

nied. He also denied that he had ever entered by the pursuer's window, or had connection with her.

The Court, after hearing counsel for the pursuer repelled the reasons of advocacy. They could place no faith in Jardine's evidence, and without it the pursuer had no case.

SECOND DIVISION.

MAGISTRATES OF ROTHESAY *v.* M'KECHNIE.

Property—Boundary. Interdict against a person building a wall to enclose his property, on the ground that the *solum* of the proposed wall did not belong to him, refused.

Counsel for the Suspenders—The Lord Advocate and Mr Muirhead. Agents—Messrs J. & R. Macandrew, W.S.

Counsel for the Respondent—The Solicitor-General and Mr Orr Paterson. Agents—Messrs J. & A. Peddie, W.S.

In this suspension and interdict the magistrates seek to interdict the respondent from erecting a wall for the enclosure of his property, which wall, they aver, encroaches on the *solum* of the public road between Rothesay and Port Bannatyne, of which they are custodiers. Issues were ordered and lodged. Thereupon the Lord Ordinary (Barcaple) intimated an opinion that the proper and expedient course was to try the case by a proof on commission, and parties having consented, that course was followed. A proof was accordingly led; and the Lord Ordinary, after hearing parties on the proof, refused the suspension and interdict. The suspender reclaimed. On the case being called, the Lord Justice-Clerk stated that he had doubts as to the competency of the course that had been followed, and appointed parties to be heard on the question, whether this was an action on account of injury to land, where the title is not in question, and as such one of the causes enumerated in the Judicature Act, and appropriated to trial by jury. After hearing counsel upon this point the Court took time to consider. On the case being called to-day, parties were directed to speak to the merits, without reference to the objection to the procedure, which was not insisted on. The case raises a pure question of fact. The averments of parties and the proof have reference to the history of the ground in question, and extend back for a period of about fifty years, the contention being whether it is to be treated as part of the road under the custody of the suspenders, or as part of the respondent's property held by him as tenant under a long lease from the proprietor of Ardbeg. The main points relied upon are (1) the planting of a hedge and the forming of a ditch along the road at the part in question, between 1815 and 1850; but the Lord Ordinary has found that the proof clearly instructs both these operations to have been performed by the agricultural tenant of Ardbeg; (2) a call made by the magistrates in 1849 upon the proprietor of Ardbeg to fill up the ditch, as being dangerous and offensive, which not being responded to, the magistrates undertook themselves. The suspenders maintain that the ditch is the watercourse of the road; but the Lord Ordinary has found that it is impossible so to regard it, looking to its nature and origin, and to the position taken in regard to it by the suspenders in 1849. On the whole, the Lord Ordinary was of opinion that the history of the ground in question implies that it has all along belonged to the proprietor of Ardbeg and his tenants, and was never either acquired or possessed by the magistrates as trustees of the road. His Lordship accordingly repelled the reasons of suspension, and refused the interdict; and to-day the Court, on the same ground, adhered.

Friday, Dec. 15.

FIRST DIVISION.

HUNTER AND OTHERS *v.* CARRON CO.

Title to Sue—Title to Exclude. Circumstances in which (*aff.* Lord Mure, *diss.* Lord Curriehill,) these defences repelled in an action founded upon the fraud of the defenders.

Counsel for Pursuers—Mr Horn, Mr Adam, and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Defenders—The Solicitor-General, Mr Clark, and Mr Balfour. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This action is raised by the sole surviving trustee and beneficiaries under the marriage-contract of the late John Lothian, S.S.C., and his wife, and under certain deeds of settlement executed by Mrs Lothian. The object of the action is to compel the defenders, the Carron Company, to account for a large amount of profits said to have been realised by them between the years 1824 and 1846, during which period the pursuers' predecessor, Mrs Lothian, was a shareholder in the company, but which profits are alleged to have been fraudulently concealed and misapplied by the defenders for the purpose and with the effect of keeping down the rate of dividend during said period, and thus of withholding from Mrs Lothian and the other shareholders profits which legally belonged to them. The sum sued for is £30,000. The defenders pleaded (1) that the pursuers had no title to sue; and (2) that they were in possession of a title to exclude the action.

The Lord Ordinary (MURE) repelled both pleas and ordered issues to be lodged. The defenders reclaimed.

The title to exclude depended on the effect of a compromise of an action which had been raised by Mrs Macfie, the second wife and executrix of Mr Lothian, against the defenders for restitution of the shares held by Mrs Lothian, which she had made over to her husband, and which after her death, had been sold to the defenders in virtue of a right of pre-emption possessed by the company under the contract. The Lord Ordinary held that the compromise of that action must be viewed in reference to its conclusions, and that, as these were restricted to the profits from 1846 downwards, this action, which had reference only to profits accruing before 1846, was not excluded by it.

The objection to the title to sue was rested mainly on a codicil executed by Mrs Lothian in 1843, by which she directed her trustees to allow her husband the option of taking her ten shares of Carron stock at an estimate of £6000 as part of the specific sum settled upon him in their marriage-contract. This codicil was acted on after Mrs Lothian's death, and it was contended that in this way Mr Lothian acquired right not only to the capital stock mentioned in the codicil, and to the profits which might afterwards accrue thereon, but also to all claim to any undivided profits effeiring to the shares, including those of which it is alleged that Mrs Lothian and her marriage-contract trustees were during her life fraudulently deprived of by the defenders. It appeared to the Lord Ordinary that the codicil had reference only to the capital stock, and not to the profits accruing during her life, which by her marriage-contract the trustees were directed to pay over to herself exclusive of her husband's *jus mariti*.

It was also urged by the defenders that as the pursuers were not now holders of stock they were not in a position to insist on a claim for bygone profits, but this difficulty the Lord Ordinary thought was removed by the fact that the action contained conclusions of reduction of the defenders' title to the stock, in so far as it is interposed as an obstacle to the pursuers' demand, and also by the