I am not satisfied with the explanations given by Mr Balfour as to the black line marked on the plan; and, on the whole, I see no good reason for disturbing the interlocutor of the Lord Ordinary. It seems true that the *onus* has been shifted from the minister and lies on the heritors; and that the disadvantage, of what I cannot but feel to be very considerable uncertainty in the evidence, must fall on the heritors.

LORD BENHOLME—The point which has been raised in this case as to the valuation of moss ground is of some importance, but it is not, I think, difficult to solve.

The distinction is *luce clarius* between mosses which produce nothing but moss maill for the privilege of selling peats for fuel, which is not a tiendable produce, and mosses which not only produce this silver duty for peats, or afford peats for home use, but, as producing pasture, are adjuncts to the arable farms adjacent to them, and of which they may form part.

It is said that the integrity of this valuation of Findone and Cookston has been encroached upon—but why? It is because certain subjects are expressly mentioned as producing moss maill allenarly, which maill was deducted from the rental, and the Court held that subjects in this position were clearly not valued. But where a moss is a part or adjunct of lands valued, being possessed as part of an agricultural subject, we must hold the moss to have been valued along with the principal lands. I concur with your Lordship in the alterations proposed on the Lord Ordinary's interlocutor.

LORD NEAVES concurred with the Lord Justice-Clerk.

Agents for Pursuer—Tods, Murray, & Jameson, W.S.

Agents for Defenders—Hill, Reid, & Drummond, W.S.; James Webster, S.S.C.; Hagart & Burn Murdoch, W.S.; Maconochie & Hare, W.S.

Tuesday, June 29.

FIRST DIVISION.

HINSHAW & CO. *v.* FLEMING, REID & CO. *et e contra.*

Reparation—Breach of Contract—Jury Trial. Motion for a new trial *refused*, the issues, which involved questions under a mercantile contract, having been fairly and fully tried.

These were counter actions of damages for breach of contract. In the year 1866 Hinshaw & Co. had purchased from Fleming, Reid & Co. 8500 gross hank yarn, which was paid for. Hinshaw & Co. became desirous of getting quit of so much of this yarn as they had not used, and on 21st June 1867 the parties met at Greenock, and the following letters were exchanged, viz.:—

"Messrs Fleming, Reid & Co. agree to take back what we have of 30 L. hank yarn, about 6000 grs., at price invoiced, and we order in place thereof about 10,000 grs. B. qu. spool, to sample last submitted. For each gross of spool up to the quantity of hank returned, we pay 17/3, and for balance we pay 15/6 (fifteen and six), comn. colours. Yarn to be delivered, and to take date as our last orders of July 23d and August 10th, 1866.

"*June* 21*st* 1867. WILLIAM HINSHAW & Co.

"21*st June* 1867.

"We accept your order as contained in yours of 21st inst. FLEMING, REID & Co."

In order to the manufacture of spool yarn it is necessary that the yarn spinner should have at an early period instructions as to the different colours and shades of yarn which are wanted. In this case no instructions were furnished until 10th September 1867, and the main question betwixt the parties was whether Hinshaw & Co. had furnished "dyeing instructions" in time, so as to enable Fleming, Reid, & Co. to deliver the spool yarn within the time specified in the contract.

The following were the issues in *Hinshaw & Co. v. Fleming, Reid, & Co.*, viz.:—

"Whether, on or about the 21st June 1867, the pursuers and defenders entered into the contract contained in the documents Nos. 31 and 12 of process; and whether the defenders, in breach of said contract, failed to implement the same, to the loss, injury, and damage of the pursuers?

"Damages laid at £6032, with interest at 5 per cent. from 9th December 1868.

OR,

"Whether the pursuers, in breach of the contract betwixt the parties, failed to implement the same?"

In the counter action the issue was as follows, viz.:—

"Whether, on or about 21st June 1867, the pursuers and defenders entered into the contract contained in the documents Nos. 20 and 45 of process; and whether the defenders wrongfully failed duly to furnish the pursuers with dyeing instructions necessary to enable them to implement their part of the said contract, to the loss, injury, and damage of the pursuers?

"Damages claimed £2000, with interest from 29th January 1869."

The cases were tried together at the last Glasgow Spring Circuit, when the Jury returned verdicts for Fleming, Reid & Co. on all the issues, and assessed the damages due to them at £300.

Hinshaw & Co. moved for a new trial, on the ground that the verdicts were contrary to evidence. Rules having been granted,

SHAND (BURNET with him) shewed cause.

WATSON (with him CLARK) replied.

The rules were unanimously discharged.

LORD PRESIDENT—The case before us arises upon two counter actions, one at the instance of Hinshaw & Co. against Fleming, Reid & Co. and the other at the instance of Fleming, Reid & Co. against Hinshaw & Co. These parties were under a contract for the supply by Fleming, Reid & Co. to Hinshaw & Co. of a certain quantity of spool yarn. In these actions they charge one another with breach of contract, and perhaps it is not very easy to say that either of them is absolutely free from the imputation of breach of contract; but the case is one purely of a mercantile character, and therefore eminently fitted for the determination of a jury. The contract is contained in the letters which occur in the course of a correspondence between the parties, and while we don't at all doubt that the construction of the letters which constitute the contract was for the Court—that is to say for the Court after hearing the evidence and understanding the whole circumstances of the case—the question whether there was breach of contract on either the one side or the other, and, above all, which party was in the end mainly in the right or mainly in the wrong, was entirely for the jury. The jury

