HOUSE OF LORDS.

Monday, April 22.

FORBES *v.* WATT.

(*Ante*, vol. viii, p. 88.)

Lease—Construction of Duration. A tenant who possessed the farm of A under a lease which terminated at Whitsunday 1787, obtained in December 1784 a new lease of the farm, to commence at the expiry of the present lease, and to subsist for two periods of nineteen years and a life, to be nominated on the thirty-eighth year of the lease, *i.e.*, in 1825. In January 1785 the tenant obtained a lease of the adjoining farm of B, to begin at Whitsunday 1785, and "to endure for the same space of time as the tack now granted on the" farm of A. The two farms were worked together, and a nomination of a life was made in the thirty-eighth year of the lease of A, *i.e.*, in 1825, and the tenant and his successors continued to possess the lands. *Held* (affirming the judgment of the Court of Session), in an action of ejectment, that the phrase used meant that the two leases should exist together, and terminate at the same time; and not that they should both occupy the same portion of time, and the one terminate two years before the other; and consequently, that the nomination in 1825 was valid in both cases.

The facts in this case will be found fully reported *ante*, vol. viii, p. 88.

The LORD ADVOCATE, SIR ROUNDELL PALMER, and WOTHERSPOON for appellant.

The Solicitor-General (JESSEL) and SCOTT for respondent.

At advising—

LORD CHANCELLOR—My Lords, the case which has now been before us appears entirely to have arisen so far as any contest was necessary or proper, upon the construction of two instruments, which were not framed with regular legal exactness and propriety, but which were framed at two different times, and undoubtedly are not altogether accurately, clearly, and distinctly expressed. The question stands thus—The Lord Seafield of 1784, in December of that year, was in possession of two properties, let out apparently to different tenants, one of the properties being called the Mains of Crombie, which was in possession of a tenant of the name of Dason, with whom he afterwards dealt with respect to the additional land of Tillyfaff. Dason had at that time an interest extending for two years longer than 1784 in the Mains of Crombie property; the other property, Tillyfaff, seems about the same period (for the two documents are dated, one in December 1784, and the other a few days later in January of the succeeding year 1785)—it seems, I say, to have been then, or to have been about to be, more immediately in hand, and an interest could be created in it by way of a tack or a lease, as from the Whitsunday immediately ensuing January 1785. An interest in the other, the Mains of Crombie, could not be created until the expiration of the two years which were then current in that lease. The consequence was, that whoever had to frame the instruments ought to have taken very great care, for the sake of accuracy, to make the instruments coincide with that state of things, because, beyond all possibility of doubt, whatever be the proper construction to be given to the instruments, the intention of the landlord was, that the two properties should be in the possession of one tenant, and should be held by him together as one quantity of land, of which he was to be possessed as tenant under Lord Seafield. The two properties were contiguous to each other, and it was natural, as was apparent upon the face of the instruments, to have been the intention that they should be occupied together.

The first instrument, that of December, begins on the Whitsunday which was to ensue after the termination of the two years, and the term (not an unusual term in these instruments in Scotland) was to be two terms of nineteen years each, making thirty-eight years altogether, and then a life, to be named by the tenant in the 38th year of the lease. That would carry it on in effect to forty years, because there were the two current years of the existing lease; therefore the 38th year of this new instrument would be the 40th year from the time when the instrument was made. About the same time, on the 28th of January, the second instrument was executed (the first being such as I have described), and in that instrument it is agreed between the Earl of Seafield and Mr Dason, the tenant, that the Earl shall grant to him a lease, to commence on Whitsunday next, and to endure for the same space of time as the tack now granted upon the Mains of Crombie of the farm of Tillyfaff—that is to say, the grant of the lease of Tillyfaff was to endure for the same space of time as the tack now granted of the Mains of Crombie.

