servitude to continue in the exercise of it for forty years together without any attempt to interrupt him." And afterwards he says that "no deed or title in writing is necessary other than the title to the lands for the use of which the servitude is claimed, for the long acquiescence of the owner of the lands burdened fully supplies the want of a written declaration establishing the servitude." Now, this being the established rule when prescriptive possession is founded upon, it is manifest that the proof before the Court is not of a nature to support the claim of a servitude right over the foreshore *ex adverso* of the pursuer's lands, although such a servitude were otherwise maintainable in law, which I greatly doubt.

The legal march being thus fixed, it remains to be considered whether the action at the pursuer's instance must be dismissed, or whether it may not be made available to the pursuer as fixing the march between the respective properties seaward in reference to the use and privilege of gathering seaware *ex adverso* of his estate. This matter of pleading was fully before the Court when the case was advised on June 21, 1866. It then appeared to all of us that should the legal line of march be within the demand made in the conclusions of the summons, there was no technical rule of pleading which stood in the way of effect being given to what was in itself just and reasonable. It is undoubted that neither of the lines of march specifically concluded for has been made out by the pursuer. The march now ascertained is to the north of both of those lines, and intersects to a small extent the area of the "fishyard." This notwithstanding it is, I apprehend, within the power and competency of the Court to declare under this summons what the true boundary is, so that there may be no room for those disputes which have hitherto existed regarding the portions of the foreshore *ex adverso* of their estates over which the parties respectively were entitled to possess and enjoy the right of gathering seaware under their respective titles. The pursuer, if he chooses, may have declarator to that limited extent, and it would, indeed, be unfortunate after all the expense that has been incurred, were any technical rule of pleading to prevent effect being given to the judicial recognition under this summons of the pursuer's right to the extent now ascertained. As regards this last point, I have the authority of the late Lord Justice-Clerk to state his concurrence in the views entertained by the Court, and which, indeed, will be found embodied in the opinion delivered by him in June 1866.

The Court found neither party entitled to the expenses of the proof, but *quoad ultra* found the pursuer entitled to his expenses, which were modified at two-thirds.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agent for Defender—George Cotton, S.S.C.

Saturday, March 2.

FIRST DIVISION.

MACINTYRE *v.* MACRAILD (*ante*, vol. i. p. 216).

Process—Pleading—Admission on Record. A party to a process of interdict having in the Bill Chamber admitted the genuineness of a document and taken a judgment on that footing, alleged on record, after the note was passed, that the document was a forgery, and that his admission had been given previously in the belief that the document was another one which he had signed. Held that he could not be allowed to plead forgery unless he obtained and produced a decree of reduction and improbation.

This is an action of suspension and interdict at the instance of Duncan Macintyre, doctor of medicine, against Donald Macraild, surgeon, and is brought for the purpose of enforcing an alleged agreement by the latter to refrain from practising within certain limits. The complainer prays the Court "to interdict, prohibit, and discharge the respondent from practising medicine or surgery at the slate quarries of South Ballachulish, and in the adjacent villages of South Ballachulish, Brecklet, and Carnock, where the workmen at the said quarries reside, and from otherwise interfering with the professional practice of the complainer and his asssistant, William Willoughby Cole Burton, member of the Royal College of Surgeons of London, at the said quarries and in the said villages."

The agreement sought to be enforced is contained in an obligatory document produced in process, bearing date at Fort-William, 28th November 1864, and said to be written and subscribed by the respondent Mr Macraild.

The note of suspension and interdict made distinct reference to this document. It set forth expressly in its fifth statement that the respondent, "of this date (November 28, 1864), wrote with his own hand and signed the obligation herewith produced." And the obligation was accordingly produced with the note of suspension in the Bill Chamber.

Answers were given in for the respondent to the note of suspension, and the following is the answer to the above-mentioned fifth statement:—"Admitted only that, at the request of the complainer, who represented to the respondent that he was apprehensive that the workmen might wish to have the respondent as their sole doctor, the respondent granted the obligation founded on, and which is referred to. It was the composition of the complainer, though written over by the respondent. *Quoad ultra* denied."

