

do not at all emerge in conveyances to trustees. The difficulties which would have arisen are now therefore swept away. Taking then this trust, which is engrafted upon the original deed, as being now a part of the settlement, and reading the deeds together, I think there is no difficulty in understanding what the wish and intention of the testator was. The trustees are meant to carry out the intention of the settlement and first codicil. Now this intention, as expressed, was simply that if his wife survived him she should have the life-ent of the residue of his estate, but that the fee should be preserved by means of the trust for certain others. Whether this intention presented itself to Mr Macdonald's mind in the technical form of fee and life-ent, or whether, being unacquainted with legal terms, he merely conceived the general intention which is so expressed, I cannot tell, but in whichever way it did present itself to him, he is entitled to have it carried into execution by his trustees. I am therefore of opinion that Mrs Macdonald's right is a right of life-ent and not of fee.

**LORD DEAS**—The whole question appears to me to be, whether the widow of Mr Macdonald is entitled to a fee, and if not to a fee, then whether she is entitled to a life-ent. I really don't see much difficulty on either point, though some was attempted to be raised. Now we must deal with these deeds just as if the grantor had begun by making a trust-disposition to trustees for certain purposes, and had afterwards executed certain codicils altering slightly the original purposes. The import of his directions to his trustees, as so altered, I hold to be that they are to give the widow the beneficial enjoyment of the property during her lifetime and secure the fee for certain other parties. And this is the whole, I think, which we are called upon to decide.

**LORD ARDMILLAN**—The first codicil must be read as part of the original settlement. The only difficulty created is through the absence of an appointment of trustees. That difficulty is removed by the creation of the trust in the next codicil. This trust clearly enables the trustees to administer the settlement and first codicil together, and this they are bound to do. When there are no legal and technical difficulties in the way, it is the duty of the Court to interpret deeds in their natural construction; and this I think your Lordships have done.

**LORD KINLOCH**—I have come to the same conclusion with your Lordships. We must read the original deed and the codicils together; and if we do so then we have a trust constituted, and the fee of the property conveyed to the trustees for certain trust purposes. What are those ends and purposes is the true question before us. Now I think that under the fair and reasonable construction which we are bound to put upon such deeds, there are no real difficulties in the case. I think that the truster's intention was, that if there should be children of the marriage the wife should have a life-ent and the children the fee of the property. If, on the other hand, there should be no children of the marriage, then under the first codicil he provided that his wife should have a life-ent and certain other parties the fee. This is the natural construction of the truster's intentions. It was argued to us that these provisions of the truster

were not provisions of life-ent and fee, but were provisions of substitution—that the truster's intention was that the wife should have full power of disposal during her life either onerously or gratuitously, but that failing such disposal the substituted heirs should succeed. Substitution, I need not say, is not readily presumed in moveables; and upon a fair consideration of the whole deeds, I do not think that such substitution is intended here.

On the first two questions the Court found and declared the first party not entitled to a fee, but entitled to a life-ent of the residue, in addition to a life-ent of the house 115 Rose Street, and of the furniture and plenishing therein. To the third and fourth questions the Court declined to return an answer in the absence of Mrs Watt and her children, who had a material interest to be heard in the premises.

Agents for Mrs Macdonald—G. & J. Binny, W.S.

Agent for Mary Macdonald—Robert Menzies, S.S.C.

Agent for Cecilia Dewar and Macdonald's Trustees—John Galletly, S.S.C.

Wednesday, November 9.

## SECOND DIVISION.

### FORBES v. WATT.

*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*, 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 accordingly terminate two years before the other; and consequently that the nomination in 1825 was valid in both cases.

*Amendment—Court of Session Act 1868.* *Held* that it was not intended by the above Act that a pursuer could amend his summons at the end of his case, so as to raise a different question from that originally intended.

This was an action of declarator at the instance of Mr Forbes, proprietor of the lands of Haddo and others, against the trustees of the late Charles Watt, tenant of the farm of Mains of Crombie, which belonged to the pursuer. The action contained conclusions to the effect—(1) that the pursuer was heritable proprietor of the farms of Mains of Crombie and Tillyfaff and certain crofts adjoining thereto; (2) that the defenders had no valid lease of the said farms and crofts; (3) that they

should be ordained to leave the said lands at Whitsunday 1864, and (4) the summons concluded for a sum of money in name of rent for the lands since 1861, and for damages.