If you proceed no further, of course the intelligible and reasonable interpretation, I think, of these words would be, if nothing further was contained in the instrument, that the two leases should give a possession to the tenant of this character, namely, that the tenant should remain possessed for the same period of time of the two properties, these two properties being held by him as one farm, and that when one was to be given up the other was to be given up, so that the two were held together as one common farm, and to be occupied for a period which should terminate on the same day.

The contest on the other side is, that the provision that they were to endure for the same time does not look forward to the termination of the interest, but looks forward to the extent of the interest, so that the extent of the interest being in the one part thirty-eight years and a life, the extent of the interest by this instrument on the other part would also be thirty-eight years and a life. But the consequence of that would be, that they could not terminate on the same day or at the same period, because, whether you take in the life as part of the duration, or whether you take the years alone, the thirty-eight years in the one case would end in 1823, namely, in this case of Tillyfaff; and in the other case they would not end till 1825, in consequence of there being two current years in the former lease.

As I said, so far as one has gone, thus far I think the more reasonable interpretation would have been, regard being had to all the circumstances of the case, as well as the wording of the instruments, and to the fact of the two properties being closely adjacent and being placed in the

hands of one tenant, occupying as a farmer—if you had no more in this instrument, you would say that he is to hold to the same date exactly in the one case as in the other. But the following part throws some degree of doubt upon that, because it says that the rent shall be for the first nineteen years so much, and for the next nineteen years and a life so much; and, I am bound to say, I do not feel myself so clear upon the construction of the instruments standing alone, if the whole thing had rested there, as to say that the matter was manifestly plain and distinct beyond all doubt, so far as the construction of the instruments is concerned, if the whole matter had rested there. But, as I observed before, the instruments were to my mind ill prepared. I am not of course so competent to form an opinion as another noble Lord here present as to what might be good or bad conveyancing in Scotland, but it is obvious that those instruments were drawn with some degree of haste and want of attention, from a blunder that occurs in the second instrument. They seem to have mistaken the rent, among other things, and there is a correction of the amount of rent, there having been some blunder as to that in drawing up the instrument.

Then we are to look at what took place after this, as to the arrangements which were made with reference to the property when the period fell out as to the longest of the two leases, namely, that which had been first in point of date, but which endured for a greater number of years (if we are to use that expression) in consequence of there being two current years in the existing lease. What happened when that was about to fall out, namely, in 1825? At that time nothing had been done with reference to the other, which, if the construction contended for by the Lord Advocate be the correct one, had terminated in 1823, or the period for giving notice of which had terminated in 1823. In 1825, some ten days I think after Whitsunday, and therefore not precisely according to the terms of the lease, unless you take into consideration that which was mentioned this morning, that the lease was for thirty-eight years and crop, and the crop would be running somewhat later than the exact termination of the thirty-eight years; but at all events, it was ten days after Whitsunday that a life was suggested to be put in by the tenant in respect of the Mains of Crombie.

Now, the mode in which that was done was by a letter addressed to the landlord's factor, which your Lordships will find in page 75. It is thus addressed —"Sir, in terms of the lease of the Mains of Crombie, I beg leave to name the life of Robert Wilson, son of Mr John Wilson, in Brangan, for the endurance of said lease.—Your obedient servant, A. DASON." Now, that again no doubt favours the construction on the part of the appellant in this case, because in this letter reference is only made to one lease and to one property, namely, the Mains of Crombie —unless the Mains of Crombie can be held to include Tillyfaff. And this introduces another quite different controversy upon the scene, and brings us to the parole evidence as contrasted with the written evidence. As regards the written evidence, undoubtedly, if we were to stop there, there would have been a great deal to be said in favour of the contention that the two properties were held by two different leases, and that these two different leases were to have their different durations, and that the life to be named for one of them might or might not be the same life as that named for the other, and that the application made for the life (as was contended very strongly at the Bar by the Lord Advocate) was an application made only in respect of one lease and in respect of one property.