In a separate statement of facts made on his own part, the respondent again said (statement 5), "The respondent thereupon wrote and signed the obligation founded on, which was prepared by the complainer."

The Lord Ordinary having passed the note and granted interim interdict, the respondent reclaimed to the Lords of the First Division, who confirmed the Lord Ordinary's interlocutor. The discussion turned throughout on the terms of the document admittedly granted by the respondent.

The case having come into the Outer House on the passed note, a record was made up by a revisal of the reasons of suspension and answers as these were presented in the Bill Chamber. In his revised answers the respondent made the following statement:—"This pretended obligation is a forged document, and was not written or signed by the respondent, who never knew or heard of its existence till it was produced in the suspension and interdict, and was not aware of its contents till the proceedings were at avizandum in the Inner House. The respondent never wrote or signed any obligation, save that referred to in article 6. . . . With reference to the statement made by the suspender at adjustment, that the respondent, in debating the case before the Lord Ordinary and the Inner House, admitted the genuineness of the document now alleged to be forged, it is explained that the document was

never shown nor its terms in any way made known to him by his agent or any other party till after the case had been taken to avizandum by the Inner House." And he pleaded, "The foresaid pretended document, of date 28th November 1864, on which the present note of suspension and interdict is founded, not having been written or signed by the respondent, the said note ought to be dismissed." The complainer pleaded—"The respondent having admitted that he wrote and signed the obligation No. 4 of process, and having conducted the present process upon that footing until the date of lodging his revised answers, he is barred from pleading that it is a forgery."

The Lord Ordinary (Kinloch) having heard parties, reported the cause, observing in his note:—"In this record the respondent has now inserted the averment that the document so long admitted by him to be genuine, and on the effect of which parties had been at issue as on the only controversy between them, is a forged document. He does not say when, how, or by whom it was forged. He does not present the slightest *prima facie* evidence of the allegation—not even producing genuine specimens of his handwriting. He simply makes the allegation. He does not dispute that he signed a writing, but he says it was another writing, different in its terms from that produced. Of this alleged other writing, he does not give any *prima facie* evidence. He produces no copy or draft either of the one writing or the other, though his averment is that the complainer furnished him with the terms of the document he was to sign. With reference to his own previous statements, his whole explanation consists in saying (statement 11), 'that the document was never shown nor its terms in any way made known to him by his agent, or any other party, till after the case had been taken to avizandum by the Inner House.'

"On this allegation of forgery, the respondent now contends that he is entitled to take his stand. And not only so; but he further contends that the document not being a probative document, but only bearing to be holograph, he is entitled to throw on the complainer the *onus* of proving it to be genuine.

"It appears to the Lord Ordinary to be a matter of the gravest doubt whether the respondent is now entitled to deny the genuineness of this document. He has admitted its authenticity to the Court with a formality which could scarcely have been exceeded by his subscribing a formal attestation attached to the document. It would be of perilous precedent if, after taking the opinion of the Court on the terms of a written instrument, and finding it unfavourable, an unscrupulous litigant were allowed summarily to turn round and allege that the instrument was forged. In the view of the Lord Ordinary the matter is one which touches as well on the respect due to the Court as on the sound administration of justice. Its importance is at once so great and so peculiar that the Lord Ordinary has thought it better to bring it before the cognisance of the Inner House than to deal with it at his own hand. "W. P."

