, who was only thirty-seven years old when she was examined as a witness, says—"When I remember the place first the property behind our house was separated from Lawson's by a stone boundary wall. That wall ran all the way from the back of our house straight up to the head of the yards. There were two or three breaks in that wall from my earliest recollection. There was one leading into Lawson's back-door just at the top of the close at the back of the house. There was no other division wall there since I can remember—only the one wall straight up from the back of the house to the head of the yards. (Q) Was there a wall dividing the back of the property from the head of the yards, or was it open there?—(A) The stable was the back boundary of the property. There was a stable there since I can remember. I remember part of that division wall being removed, about 1852 or 1854 to the best of my recollection. It was not more than two or three years before my father died. At that time the old wall was taken down so far, and a new wall was run across the top of our garden and right up to Durie's boundary on the east. That was done by David Lawson." And the evidence of David Lawson on this point is, I think, substantially to the same effect; while the defender's witness William Thomson, who appears at one time to have occupied part of the property which now belongs to the defender, in answer to the question "Did the wall between M'Queen's property and Lawson's back court run straight back all the way up to the head of the yard?" says—"There may have been a sort of height in it, but I think it ran nearly straight all the way up. It is a good garden dyke, just like the ordinary garden dykes in the neighbourhood." And there is the very distinct evidence of John Durie, who is the owner of the property on the east of the pursuers, who says he succeeded his father under his deed of settlement, and that the property he so succeeded to "extends back from the High Street to the old Roman Road, and always did so in my recollection. In my title it is described as bounded on the west by the property sometime of David Drummond, now of David M'Queen. That property of M'Queen's adjoins mine. The properties are marked off by march stones set up by the guildry of Inverkeithing in 1812. I know that, because I have the guildry minute in my possession. I have not got it here; it is at home. The stones were put in on application at the instance of the pursuers' grandfather John M'Queen. I came to know of it in this way—They challenged me for putting up a wood fence on the boundary set by the guildry. I think Mr Fraser was town-clerk at the time; he asked me who put in the stones. I said I did not know, and he said he would go and see; and he went and found that extract of the guildry in the town's books. I think it was a person called Todd who was Dean of Guild at the time. These stones are there still. The first stone is about thirty feet from the back of the house, then there is another one about one-third up, and there is another further up the ground. They extend the whole way up from the house to the back of the yards. One of the stones is immediately at the back of the part where this dispute has arisen. (Q) When you remember it first, what was on the other side of M'Queen's property from you?—(A) It was the same as it is at present. There was first the house, then there was a wall at the side of the entry, then you come to a building that was used as a smithy, then at the back of that there is a property belonging to Horn, and then when you go beyond this you come to David Lawson's garden. There was a wall separating M'Queen's property from Lawson's; there is a portion of it intact to this day. Then there was a piece of old wall of dry stones—I think—at the bottom, and with danders on the top. That was removed at the time when Lawson extended his boundary to mine; but before that it went up alongside M'Queen's garden, and made a bend in to connect with the stable. It never went right up to the head of the yards; it only went up the length of the stable. The wall of the stable was in a line with the wall that was taken down, and it is in a line with the remainder of the wall that is standing yet. I cannot tell the year when that wall was taken down, but it was after 1843. At the same time that he removed that old wall Lawson built a wall across from his own property to mine. It is still standing in the same position in which he extended it at that time."

This very distinct testimony of Durie, the immediate neighbour of the parties, as his father had been before him, is to my mind quite conclusive, especially when taken in connection with the other evidence to which I have referred, to the effect that the whole stripe of ground, including the disputed pieces back from the pursuers' house in the High Street to the Roman Road or "way at the head of the yards," was the pursuers' and their authors', and marked off and enclosed by boundary walls till encroached upon by the defender's immediate author Lawson. If this be so, the gossiping evidence of some of the witnesses as to rent having been paid by the Lawsons for part of the disputed ground is entitled to little or no regard. I cannot believe Lawson's statement that David M'Queen paid him rent for the stable that is now Joseph Scott's "for sixteen or twenty years at anyrate." No receipts or entries in books for such payments have been produced, and that M'Queen was ever the tenant of Lawson and paid him rent appears to me to be inconsistent with other perfectly reliable evidence in the case.

Upon the whole, and without entering into more details, I have, for the reasons stated, been unable to come to the same result as the Lord Ordinary. On the contrary, it appears to me that

the pursuers have established their case, and are entitled to decree as concluded for by them. I may just in a single sentence add that it is not a little remarkable and significant as regards the defender's case that he has been unable to show, or even to aver, that there has ever been any arrangement or transaction whereby he or any author or predecessor of his acquired the pieces of ground in dispute or any of them. It being my belief that there never was any such arrangement or transaction, and that possession of these pieces of ground has been illegally taken without any right or title whatever, it is only just that they should be restored to the pursuers, their true owners.