Now, when we come to look at the external matters connected with the holding of these properties from the time the leases were granted, two things arise—*First*, How was this property, the Mains of Crombie, after thus being held by the same tenant as was entitled under the second memorandum to the Tillyfaff property, how, I say, was this property dealt with by all the parties? We have a concurrent mass of testimony showing that the common designation, after Tillyfaff had been added to Crombie, remained the same as when the title had been acquired to the Crombie property by Mr Dason, who had been in possession of it by a lease of which two years remained unexpired. The Crombie property, to which Mr Dason had acquired a title, had been long in his possession, including the residence, the farm-house, which was on the Mains, and he took this additional holding and added it to the farm which he already possessed, called the Mains of Crombie. Undoubtedly a good deal might be said, and a good deal has been said, upon the evidence, tending in many instances clearly to show that the property was called by one designation, as when letters were addressed to this gentleman at the Mains of Crombie, that being the only place where the house was. And there is also a good deal of evidence on the other side, which is very irrelevant to the issue we have to try, because it only shows the place called Tillyfaff was always known by the name of Tillyfaff (as of course any particular field or any particular farm always may be called as regards itself), and that the Mains of Crombie were always called the "Mains" of Crombie, and that Tillyfaff was never called the Mains of Crombie. There is a good deal of evidence to that effect—of course a single field will never be called by the name of the whole estate, though the whole estate may comprehend that field. There was a good deal of evidence, which is of very little value, to that effect.

Now your Lordships have to take into consideration a series of circumstances—entries in books by the proprietor of the estate on the one hand, and the dealings with the tenant on the other. In the books of the proprietor, at the commencement of the transaction, you find the two properties kept all through the books as distinct. There is an interval in the earlier part of the books, and there are several holdings between the holding of the Mains of Crombie and the holding of Tillyfaff, but both of them are entered down to the year 1825, when the life of Robert Wilson was put in, in this way—two periods of nineteen years and a life, that is the form in which they are entered. Then, after 1825, this takes place. The Mains of Crombie are entered as held for the life of Robert Wilson, the term having now expired, and, curiously enough, between 1823 and 1825, when, according to the construction of the appellant, all the interest was at an end, no life having been named at that time as regarded Tillyfaff, because, according to the appellant's construction, there would be a termination of the lease, the properties still are entered as held for two periods of nineteen years each and a life. Then, after 1825, this takes place. Up to 1830 or 1831 the entries in the landlord's factor's books are these, "The Mains of Crombie held for two nineteen years and the life of Robert Wilson;" and then goes on an entry up to 1830, "Tillyfaff

held for two nineteen years and a life," not naming the life. Then, after that, in 1830, in consequence of a bankruptcy which then took place on the part of the then holder of the farm, a sale is made of the tenant's interest, and that sale having been made of the tenant's interest at that time, that which is very important in the consideration of the case is this:—From that time forward down to the present time a change is made—not only is Tillyfaff sold and conveyed to Mr Watt, the purchaser, the present respondent, as well as the tenant's interest in the other property, known originally by the name of the Mains of Crombie; but in the books from that time forth an entry is made as to Tillyfaff which had not been done till then. The entry is made—"Term for two periods of nineteen years and the life of Robert Wilson." That is extremely important, because from that time forward the landlord's factor has acted upon that view of the case, and has treated this not only as a holding still continued to Mr Watt, which he held from 1825 to 1859, when the sale was made to the present appellant of the landlord's interest, not only is that so done, but the designations which afterwards take place on all sides in the dealings with the property correspond with that view, because at the very sale made to the present appellant, the property seems to be described (it appears to be quite distinct by the evidence we got from the plans) as one property, namely, the Mains of Crombie property, without any special designation of the name of Tillyfaff at all, for the name of Tillyfaff happens not to appear. The farm is treated at that time as well known by the name of the "Mains of Crombie," and the holding is so designated by the landlord. And in the sale made to Mr Forbes, the appellant, it is dealt with accordingly as property all held by one title, namely, by the title of the life still current of Mr Robert Wilson.