N. C. CAMPBELL was heard for the complainer.

W. N. M'LAREN for the respondents.

At advising,

The LORD PRESIDENT—It appears to me that this is a question of very considerable delicacy and importance, and I think the Lord Ordinary has very properly reported the matter to the Court. Indeed, so far as I know, the circumstances are ltogether unprecedented. The respondent in his answers to the note of suspension admitted quite distinctly, and without reserve or qualification of any kind, that he wrote and signed the document on which the suspension was founded, and he now alleges that it is a forgery, that it was neither written nor signed by him. At first sight, undoubtedly, it appears impossible to allow a party thus to reverse his position and his allegations; but when we look a little farther the difficulty is increased. What the respondent now alleges is that he did write and sign a document on the same subject as the document referred to in the note of suspension, and being aware of that, that incautiously he instructed his agent to admit that the document was written and signed by him; that he had not access to see the document until after the case was heard in the Inner House; and that he then discovered that the document was not the document which he had written and signed, but a different one, which he then saw for the first time, and which is a fabrication and a forgery. Now, all I shall say at present is, that it is possible that all that may be true; and if it is, then unquestionably a crime has been committed against the respondent, for which he is entitled to the fullest remedy. I say nothing just now of the probabilities of the truth of the statement. At present we have nothing to do with that, but only with the question whether the respondent has made an allegation of which he is entitled to have probation allowed. But while I take that view, I must say that the respondent has placed himself in a position which entitles him to no favour; and after what has taken place, I think the respondent is not entitled to allege and prove his allegations *ope exceptionis* in this process. My notion is, that the respondent should not be allowed to state this plea unless he produces a decree of reduction-improbation of the document, the complainer's interests being in the meantime protected by the subsisting interdict. I think, therefore, that we should supersede this case for a limited period, that the respondent may produce such a decree; and if he fails to do so within a limited time, that he should be precluded from maintaining the defence altogether.

Lord CURRIEHILL concurred, his only difficulty being whether the respondent had not already barred himself from pleading the defence.

Lord DEAS also concurred. He thought the peculiarity of the case lay in the fact that the admission had been made in the Bill Chamber. He regarded the respondent's allegation as most improbable, and suggested that if an action of reduction was raised the Lord Ordinary should conjoin it with this process in order that the respondent's admission might be available to the complainer as proof *quantum valeat*.

Lord ARDMILLAN also concurred. He was induced to do so chiefly by the consideration that the complainer's interests were in the meantime protected by the interdict, and he expressed a hope that the respondent would consider well the responsibility, moral as well as legal, which was incurred by a person who made such a charge as he had made and failed to prove it.

The following interlocutor was pronounced:—

"*Edinburgh*, 2*d March* 1867.—The Lords, on report of Lord Kinloch Ordinary, and having considered the record and whole cause, and heard counsel for the parties, remit to the Lord Ordinary to sist process for a certain reasonable period to enable the respondent, if so advised, to institute and follow out to decree *quam primum* a reduction

and improbation of the document alleged to be forged. JOHN INGLIS, *I.P.D.*"

Agent for Complainer—John Patten, W.S.
Agent for Respondont—J. M. Macqueen, S.S.C.

MOORE *v.* FORTH IRON CO.

Process—Jury Trial—A. S. 1841. Circumstances in which a motion for absolvitor, in respect the pursuer had not gone to trial within twelve months after an issue was adjusted was refused.

This was an action of damages by a manager for wrongous dismissal. An issue for trial was adjusted on 3d February 1866. Notice of trial had been given for last Christmas sittings, but on 3d December 1866 it was ascertained that the pursuer could not go to trial at Christmas, and he accordingly countermanded his notice of trial, and gave notice of trial for the ensuing sittings. On 29th January 1866 the defenders made a tender of £1020, 5s., and expenses up to that date, and on 28th February last the pursuer, finding that he could not be present as a witness at the trial in consequence of professional engagements in Spain, intimated to the defenders' agents that he was willing to accept their tender and to pay them the expenses which they had incurred since its date. On the following day—namely, 1st March—the defenders intimated that they intended to move the Court for absolvitor under sect. 46 of the Act of Sederunt of 1841, in respect of his failure tc proceed to trial within twelve months. This motion was discussed to-day.

WATSON for the pursuer.

YOUNG and CLARK for the defenders.

The cases of Blair *v.* Buchanan, 22 D., 1271, and Angus *v.* Grier, 16 D., 303, were cited.

The motion was refused, with expenses.