The action arose in the following circumstances. On 4th December 1784 the Earl of Seafield granted to Cosmo Dawson a missive, whereby it was agreed "that the Earl shall grant to him a lease of the Mains of Crombie as presently possessed by himself, the lease to commence at the expiry of the present tack, and to endure for two nineteen years and thereafter for the lifetime of a person to be named by the person in possession of the lease in the thirty-eighth year thereof," for a certain rent.

Thereafter, on 28th January 1781, another agreement was entered into between the same parties containing the following clause: "It is agreed between the Earl of Findlater and Seafield, and Cosmo Dawson, in Mains of Crombie, that the Earl shall grant to him a lease to commence at Whitsunday next, and to endure for the same space of time as the tack now granted on the Mains of Crombie, on the farm of Tillyfaff as presently possessed by," &c., "for which he is to pay," &c.

Cosmo Dawson continued to possess these farms until 1817, and thereafter his sons possessed until 1830, when the estates of the last possessor were sequestrated. In 1831 John Watt entered into possession under a title derived from the trustee of the bankrupt, and thereafter Charles Watt, his nephew, by arrangement with his uncle, became tenant of, and occupied the farms until his death. The trustees of Charles Watt were in possession of the lands at the time the present action was instituted.

The pursuer Mr Forbes purchased the lands in 1859 from John Charles Earl of Seafield, and he now brings the present action of declarator and ejectment, on the ground that the defenders had no valid lease of the land farms in question, and that they and their predecessors had occupied them merely on sufferance, and by tacit relocation from year to year. The defenders alleged that they held the farms under the two tacks above set forth. They averred that the two farms had always been farmed together, and that the crofts were part and pertinent of the farm of Tillyfaff, and that on 25th May 1825, within the time named in the missive of lease, Adam Dawson, who was then in right of the lease, nominated a life in terms thereof, in a letter to the factor for the Earl of Seafield. This letter was acknowledged by the factor in the following terms:—Cullen House, 25th May 1828.—"Sir, I am favoured with your letter of this date, of which the above is a copy, and have accordingly noted the name of Robert Wilson on the Earl of Seafield's rental, in terms thereof."

The nominee still survives.

The pursuer alleged—"Besides the parole evidence of possession, there is, first, the document No 47 of process, which bears to be a minute of lease to Adam Dawson as on 25th October 1819, and in that document there is a narrative of the leases which had been granted in 1784 and 1785 to his father, Cosmo; of the removal of Cosmo in 1817 in consequence of his having fallen into arrears; of the payment of these arrears, and all expenses by Adam of a verbal agreement, under which Adam had subsequently been in possession as the tenant; and it concludes with a request that the curator of Lord Seafield would 'subjoin thereto a few lines approbatory' of what is therein set forth. To this document there is, accordingly,

subjoined by Lord Seafield's curator, who himself became Lord Seafield in 1841, these words, 'I agree to the above.'"

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"*Edinburgh, 25th June 1870.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it established that the pursuer is proprietor of the lands libelled, but finds that the pursuer has failed to prove that he is proprietor of the lands and farm of Mains of Crombie, and the lands and farm of Tillyfaff, and the two crofts adjoining Tillyfaff as libelled, free from and unaffected by any leases or titles of possession in the person of the defender: Therefore finds and declares in favour of the pursuer in terms of the first conclusion of the summons, but *quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns; reserving, however, to the pursuer his right to have the precise boundaries or marches between the lands which the defenders are entitled to possess as tenants, and his the pursuer's other lands, cleared up and determined in any competent process brought for that purpose, and to the defenders their answers thereto as accord: Finds the defenders entitled to expenses: Allows them to lodge an account thereof, and remits it when lodged to the auditor to tax and report.

"*Note.*—This case, which the Lord Ordinary regrets to observe has been in dependence for no less than seven years, has only very recently come under his observation, and he has not had the advantage of having had the evidence adduced before him, or, indeed, knowing anything whatever of the case till it was debated before him a few weeks ago.

"The pursuer purchased the property in question in 1859. No question, therefore, has been raised as to his being proprietor of the lands libelled, and declarator has been pronounced in terms of the first conclusion of the summons to that effect. Any such declarator, indeed, appears to have been uncalled for, and was probably concluded for merely as an introduction to the other conclusions of the summons which directly affected the late defender, Charles Watt, as possessor of the lands or farm of Mains of Crombie, and Tillyfaff, and the two crofts referred to in the preceding interlocutor. The present defenders are the late Charles Watt's trustees, and they were sisted as such on 19th November 1864.