Now, the Lord Advocate admitted that, as regarded some apparent difficulty that arose as to the proper naming of Mr Wilson in due time, in consequence of the expiration of ten days; even if the question of the difference of style, which might have accounted for the ten days, was put out of consideration; even if the duration of the lease had not extended to the right of taking off the crops; and assuming Mr Robert Wilson to have been named, as he was named in that letter which I read, as the life at the time subsequent to the proper time when he ought to have been named, still, if the landlord, or his representative, had received that name, and had waived all difficulty as to the period of its nomination, and the landlord had gone on upon that footing, receiving Mr Robert Wilson as the life upon which the Mains of Crombie was held, he could not contend that that was not a nomination to be accepted by the landlord, a waiver having been made of the condition which required that it should be named within a certain period. It was properly enough said, that ten days having been allowed to expire in the case of the Mains of Crombie, he could not say that if, as to the Tillyfaff property, there was a period of two years during which the nomination had not taken place; still, if Robert Wilson was recognised in that period as the proper nomination by both landlord and tenant of the person for whose life the lease was to be held, that must be taken to be the terms on which the property is held under that title.

Now, the difficulties that were thrown in our way with reference to the holding of the Court of Session below, as they have held, in favour of the tenant, undoubtedly, to my mind, are not inconsiderable as regarded the construction of the lease. But what follows? These continuous entries in the factor's books on the one hand, and the continuous dealing with the whole of the property remaining in possession on the other hand, with the clear evidence, beyond all dispute, with reference to the landlord's dealing with it, not only by the entries in the factor's books, but also by describing in the particulars of sale of this very property the whole property as held under one title, and giving the quantity 616 acres, which quantity comprises the whole property of Tillyfaff and Scotsward, as being held as one property, showing that the landlord, on his part, always so treated it down to the very time of the sale to Mr Forbes, the present appellant, and that the tenant had, in the same manner, constantly treated the two properties as united and held upon one life,—I say that those circumstances combined make me concur with the opinion of the learned Judges who have been favourable to the respondent in the present case, and to disagree, with great respect, from the opinion expressed by Lord Neaves in the view that he took of this case, namely, that in reality it is impossible to hold that that common action on the part of the landlord and the tenant would have gone on for this period of years—that is, from the year 1830 to the year 1859—without a full and complete knowledge on the part of the landlord that that which he was doing, and which his factor was doing, from time to time in his books, and in the receipts for rent from time to time given, was also that which was being acted upon by the tenant in his dealings with the property, with the Mains of Crombie and Tillyfaff, treating it all as held under one continuing title.

The difficulty suggested by the Lord Advocate is this—You have not shown in this case that there was any communication to the tenant by the landlord of his having accepted the holding of Tillyfaff as a holding on the life of Mr Robert Wilson; you have only the entries in the factor's books, and you have no distinct or clear evidence of those entries in the factor's books having been communicated to the tenant. But, on the other hand, you have the tenant dealing with the property and selling his interest in it, and persons buying it from him on the same tenure, and that publicly. I think the sale of that interest was by auction; but, at all events, the whole thing was publicly treated and dealt with.

The learned Judges came to the conclusion that, finding this evidence in writing both on the one side and on the other in the case not to have been impeached, they could not assume that during that long period of time this course of dealing on the one side and on the other could have gone on without the existence of joint and mutual knowledge and understanding on the part of the two parties principally concerned.

Now, the landlord undoubtedly, when he sold this property, sold it to Mr Forbes, with distinct notice of his views as to how the whole property was then held; and one has had to endeavour in this case to divest one's mind a little of the prejudice which might not unnaturally occur to any mind from what might appear to be an attempt to overthrow an arrangement which had been subsisting for so many years, or certainly an understanding on the part of the tenant. As it regards the landlord, a prejudice might be excited at an