The LORD PRESIDENT said—I think this motion cannot be entertained. There is no doubt that the rule of the Act of Sederunt is an exceedingly wholesome and expedient one, but it is a rule which might be strained so as to work great injustice, if a certain amount of discretion was not, as there is, left to the Court. I think there has been in this case sufficient cause shown why the rule should not be applied. The kind of investigation necessary with a view to trial was out of the ordinary course, and involved an inquiry into the going business of the defenders. It was not to be expected that they were to give up their business books, and accordingly a very reasonable arrangement was made whereby accountants for both parties, one from Edinburgh and another from Glasgow, were to examine the books at the defenders' works in Fifeshire. This arrangement, however, was calculated to cause delay, and we find that it did so. Then on 3d December last, the pursuer's agent, seeing that the investigation was not sufficiently advanced to justify his going to trial at Christmas, wrote to the defenders' agent that he had countermanded the notice for trial then, and given a new notice for March. It has not been said to-day that the investigation was sufficiently advanced in December to justify the pursuer in going to trial at Christmas; and how do the defenders' agents receive the letter of the pursuer's agent? They were entitled, notwithstanding the countermand, to come to the Court and ask us to fix the trial for Christmas, but instead of that, they go on jointly with the pursuer's agent until recently in preparing for the trial in March. In these circumstances, I think the defenders' motion should be refused.

The other Judges concurred, Lord DEAS observing that, to his mind, it was not immaterial that the acceptance of the tender had preceded the intimation of this motion. The twelve months expired on 3d February, but this motion was not made till 1st March, the tender having been accepted the day before.

Agent for Pursuer—A. Kelly Morison, S.S.C.
Agents for Defenders—Lindsay & Paterson, W.S.

CAMERON AND CO. *v.* GIBB.

Reparation—Breach of Contract—Master and Servant. Circumstances in which a servant found liable in £100 damages to his employers for breach of contract of service.

This was an advocation from Glasgow. The pursuers, who are stationers in Glasgow, sued the defender for £300 damages for breach of contract, he having in September 1864 left their service without their consent, and having before throwing up his engagement clandestinely carried on business on his own account. The Sheriff-Substitute (Glassford Bell) in his interlocutor "finds that the pursuers have proved both by the defender's own admissions, when examined as a witness *in causa*, and by other evidence, that said defender broke his said engagement at the time set forth; and the defender has failed to prove that there was any sufficient ground to justify his so doing, and in particular, has failed to prove either that the pursuers themselves wished to discontinue his services, or that they, on their part, committed any breach of the terms of the engagement: Finds that the pursuers have also proved out of the defender's own mouth that he transacted business with at least thirty customers of his own between January and September 1863, when in the pursuers' employment, and the defender has failed to prove that he did this with the pursuers' consent or acquiescence; it being, on the contrary, proved that the pursuers expressly refused their consent when it was asked, and were ignorant until after the defender left them, that he was so carrying on any private business in breach of his engagement: Finds that immediately after breaking his engagement with the pursuers, the defender assumed a partner and commenced a business, under the firm of James Gibb & Company, of precisely the same character as that carried on by the pursuers, and for nearly fifteen months of the time he ought to have been in the pursuers' employment entered into an active competition with them in nearly all the districts in England and Scotland in which they had customers, whereby the pursuers' emoluments were seriously affected." He therefore found damages due, and assessed them at £150. The Sheriff (Alison) altered, but only to the effect of reducing the damages to £100.

Both parties advocated.

FRASER and R. V. CAMPBELL were heard for the pursuers.

MACKENZIE and CATTANACH for the defenders.

The Court adhered to Sheriff Alison's judgment.

At advising,

The LORD PRESIDENT—The first question is whether the pursuers have made out the two grounds of damage libelled. I can see no reason for doubting the soundness of the leading findings in the Sheriff-Substitute's interlocutor. It would be a mere waste of time to go into the evidence. The defender was not entitled to read the memorandum of engagement in the way he says he did,