"That the defenders are now in possession of these lands or farms and crofts, as their predecessors have been for about a century, is not disputed. It is because of such possession that the pursuer has brought the present action. But while the defenders maintain that they are in possession in virtue of a good legal title of lease, as their predecessors have been before them, and therefore that the summons should be dismissed so far as it affects them, the pursuer, on the other hand, maintains that the defenders have no lease, and that they are mere possessors at will, or on the tolerance of the landlord, and liable to be turned out at any time; and therefore that the conclusion of the summons for their removal is well founded. The question thus raised is the substantial if not the only one in controversy between the parties. The Lord Ordinary will now advert to the leading circumstances and considerations in respect of which he has decided this controversy in favour of the defenders.

"The pursuer stands in the position of a singular successor in the property of which the lands in dispute form a part. But when the pursuer purchased the property in 1859, the original defender, Charles Watt, was and had been for a considerable time previously in possession of the lands or farms and crofts referred to under, as he maintained a title of lease which does not expire till the death of a person of the name of Robert Wilson, who is now alive. Whether the title so founded on is a good and sufficient one, is the question to be inquired into.

"The state of possession of the lands or farms and crofts in dispute, as well as the titles under and in reference to which the possession has been had, are traceable back for nearly a century. In 1784, the document No. 46 of process, bearing to be a lease of the Mains of Crombie, was granted by the then Earl of Seafield in favour of Cosmo Dawson, and in the following year the writing also contained in No. 46 of process, bearing to be a lease of Tillyfaff, was executed by the Earl of Seafield in favour of the same individual, Cosmo Dawson or Dason. These documents or writings may not be quite formal or complete in themselves. They refer back to a lease which preceded them, and the lease of the Mains of Crombie bears that it was to commence from the expiry of that former lease, that is Whitsunday 1787, and to endure for two nineteen years, and thereafter 'for the lifetime of a person to be named by the person in possession of the lease in the thirty-eighth year thereof.' The other lease, viz., that of the lands of Tillyfaff, bears that it was to commence at Whitsunday next, that is at Whitsunday 1785, and 'to endure for the same space of time as the tack now granted on the Mains of Crombie.' Looking merely at the terms of the Tillyfaff lease, it might be difficult to determine whether it was to terminate on precisely the same date as that of the Mains of Crombie, or to run a course of two nineteen years and a liferent, calculated from its own commencement. The meaning of the document is in this respect somewhat ambiguous and uncertain. If the lease of Tillyfaff is to be held as meaning that its endurance was for two nineteen years from its date in 1785 and the life of a person to be named in its thirty-eighth year, that is in 1823, then, as said person was not named till 1825, by the letter No. 11 of process, the nomination was apparently too late as regards the lands of Tillyfaff, and, *quoad* these lands, there would have been room for the contention that there has been no written title of possession subsequent to 1823. But in the special circumstances of this case, as bearing on these points, the Lord Ordinary thinks that this contention must be held as excluded.

"He thinks that any defects in the documents or leases referred to as formal and unobjectionable documents in themselves, and any ambiguity in their terms, must be held to have been eased and cleared up by the possession which followed on them and the actings of the parties—the landlords as well as the tenants.

"Besides the parole evidence of possession, there is, first, the document No. 47 of process, which bears to be a minute of lease to Adam Dawson as on 25th October 1819, and in that document there is a narrative of the leases which had been granted in 1784 and 1785 to his father, Cosmo; of the removal of Cosmo in 1817 in consequence of his having fallen into arrears; of the payment of these arrears and all expenses by Adam; of a verbal agree-

ment, under which Adam had subsequently been in possession as the tenant; and it concludes with a request that the curator of Lord Seafield would 'subjoin thereto a few lines approbatory' of what is therein set forth. To this document there is, accordingly, subjoined by Lord Seafield's curator, who himself became Lord Seafield in 1841, these words, 'I agree to the above.'