attempt to overthrow a long subsisting understanding on the part of the tenant. But if there were no other circumstances—if we had not had the entries on the part of the landlord—we now come to that remarkable period when there was a change of interest, which, in my mind, makes it necessary for us to adopt the conclusion that the landlord had a knowledge of the view taken by the tenant, who had been just disposing of his interest in the Mains of Crombie. I refer to the circumstance of his making a change in his books at the moment when that change of interest was made. If there had not been that consideration, there might have been a good deal of difficulty in this gentleman making out, to the satisfaction of the Court, that he had acquired an interest in the property lasting during the life of Robert Wilson; but I think that, when regard is had to all the circumstances of the case—when you look to the original agreement, which was in itself doubtful, and admitting of the construction which has been put upon it—when you find the application duly made only under the name of the Mains of Crombie, and having reference only to the "lease," and not to "leases," showing that the interest was identical,—it would be reasonable enough that he should regard his interest under that lease as terminable only on the expiration of that life, regarding the two instruments as being one instrument under which his title was created, though the rents were different, because he was in possession of one before he was in possession of the other.

Under all the circumstances of the case, I think sufficient has been made out to show that it was not a holding by a tacit relocation to him of the property, but a holding under the title which appeared in the landlord's books at the time of the purchase, as the title by which the tenant was holding it, namely, that title which he acquired by the notice he gave of his intention to put in the name of Robert Wilson—he intending, and the landlord intending, they both being of one mind and intent, that the one name should cover the two properties.

Now, with respect to Tillyfaff, I think it reasonable to come to the conclusion, that as regards this gentleman, Mr Watt Dason, the gentleman under whom he claims, had been in possession. There is abundant evidence that Watt had been in the occupation of Scotsward, all being held under the one designation under which it was sold, but how it came in,—whether it came in originally with the Tillyfaff holding, or whether it came in with the Mains of Crombie holding—does not appear clearly from the evidence. At the same time, if Tillyfaff had been included in the Mains of Crombie holding, which I think the evidence is quite sufficient to establish, then of course the question upon the facts of this case comes simply to this, whether Scotsward was or was not part of Tillyfaff. And it is upon that part of the case that my mind was in some degree of doubt, although I do not think that it materially affects the main question at issue. As regards Tillyfaff, there is strong evidence to show that there was a contract on the part of the landlord to inclose all Tillyfaff except some nooks and angles. Now Scotsward is about 50 acres. I quite agree with the learned Judges of the Court below that 50 acres is too much to be considered to be included in an angle not inclosed within the four walls. But I think undoubtedly the cultivated parts of Tillyfaff were all included within the four walls, and within those four walls Scotsward is not found; but at the time of the inclosing of Tillyfaff that was uncultivated. There is evidence in the cause (the evidence of Mr George Bremner) sufficient to show that at that time, when Tillyfaff was inclosed, this was all land not cultivated—rough land, as it is called—running up towards the moss, and capable only of being used as pasture for cattle—of the kind called rough pasture. It would be extremely reasonable and intelligible that property of that description should not be considered as included within the undertaking to surround by a dyke, as not being then in a cultivated condition, but being in the rough state I have described. And there is some evidence to show that a part of it at least, if not all (Mr Bremner gives evidence to that effect), was depastured by those who held Tillyfaff. And so it might have gone very well, or parts of it might have gone with the Tillyfaff property, when it was taken in by Mr Dason, the tenant. But there is very strong evidence to show that Mr Dason himself occupied this rough ground, whether it belonged to Tillyfaff or whether it belonged to the Mains of Crombie. The learned Judges came to the conclusion, that whether it was the one or the other, it was within the tack which Mr Dason took.