Lord Gifford—I do not feel myself warranted in dissenting from the judgment proposed. But the difficulties of the case appear to me greater than they have done to your Lordships.

In regard to the possession of the subjects, I am inclined to agree with the Lord Ordinary. His Lordship saw the witnesses for the defender and believed them, and I am not in a position to say that they ought to have been disregarded.

In regard to the question whether the defender has a sufficient title taken in connection with the possession and proof to establish his right, I appreciate the well-settled character of the rule that in the case of a bounding charter no right of property can be acquired by prescription beyond the specified boundaries. Possession without a title goes for nothing. But when we look at the defender's title, the difficulty arises, whether there is any distinct boundary on the east and west sides. The High Street of Inverkeithing is a well-defined boundary, and so is "the way above the head of the yards," or the old Roman Road, and these are still as they have always been; but when we look at the east and west boundaries there is a great deal more difficulty. When the lands of one party are described as bounded by the property of another, as when it is said that the estate of A is bounded on the east by the lands of B, it arises from the very nature of the title that the boundary must be proved by possession. It requires proof where the land of A begins and that of B ends; and the boundary may advance or recede, and is a flexible boundary by its very nature.

I quite admit that there is a great presumption against the defender in the origin of the line of subjects fronting the High Street of Inverkeithing and in the line of the ground. But I doubt whether the eastern boundary of the defender is so distinctly defined as to prevent him prescribing by possession a right to ground originally without that boundary.

I have felt these and other difficulties in concurring, but still looking to the strong grounds of your Lordships' judgment I do not dissent.

The Court recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the summons, reserving to the defender any claim he might have to be indemnified for expenses incurred in respect of the subjects in dispute, and to the pursuers their defences thereto, as accorded, and finding the pursuers entitled to expenses, &c.

Counsel for the Pursuers (Reclaimers)—Balfour—Shaw. Agent—A. Gordon, S.S.C.

Counsel for the Defender (Respondent)—Strachan—M'Kechnie. Agent—P. Morrison, L.A.

Tuesday, November 4.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

FRASER *v.* FRASERS (INVERALOCHY ENTAIL).

Entail—Prohibitory and Irritant Clauses—Contraction of Debt—Act 1685, *c.* 22; *Act* 11 *and* 12 *Vict. c.* 36 (*Rutherfurd Act*), *sec.* 43.

The prohibitory clause of an entail provided that it should not "be lawful for the heirs of entail to sell, dispone, wadset, or impignorate the lands and barony . . . . or grant infeftments of annual-rent or liferent forth of the same, or any other right or security, redeemably or irredeemably, of the lands . . . . nor to grant tacks or leases, nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." The irritant clause included a special irritancy against "contracting debt." *Held* (in conformity with *Cathcart* v. *Cathcart* (Carleton Entail), March 31, 1863, 1 Macph. 759) that the entail was invalid, as (1) there was no prohibition against the contraction of personal debt—the prohibitory clause striking merely at the granting of voluntary securities, and the defect not being such as could be supplied by the irritant clause; and as (2) the general words in the prohibitory clause "nor to do any other act or deed," &c., could not be extended beyond the particular acts previously enumerated.

Colonel F. M. Fraser was heir of entail in possession of the lands and barony of Inveralochy and others, under, *inter alia*, a disposition of tailzie dated 27th August 1793. The prohibitory clause of this disposition, after prohibiting alteration of the order of succession, proceeded—"It shall not be leisome nor lawful to the said Major Alexander Mackenzie, or the heirs-substitutes or successors before named, to sell, dispone, wadset, or impignorate the lands and barony before disponed, or any part thereof, or grant infeftments of annual-rent or liferent forth of the same, or any other right or security, redeemably or irredeemably, of the lands and barony before disponed, or of any part thereof, nor to grant tacks or leases, nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." The irritant clause of the same deed ran thus—"If the said Major Alexander Mackenzie and the heirs-substitutes and successors before named, or any of them, shall act or do in the contrary of the particulars before specified, or any of them, or shall neglect to fulfil the conditions and provisions before written, or any of them, then and in that case all and every such acts and deeds, whether by altering the order of succession, selling, disponing, contracting debt, or otherways, with all that shall happen to follow or may follow thereupon, shall be *ipso facto* void and null."

Colonel Fraser raised an action of declarator to have it declared that the entail was invalid and