"The next point to be noticed is the fact, which the Lord Ordinary thinks is established by the proof, that for some time prior to 1823 the Mains of Crombie and Tillyfaff were merged into one farm, and known and dealt with under the name of the Mains of Crombie alone. If this be so, the terms of the nomination, No. 11 of process, can be the more readily understood as having had reference to the lands of Tillyfaff, as well as to the lands of Mains of Crombie. Accordingly, Adam Dawson, the eldest son of Cosmo Dawson, who had come, as has just been explained, into the right and place of his father Cosmo, the original tenant, named Robert Wilson as the person during whose life the leases were to endure, by the letter No. 48 of process, dated 25th May 1825, addressed to Mr Fraser, the proprietor, Lord Seafield's cashier and commissioner. The receipt of that letter is acknowledged by Mr Fraser by the letter No. 11 of process, in which he says that he had 'noted the name of Robert Wilson on the Earl of Seafield's rental in terms thereof.' And the rentals, No. 106 of process, show unequivocally, from at least 1830 downwards, that the nomination of Wilson was so entered equally for Tillyfaff as for the Mains of Crombie.

"Adam Dawson having died in 1826, the leases would appear to have been taken up by his son, John Dawson, who then entered into possession; but his estates having not long thereafter been sequestrated, Mr Edward Mortimer, solicitor, Banff, was confirmed trustee thereon. And here a very important and comprehensive piece of written evidence presents itself, in the shape of an assignation of the leases by Mr Mortimer in favour of John Watt. The assignation (No. 12 of process) is dated 15th August 1831. It narrates the leases and all that had followed on them from the time they were granted in 1784 and 1785, and particularly the possession under them by Cosmo, Adam, and John Dawson in succession; the nomination of Wilson as for both leases by Adam Dawson; the right of Mortimer himself to the leases as trustee on John's sequestrated estates; and the purchase of the leases by John Watt for £1112. Then comes a translation of the leases by John Watt in favour of his nephew Charles Watt in 1848 (No. 13 of process); and this deed of translation also contains a full narrative of the leases and their transmissions down till that time. In particular, it refers to the nomination of Wilson in 1825, as the individual on whose life the endurance of both leases was to depend.

"Finally, there are the proceedings connected with the sale of the Barony of Crombie and others, including the lands or farms in question, and the purchase of them by the pursuer in January 1859. These proceedings make no allusion to the former lands of Tillyfaff as being separately possessed from the Mains of Crombie. The whole are referred to under the name of Crombie or Mains of Crombie. In particular, the rental and measurement of the property in reference to which the pursuer made his purchase, while it contains no mention of Tillyfaff, contains an entry in a column

titled 'Possessions in these terms,' 'Mains of Crombie;' in a column titled 'Tenant's names,' the name 'Charles Watt;' in a column showing the extent of measurement by acres, roods, and poles, '616: 1: 32;' and in a column titled 'Expiry of leases,' the entry 'R. Wilson's lifetime.' These entries demonstrate that the Mains of Crombie were held and considered by the proprietor at the time, and sold by him to and purchased by the pursuer, as including not only the farm or lands let by the lease of 1784 as the Mains of Crombie, but also the farm or lands let by the separate lease of 1785 under the name of Tillyfaff; and they also demonstrate that, in the knowledge and understanding both of the landlord as the seller, and the pursuer as the purchaser of the property, the Mains of Crombie, as including Tillyfaff, was possessed by the tenant Charles Watt under a lease or leases which would expire at the same time, viz., with the life of Robert Wilson.

"In support of the various documents which have now been referred to, a considerable body of other evidence, both parole and written, has been adduced on the part of the defenders, sufficient in the Lord Ordinary's judgment to establish—(1) the authenticity of the documents and the genuineness of the signatures of them; and (2) the possession of Charles Watt and his predecessors from 1784 downwards of the lands or farms in dispute, in connection with and by virtue of the documents which have been referred to.

"In these circumstances, it is not easy to see how the pursuer's grounds of action, so far as they affected Charles Watt, the original defender, or now affect his trustees the present defenders can be maintained. The Lord Ordinary holds it to be clearly established by the proof that the leases of 1784 and 1785, however imperfect or defective in themselves, have been made good and effectual by the possession which has followed on them, and whole other actings of the parties—landlords as well as tenants—and that the possession which has been had is attributable to the written leases, and not to any merely verbal understanding or tolerance.