But then arose a difficulty as to the pleading. The Lord Advocate said—You have pleaded that it is a part of Tillyfaff. We hold you to your pleading, and if you do not show by evidence that it is a part of Tillyfaff, I say that I, the landlord, have succeeded in making out that you have no durable interest in this property beyond the interest you have acquired as tenant from year to year by tacit relocation from time to time. But it appears to me that this gentleman, purchasing this property, and coming here as landlord, has the onus upon him. He shows undoubtedly that he is landlord. He discharges that onus so far as to show that the property is his as to which those who claim any tenant right under him must make answer; but if a man comes to him and says, I have two instruments of title under which I have been holding all this time, and of those two instruments of title, dating from 1784, or somewhere about ninety years ago, I cannot distinctly show you under which this holding passed; but I have held it, whichever it passed under, and I believe it was under Tillyfaff—and I assert that it was under Tillyfaff—and that is what I seek to prove; but I prove the two tacks—I prove the possession of the whole of the property, including Scotsward, whether it was held under the one or the other. And the tenant having the two tacks of nearly equal date, ninety years ago, it appears to me that if we are reasonably satisfied, as the learned Judges below were, that it had been held either as part of the Mains of Crombie or as part of Tillyfaff,—inasmuch as he never held either the Mains of Crombie or Tillyfaff by any title except one, namely, the title conveyed by these two instruments,—if we hold that the title under each instrument was to endure during the life of Mr Robert Wilson,—then we have arrived at a sufficient conclusion that Scotsward was held for the life of Robert Wilson, whether it was part of Tillyfaff or whether it was part of the Mains of Crombie, distinct and separate from Tillyfaff. It seems to me that this unfortunate litigation, which was very unnecessary, regard being had to the terms under which the purchase was made, has succeeded in throwing some difficulties and creating some obscurity in the instruments, because there is nobody now alive to throw complete light

upon the character of the property. But I do not see any sufficient reasons to induce me to doubt that the learned Judges in the Court below have come to the right conclusion. Therefore, my Lords, I move that the interlocutor appealed from be affirmed, and that the appeal be dismissed, with costs.

Lord Chelmsford—My Lords, if the question had depended solely upon the two leases of Mains of Crombie and Tillyfaff, and the nomination of the life of Robert Wilson by the letter of the 25th May 1825, which is expressly made "in terms of the lease on Mains of Crombie," I should have had some difficulty in holding that the lease of Tillyfaff had not expired.

It is clear that for two years before the lease of "Mains of Crombie" ended there was no existing lease of Tillyfaff; and therefore any nomination of a life for Tillyfaff must operate as the creation of a new lease, and not the continuance of an old one. But I cannot get over the facts of the different recognitions by the landlord,—not only that Tillyfaff was one of the holdings under him, but that it was held upon the same life upon which the Mains of Crombie was held. It appears to me that there is evidence, not only of a nomination by the tenant, but also of a written assent on the part of the landlord, to the existence of the lease of Tillyfaff for the life of Wilson. I think it must be taken that the original intention was that the leases of "Mains of Crombie" and of Tillyfaff should be concurrent; and, when the lease of Tillyfaff expired by effluxion of time, the tenant was permitted to continue in possession, waiting for the arrival of the thirty-eighth year of the lease of "Mains of Crombie," and the nomination of a life by the tenant; and then, the nomination being made, was accepted for Tillyfaff as included in the general description of "Mains of Crombie," in order that the original object might be carried out, and the two leases endure "for the same space of time"—words which aptly express the indefinite duration of the leases when they were to become dependent upon the continuance of the nominated life.

With respect to Scotsward, there is a slight difficulty, arising upon the respondent's pleadings, in which he claims Scotsward to be part of Tillyfaff —the tendency of the evidence being rather to the contrary. But the appellant claims Tillyfaff and Scotsward as being out of the leases, and he must make out his case, and cannot found himself upon the failure of the tenant exactly to establish his allegation. The appellant bought from Lord Seafield upon articles and conditions of sale, and upon the measurements of each lot as stated in the plans and upon printed rentals. Now, by the rental and measurement, the possession is stated to be the Mains of Crombie, the tenant Charles Watt, with a measurement of 616 acres 1 rood 32 perches, and the expiry of the lease is stated to be Robert Wilson's lifetime. Now, these dimensions of 616 acres 1 rood and 32 perches include the lands of Tillyfaff and Scotsward. The appellant purchased, therefore, with notice that Watt, the tenant, held Tillyfaff and Scotsward as part of Mains of Crombie on Wilson's life, and he cannot now claim them from the tenant as belonging to himself, unburdened by any lease. I am therefore of opinion, with my noble and learned friend, that the interlocutor ought to be affirmed.