have returned a verdict in which they find for the defenders upon the issue in the action at the instance of Hinshaw against Fleming Reid & Co., and in the counter action they find in favour of Fleming, Reid & Co., with a verdict for £300. We have heard the case very elaborately argued, and we have studied the evidence with all attention. We have also had the benefit, under the recent arrangement of the Act of 1868, of the presence of our brother the Lord-Justice Clerk, who tried the cause, and we certainly have derived very great advantage from the information which he has communicated to us as to the course of the trial. We learn from him that the jury who tried this cause was a jury certainly of average intelligence, if not more so; that they bestowed great attention and pains upon the case, and seemed thoroughly to comprehend the question which they had to dispose of. There is no reason at all, either in the opinion of the Lord-Justice Clerk or in the opinion of any member of the Court, to doubt that the construction of the contract given to them by the presiding Judge was followed by the jury. The question therefore which they had to determine was a purely jury question, arising in the course of mercantile dealing, and we should not be ready to disturb a verdict in such a case under almost any circumstances. But it is enough to say that, as regards the present case, we see no reason whatever for disturbing either the one verdict or the other. The rules therefore which have been granted will be discharged.

Agents for Hinshaw & Co.—Murdoch, Boyd & Co., S.S.C.

Agent for Fleming, Reid & Co.—William Mason, S.S.C.

Friday, July 2.

TENNENT *v.* TENNENT'S EXECUTORS.

Trust — Irrevocable Deed — Delivery — Registration. Held, after a proof, that a trust-disposition and assignation, which contained *inter alia* a clause consenting to registration, and which was in fact registered, an extract being sent to the trust-disponee, was a delivered and irrevocable deed.

On 1st December 1862 the late Hugh Tennent of Wellpark executed a trust-disposition and assignation in favour of his son, Gilbert Rainy Tennent, and certain other parties, whereby he conveyed to them certain property for purposes set forth in the deed. The deed contained, *inter alia*, clauses declaring that the truster had delivered up to his trustees "the whole vouchers, writs, and title-deeds of the sums of money and land securities and others hereinbefore designed, disponed, and conveyed, to be kept and used by them in time coming for the purposes of this trust;" and consenting to "registration of the deed for preservation and execution, and also to registration in the General or Particular Register of Sasines." The deed was registered in the books of Council and Session in March 1863. In 1864 Hugh Tennent, shortly before his death, executed another deed, in which he stated, with regard to the deed of 1862, that in so far as that deed was expressed as to be in its terms irrevocable, the same was not his act and deed, it having been his will and intention to make it revocable at any time during his life; that he never delivered that deed or authorised delivery of it; that the recording was merely for safe preservation; and that he now recalled that deed. G. R. Tennent now asked declarator that the deed of 1862 was delivered and irrevocable, and that Hugh Tennent had no power to revoke or alter it. After a proof, the Lord Ordinary (BARCAPLE) found that the deed of 1862 was a delivered deed prior to the date of the second deed of 1864, and was irrevocable. The defender Hugh Tennent's trustees and executors reclaimed.

CLARK and WATSON for reclaimers.

GIFFORD and WEBSTER for respondent.

At advising—

LORD PRESIDENT—This action is raised by Mr Gilbert Rainy Tennent, describing himself as the only accepting and surviving trustee under a trust-disposition and assignation executed by his deceased father, Mr Hugh Tennent, on 1st December 1862. It is directed against the testamentary trustees of Mr Hugh Tennent as defenders; and it concludes for declarator that the deed of 1st December 1862, under which Mr Gilbert Tennent is, as he says, the sole surviving and accepting trustee, is a delivered and irrevocable deed, and that the granter thereof had no power to revoke or alter the same; *secondly*, for declarator that it is a subsisting conveyance of the several sums of money, lands, securities, and others therein specified and described; and *third*, that the pursuer is entitled to complete his title to the subjects described in the deed, and to enter into possession, and generally to execute the trust created by the said deed; and there is a subsidiary conclusion for prohibiting the testamentary trustees from interfering with the execution and administration of this trust. The defence maintained, on the part of the testamentary trustees of Mr Hugh Tennent, is, that this deed was in its nature a revocable deed; at all events, if not revocable in its nature, that it was retained in the custody of the granter, and was never delivered, and consequently that it was liable to be revoked, and was effectually revoked by the granter by another deed executed by him on 16th January 1864. To this, again, the pursuer replies that the deed founded on by him—the deed of 1st December 1862—was in its nature an irrevocable deed; that it was delivered by the granter; and that therefore he had no longer any power of revocation, and that the deed of revocation, dated on 16th January 1864, is therefore ineffectual. The whole question comes to turn upon the matter of fact, whether this deed was or was not delivered by the granter, because it is impossible to dispute that the deed is in its own nature an irrevocable deed. It is an absolute conveyance; it bears to convey the subjects which it embraces absolutely and irrevocably, and has upon its face all the marks and characteristics of an irrevocable deed. But the question whether it was delivered by the granter, although it be a question of fact, is yet one of considerable importance, and indirectly involves some important legal principles. Such being the nature of the case, I think it necessary to enter somewhat more into detail in giving judgment than I should have considered to be at all appropriate, if we had been dealing with a mere question of fact.

One of Mr Hugh Tennent's daughters, named Helen, was married to Mr Craigie of Dumbarnie, and Mr Craigie of Dumbarnie died, leaving her a widow with two infant daughters, in the year 1854. The estate of Dumbarnie was very much involved in debt; indeed so much so as to be apparently in a hopeless and irrecoverable position, so far as the