"But the pursuer, notwithstanding of the undoubted fact that he became the purchaser of the property now held by him in the knowledge of the possession of Charles Watt, and of the nature of that individual's right of possession—for this, indeed, appears on his own showing when examined as a witness for himself—now asks in the present action to have Charles Watt's trustees evicted and turned out of possession, as if they had no right of lease at all, but held their possession merely on the tolerance or at the will of the proprietor. He does so on various grounds—(1) He has argued that the letter of nomination of Robert Wilson as the life during which the leases were to endure was too late of being made as regarded all the lands, and, at any rate, was ineffectual as regarded Tillyfaff, in respect it only mentioned the Mains of Crombie. To this the Lord Ordinary thinks the answer is sufficient that the parties interested have treated the nomination and dealt with it as made in sufficient time, and as applicable to all the lands alike—to Tillyfaff as well as to the Mains of Crombie; and that it has been so treated and dealt with all along, down to the date of the purchase of the property by the pursuer; and in that purchase itself. (2) The pursuer has further objected and argued that the property was under such fetters of entail as to have rendered it out of the power of the

successive proprietors from the dates of the leases of 1784 and 1785 downwards to agree to such leases, or by any acts of acquiescence or homologation to pass from or cure any defects to which they were subject. The Lord Ordinary does not think that this objection is entitled to receive any effect in the circumstances. The pursuer is not one of the heirs of entail, and it is not as such that he pursues the present action. Neither does he pretend to be in the right of any heir of entail. And it is not to be over-looked that, according to his own showing, the lands in question were disentailed in 1850, and were purchased by him from a proprietor who held them in fee simple, and who, as well as his predecessors, had recognised and dealt with the defender's right of tenancy as being perfectly good and effectual, exactly as now contended for by them in the present litigation. (3) It has also been objected by the pursuer to the right of tenancy claimed by the defenders, that the acts of adoption, assent, and homologation, on which they found, were beyond the power and competency of the *curator bonis* of a lunatic, as the Lord Seafield, who stood in the position of landlord prior to 1841, was. But even were it so, although the Lord Ordinary is not satisfied that it was, he does not see how that can now avail the pursuer. There has been no challenge of the acting of the *curator bonis* by any party who had an interest to raise or insist in such a challenge. The *curator bonis*, who was the Honourable Francis William Grant, brother of the lunatic himself, succeeded on the death of the lunatic to the estates as Lord Seafield, and he was in 1853 succeeded by the Lord Seafield from whom the pursuer purchased the property in 1859; but, in place of any challenge having been brought of the actings of the curator, his actings in regard to the lauds and leases in question appear to have been fully acquiesced in, homologated, and adopted, from 1841 downwards. And (4) it was also objected and argued by the pursuer that, as according to the terms of the leases of 1784 and 1785, founded on by the defenders, assignees and sub-tenants are excluded, and as the tenants have exceeded the number of fire-places they were entitled to keep up, the whole subsequent transmissions of the leases are null and ineffectual, and that all right under the same has been forfeited; but to this the answer is thought to be sufficient, that the successive landlords were entitled to waive and pass from all such objections, and that they did so.

"In regard to the two crofts, in possession of which the defenders are, besides the Mains of Crombie and Tillyfaff, and from which the pursuer now seeks to evict them, the Lord Ordinary has to remark that, although the evidence is to some extent conflicting, it appears to him greatly to preponderate in favour of the defenders; and he is satisfied on the whole proof that the two crofts in question have been all along held and possessed by the defenders and their predecessors as part of the lands of Tillyfaff. If this be so, the defenders can no more be evicted from these crofts than from any other portion of the lands of Tillyfaff. It might be enough that the pursuer has failed, as the Lord Ordinary thinks he has, to prove his statement on the subject of the two crofts as contained in article 12 of his condescendence.

"The Lord Ordinary has only further to notice a contention of the pursuer, maintained by him at the debate, to the effect that the defenders, by their possession, have encroached on his property

beyond the limits or marches of the lands of Mains of Crombie and Tillyfaff, and relative crofts, in any reasonable view that could be taken of their right to these lands, and that he was therefore at the very least entitled to have them restricted and confined within their proper limits or marches. In regard to this contention, it appears to the Lord Ordinary sufficient to say that he cannot find any *termini habiles* for dealing with it in the present action, which appears to him not to have been brought for such a purpose at all. The Lord Ordinary, however, has inserted in his interlocutor such a reservation as will save the rights of the pursuer in this matter."

The pursuer appealed.

The SOLICITOR-GENERAL and ASHER, for him, argued—That the nomination of the life of Robert Wilson on 25th May 1825 was made too late, as regarded both Mains of Crombie and Tillyfaff, and certainly as regarded Tillyfaff, in respect that thirty-eight years of the lease of Tillyfaff expired in 1823. Further, that in the proof it was not made out that the crofts in question had been preserved by the defender's predecessors.