Lord Colonsay—My Lords, this case is now limited to a portion of its original dimensions. The principal subject appears to have been the Mains of Crombie, but one part of the subject in dispute was the lands of Tillyfaff and Scotsward. There are two documents under which the lands were held—two leases or memorandums of leases, the one having reference to the other. The one which we have to deal with is the one of 1784—it is the one as to the Tillyfaff, and it is made in a peculiar fashion, by reference to one which had been made sometime before in reference to the lands of the Mains of Crombie. The question that comes to be determined is, whether the tenant, the respondent, who now holds those lands of Tillyfaff and a parcel called Scotsward, is entitled to hold them during the life of Robert Wilson.

Now, the terms of the minute I need not repeat at present—they have been read two or three times; but this much appears, I think, without going over the document in detail, that the matter was treated both by the landlord and by the tenant as if the rights of the tenant depended upon the life of Robert Wilson. It is clear that the tenant so dealt with it, because he disposed of it from hand to hand upon that footing. And I think it is clear that the landlord so treated it, because it appears from an inspection of the factor's book, from the commencement to the end, that the life was part of the duration of this lease. Down to 1830 it is entered as a lease to 1823 and a life. Then, sometime after that, it is entered as a lease depending upon the life of Robert Wilson. And it so stood at the time of the sale of the lands, and it is so referred to in the documents by which that sale was effected publicly, and set fourth as the lands or Mains of Crombie, admitted to comprehend both parcels, and as a lease depending upon the life of Robert Wilson.

But there is a challenge made, and is stated, and truly stated, that a lease of this kind cannot be held to be valid or to be effectual against a purchaser, or even against the Earl of Seafield himself for a length of time, unless it was constituted by writ. Now, the question comes to be, in the first place, whether the minute which constituted the lease here when the lease was granted admits of a construction such as has been given to it by both parties to the transaction. And then, supposing that to be a doubtful matter, I apprehend that, if it be doubtful, the construction given by both parties, and the actings of both parties, would be the construction which your Lordships would adopt. The further question might arise, whether the entries in the landlord's rental book, and the acceptance of the rent and the dealings with the tenant, might not themselves be referred to by the tenant as evidence of the lease, although the original document was not to be discovered. However, I do not think that that is the footing upon which they put it.

Now, as to the original missive, it is very inartificially framed. I think it appears to have been written by the local factor, and I presume it was framed by him. It is not done with very great accuracy, and I can hardly read out of it the strict meaning that has been put upon it by either party. It is a lease of the Mains of Crombie. The original bears that the tack is to endure for two nineteen years and the lifetime of a person to be named—that is the period for which the tack is to endure; it is to endure till the termination of a

life to be named, as well as two terms of nineteen years. Then the next part of it refers to the division into the two nineteens of rent. As to one portion, the counsel for the respondent rightly said to-day, it was introduced into the missive for the purpose of regulating the rent.

Now, when we come to the missive or agreement relative to Tillyfaff, it is said that it is to commence at Whitsunday next, and to endure for the same space of time as the tack now given for the Mains of Crombie. Now, the tack of the Mains of Crombie was to endure till the termination of a life to be named in the 38th year, and this is said to endure for the same space of time. Now, if you are to say that it is the same number of years from the commencement to the termination of that, it is quite clear that the duration would not graduate with the currency of the lease; because, with respect to the lease of the Mains of Crombie, part of its duration being for a life, if this lease of Tillyfaff is to be held upon a life also, be it either the same life or a different life, it will not at its termination have endured the same length of years or space of time. If it be upon a different life, it may be shorter or it may be longer. If it be upon the same life, then it is not the same space of time, because it commenced two years earlier, and therefore it has had a longer endurance. Therefore that construction, which I think is the one which Lord Neaves puts upon it, cannot stand when it is examined. It is therefore difficult to say that the contention of the appellant is to be accepted as the only construction of this document. Then again, taking the construction of the other party, if you view it in the other light, if you limit the words "during the same space of time" to the nineteen years, then that will not make out their case, for the duration of the lease of the Mains of Crombie is not a duration for two terms of nineteen years, it is for two terms of nineteen years and a life beyond; that is part of its endurance, and this lease is to endure for the same time. Call it space of time or what you will, it is to endure for the same space of time —that is to say, it is to endure as long as that life, if a life is named, shall endure, upon which the Mains of Crombie was held.

