June 1, 1814.

SPECIFIC PERFORMANCE.—DECREE.

if Hiffernan, the devisee, did not choose to take the beneficial interest, it was proper that the heir at law should take it; and therefore the decree was substantially right.

Judgment. Decree altered accordingly, and *affirmed*.

Agents for Appellant, CANNON and GARGRAVE.
Agents for Respondent, FEW, ASHMORE, and HAMILTON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LORD SEAFORTH—*Appellant*.
HUME—*Respondent*.

Dec. 8, 1813.
June 1, 1814.

HIGHLAND BOUNDARIES.

THE possession of shealings very strong evidence of the right, in questions of Highland boundaries. The circumstance that the burying of charcoal is a common mode of marking Highland boundaries questioned, on account of its apparent inaptitude in a country of that description.

THIS was a conjoined process of declarator and suspension, instituted by the Respondent, to have the proper boundaries in the island of Lewis ascertained between himself and the Appellant. On Lord Seaforth's part, there was evidence of an agreement between his ancestor and Hume's predecessor, that the march should be settled in the line contended

for by him. On Hume's part, there was evidence of an understanding along the boundaries, that the line of march which he contended for was marked by buried charcoal, by the remains of a cairn, and by a stone with an inscription which had been removed. On both sides there was evidence of possession by shealings, but mutually disturbed; the Seaforth tenants having gone so far as sometimes to destroy the shealings of the other tenants. The Court of Session decided, that the parties had an equal right and interest in what was called Seaforth, or Mulag Island, but that the Respondent had an undoubted right to the other grounds in dispute. From this decision an appeal was lodged. The case is mentioned here merely for the purpose of introducing certain general observations made in the speeches in judgment on evidence as to Highland boundaries.

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Lord Redesdale. In a country of this description, with which he was perhaps better acquainted than any noble Lord in the House, the possession of shealings was probably the strongest evidence of the right; and in the case of *Fraser v. Chisholm*, (*vide post*,) the judgment of the Court of Session was in a great measure founded on it: he himself knew that it must be a material circumstance.

The possession by shealings strong evidence of the right, in questions of Highland boundaries.

One circumstance had been much relied upon, which appeared extraordinary to some of their Lordships at the hearing of the cause; viz. that charcoal had been found in a certain spot in the line contended for by the Respondent, and Dr. M'Leod, one of the witnesses, stated that this was a common way of marking boundaries in the Highlands. The

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The burying of charcoal could hardly be a common mode of marking Highland boundaries, from its inaptitude for the purpose in such a situation.

witness stated that he had so heard, without apparently having much knowledge of his own on the subject. But if the nature of the country were attended to, it must appear obviously improbable that the burying of charcoal should be a common mode of marking Highland boundaries. They were generally marked by natural objects, such as lakes, rivers, and ridges. But when they came to a spot where there were none such, they must take an imaginary line, marked by the eye thrown from one visible point to another, as without this it was impossible to know precisely whether there was a trespass. A man standing on one bounding point marked a straight line with his eye to another, and he had seen herds with their dogs marking out the line in this manner, the dog appearing to be almost as well acquainted with it as his master. Charcoal never could answer this purpose. The only purpose which it could serve in this way must be to mark where a stone might have been erected to point out the boundary.

There was great doubt to which of the parties the property belonged, and he could not assent to the proposition, that the Respondent had an *undoubted* right to *all* the lands in dispute (except the island of Mulag.) He was the Pursuer, and was bound clearly to make out his right. It had been found that the parties had an equal interest in the island of Mulag. That was founded on their intercommoning, and on possession by both; and if the Court below had said that they had an equal interest in the other grounds in dispute, he could not have said that the judgment was wrong. But when they

said that Hume had an exclusive right, that was against the evidence of possession, which was not satisfactorily rebutted by other evidence. He therefore thought it would be most proper to remit to the Court of Session to review the judgment, and to consider whether the parties had not an equal right to the lands in dispute,—not on the ground of such having been originally the case, but because, in consequence of their intercommoning, and the nature of the situation, each party had gained a sort of prescriptive title. An order would be framed adapted to these ideas.

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Lord Eldon (Chancellor.) It was quite impossible adequately to represent the distress of mind which he suffered in endeavouring to form an accurate judgment upon such evidence as this. He was not acquainted with countries of this description, as his noble friend was, and when the question came to depend upon Scotch hills, and charcoal, and such matters, he was afraid that he might not sufficiently comprehend the proper import of the evidence. The inclination of his mind was, that Seaforth's was the better evidence. But at least, if this matter were to be tried by a jury, as it would have been here, he should think it reasonable in such a case to grant a new trial,—not because he was satisfied that the verdict ought to be different, but on account of the difficulty of collecting the true effect of the evidence; and the proposed mode of proceeding was as near this as any that could be adopted.

Lord Redesdale. On reconsidering this case, it seemed a question attended with so much difficulty, June 15, 1814.

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that the best mode of proceeding appeared to be, to remit the interlocutors for review generally, rather than to remit with any particular declaration or direction.

Judgment.

Judgment of remit accordingly, to review generally.

Agent for Appellant, MUNDELL.
Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HEPBURN—*Appellant.*
BROWN and others—*Respondents.*

May 18, 20, June 6, 1814.

MUTUAL CONTRACTS BETWEEN HUSBAND AND WIFE.

A DEED or contract between husband and wife, which is in substance a gratuitous settlement upon the wife, or a pure donation on the part of the husband, is revocable by him,—*secus*, if it be a mutual contract between husband and wife, for consideration or onerous cause; or if it be only a rational provision, under the circumstances, for the wife; and the Court will not weigh in nice scales what is, or is not, too much. Therefore, where a mutual contract was entered into between a farmer and his wife, by which the survivor (there being at the time no children) was to have the absolute disposal of the whole of their property, of every description, with the exception of the lease of a farm on the one hand, and a small reversionary interest on the other—the husband having, at the time of the marriage, only a share of the stock (the whole stock being worth about 1000*l.*) of a farm, of which, soon after the marriage, he got a lease, (excepted as above,) and some time after,