SCOTT, in answer, maintained that the lease of Tillyfaff was to endure until the expiry of the lease of Mains of Crombie, and that the nomination was validly made in 1825.

At advising—

LORD JUSTICE-CLERK—Some puzzles have been raised in this case which I think are more verbal than real. In my opinion the interlocutor of the Lord Ordinary is well founded. The state of matters is this—There are two documents, the one dated in December 1784, and the other in January 1785, which bear to be undertakings by Lord Seafield to grant two leases—the one of the Mains of Crombie, and the other of Tillyfaff—to the same tenant. These documents are informal in expression, but they are probative, and contain all the requisites of a valid lease. Following upon these documents, the tenant and his representatives and successors have possessed these farms till the present time. No doubt it is denied by the pursuer that the possession is referable to the documents, but the possession itself is admitted. Now, in my opinion, the best interpreter of documents between landlord and tenant is long continued possession; and if there be ambiguity, the actings of the parties will best explain it. I can fairly say that I have no difficulty in understanding the documents. Dawson was tenant in possession of the Mains of Crombie under a lease which did not expire for two years; and Lord Seafield agrees to give him a renewal of that lease at its termination for two periods of nineteen years, and thereafter for the period of the lifetime of a person to be nominated in 1825.

Now, at the time of this agreement the lease of Tillyfaff, which was a farm contiguous to the Mains of Crombie, had terminated. It was the design of the parties that the two farms should be cultivated together. The second lease was dated 28th January 1785, and contains these clauses—(quoted *supra*). Now, here there are three things certain—(1) The term of entry, which is stated to be next Whitsunday; (2) the ish, which is said to be the same as that of the lease already granted for the Mains of Crombie, which means that it will come to an end at the same time; and (3) the rent as fixed. I can see no difficulty or ambiguity here. The meaning is, that the two leases, which are leases of two contiguous farms which it has been

the custom to farm together, are to terminate at the same time. The possession of the subjects has been consistent with this interpretation. Dawson became bankrupt in 1817, and thereafter his son possessed the farms until 1825; and on 23d May in that year the nomination was made and accepted by the landlord, and entered into his books; and the ish of the lease is now the death of Thomas Wilson.

On the other point, I think it is proved that the crofts in question have been possessed by the tenant of the two other farms for more than forty years; and therefore I think that in all points the Lord Ordinary's interlocutor should be affirmed.

LORD NEAVES thought the interlocutor of the Lord Ordinary was erroneous, not as to the lease of Mains of Crombie, but as to that of Tillyfaff—and also as to the adjacent crofts. He thought that by the words in the lease of Tillyfaff it was intended that the tack there granted was to exist for the same number of years as that of Mains of Crombie, not that it was to expire at the same point of time. The lease of Tillyfaff accordingly would be in its thirty-eighth year in 1823; and as there was no nomination of a life made until 1825, the lease of Tillyfaff was invalid. His Lordship further was of opinion that it had not been proved that the crofts had been possessed by the tenant of Tillyfaff.

LORDS COWAN and BENHOLME concurred with the Lord Justice-Clerk.

The SOLICITOR-GENERAL, after the delivery of the judgment, moved their Lordships to fix the limits of the two farms comprehended in the leases; and alleged that it was contended on record that, even if the defenders held valid leases of the two farms, they encroached in possession beyond what they were entitled to under the leases. He offered, if there was not sufficient in the summons to raise the question, to amend the summons under the Act of 1868.

The Court were unanimously of opinion that it had never been intended to raise this question under the present record; and that it was not the intention of the Act of 1868 to allow parties, by amendment of the summons, to raise, at the end of the case, an entirely different question from that which was originally in dispute.

Agent for Pursuer—Alex. Morison, S.S.C.

Agent for Defender—John Walls, S.S.C.

Thursday, November 10.

MACFARLANE v. ANSTRUTHER.

*Cautioner—Release—Lapse of Time.* In an action against the representative of the cautioner of an executrix-dative for a share of an executry estate, held that the cautioner had been released, (1) by the length of time (twenty-six years) which had elapsed without any claim having been made; and (2) by the actings of the principal parties, which presumed a discharge of the cautioner.

This was an action at the instance of Miss Isabella Macfarlane, as executrix-dative of her father, against Miss Annabella Anstruther, executrix-dative of the late Dugald Anstruther, and against Mrs Vulliamy, the representative of the cautioner of the