Therefore, in that state of ambiguity of the document, admitting of more than one construction,—which is not wonderful, seeing that it was written by the local factor,—and with that sort of framing by reference, which is a very dangerous mode of framing a document at any time, seeing that it admits of that variety of construction,—I think we are brought back to the question, What is the construction that the parties themselves put upon it?

Now, if the notice of the nomination of the life of Robert Wilson had expressly stated that it comprehended and applied to Tillyfaff as well as to the Mains of Crombie, I understand that there would have been no question raised as to the fact that two years had elapsed before the nomination was made. I think the Lord Advocate was quite right in putting that so,—the parties accepted the nomination then, though the time had elapsed. But if the lands were at that time known as the lands of the Mains of Crombie, and if the parties had afterwards dealt with the matter as a nomination which comprehended the whole of the lands now known by the name of the Mains of Crombie, including Tillyfaff first of all, then I think it is to regarded as the effect of the nomination which was made, which the parties recognised as effectual, as applicable not merely to Tillyfaff, but as applicable to the lands held under both the documents. On these grounds, my Lords, I think the judgment of the Court below is right.

As to Scotsward, that is a matter which presents some little difficulty, and I see there has been a difference of opinion among the learned Judges below as to which portion of the land Scotsward belongs to. But it appears to me, upon the grounds stated by my noble and learned friend on the Woolsack, that it is enough for this party, when it is doubtful whether it belongs to the one or the other, if it is clear that it is under either the one or the other. I do not think that the doubt which appears to exist as to establishing which of them it was under, or the conflict of evidence on that matter, is a thing that the landlord can take advantage of in order to show that the tenant has no title to it. On these grounds, I think that the judgment of the Court below ought to be affirmed.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellant—Alex. Morison, S.S.C., and Wm. Robertson.

Agents for Respondent—John Walls, S.S.C., and J. M. Greig.

Tuesday, June 11.

JAMES OGILVIE TOD FORSTER (PAUPER) *v.* JESSIE GRIGOR OR FORSTER (PAUPER).

Husband and Wife—Constitution of Marriage.

Circumstances in which it was *held* (affirming judgment of the Court of Session) that a mutual declaration in writing by a man and woman, accepting of each other as husband and wife, having been proved to be authentic and seriously meant, instructed marriage.

Process—Concluded Proof.

The defender in an action of declarator of marriage adduced no evidence, but applied for leave to do so after the Lord Ordinary had given judgment in the cause. *Held* (affirming judgment of the Court of Session) that, as the defender had had ample opportunity of giving evidence in the proof before the Lord Ordinary, and had not availed himself of it, he could not be allowed after that to lead further evidence.

This was an appeal from a decision of the First Division of the Court of Session. The respondent Jessie Grigor raised an action of declarator of marriage and damages against James Ogilvy Tod Forster. She stated in her condescendence that she was about twenty-three years of age, and in 1865, when of the age of twenty-one, went into the service of the defender's mother as housemaid. The defender's mother resided at Findrassie House, near Elgin. She said that soon after she entered the house the defender was attracted by her personal appearance and manners, and began to court her with a view to marriage; that they exchanged promises of marriage, and met frequently unobserved. On hearing this, Mrs Tod, the defender's grandmother, immediately dismissed the respondent (Mrs Forster, the defender's mother, being from home); but the defender would not allow her to go till his mother's return. On 2d September 1865, the pursuer and defender being alone in the