Act 1573, cap. 55. The question seems to me to depend upon the intention of the testator.

Now, without going into any detailed analysis of the words of the deed, I am quite satisfied that the words were chosen with a view to a possible divorce. What is the meaning of the words in the provision for payment of the annual proceeds which I have just quoted if read according to their natural meaning. Mr Scott says that the meaning is that if the marriage were dissolved by divorce the wife was to have the fee during the life of both, the marriage being terminated; if the marriage was not terminated by divorce, then the wife was not to get the fee till the death of her husband. The Dean of Faculty says the meaning is, that the father had in view the possibility of a divorce, and that the meaning of his words is that even in the event of a divorce the wife was not to become entitled to the fee of the property until the natural death of James Mason.

In regard to the latter part of the clause, relating to the period at which the rents were to be paid, it seems to me expressly to dissociate that term from the dissolution of the marriage by divorce, and to fix it specially at the date of the husband's actual death. The clause relating to the fee is also ambiguous, but I am inclined to arrive at the same view of its meaning, that what the testator had in his mind was the natural death of James Mason. Though it is impossible to say that this meaning is clearly expressed, I am of opinion—distinctly so—that the Lord Ordinary is right, and that the testator, to guard against the possibility of the husband having at any time any interest whatever in the fee, and having in his mind the possible contingency of divorce, used the words he did for the express purpose of meeting this contingency.

At first I did not see how this could have affected the testator's mind, but I have since come to see that the divorce being in absence, the friendly letters passing between his daughter and her husband, and the other circumstances of the case (*cf.* 14 S.L.R. 592) might have weighed with him in keeping the husband out altogether, and in making the term of payment the date of the husband's natural death.

In conclusion, I may say that I do not think the children have any *jus quæsitum* whatever.

Lord Ormidale—I have come to the same conclusion as your Lordship. In construing this deed it is of great importance to keep in view that it is not a marriage-contract, or granted in any way *intuitu matrimonii*. If it had been, then a rule of construction would have been introduced which has nothing to do with the matter as it comes before us. The deed was executed fifteen years after the pursuer's marriage, and its object seems to me to be to counteract the effect the marriage had in so far as it gave the husband an interest in his wife's succession. The law regulating marriage-contracts and all such deeds is therefore out of the question, and we come to the construction of this deed independently of that element.

Now, it is not unimportant that whereas we have language in the deed expressly pointing out the actual death of one or other of the parties, we have had no case quoted in which the natural meaning of the ordinary word has been construed to mean anything different, except in the three cases relating to the marriage-contracts.

As to the consideration of what was the testator's intention, I am not much affected by it. I do not think we have anything to do with that consideration if the language of the deed is otherwise clear. A testator may be fantastical or absurd if he pleases, but that does not entitle us to interfere if his language is otherwise clear. But I think it is not unnatural that the testator here might have had it in view that there was a possibility of a divorce, and even that the husband might return afterwards and be desirous of uniting himself with the pursuer again. There being nothing therefore in this deed to enable us to construe it differently from what its own language imports, I think it clear that the natural death of the husband is what was intended, and that therefore we should adhere to the Lord Ordinary's interlocutor. I must add that I think that the children's interest might be materially affected if we decided differently.

Lord Gifford—I do not differ from your Lordships, but perhaps I have felt more difficulty in coming to a decision. I agree that this is not a case relating to husband and wife in consistorial law; it is merely a question of construction of a deed. But this does not exclude the idea that the testator may have looked to divorce as being equal to natural death so far as the marriage was concerned, and so meant his deed to be construed. But where I am compelled to agree with your Lordships is, that the words used have reference to the actual death of the husband even after the possible contingency of divorce. But I may say that I should not have been at all embarrassed even though "death" were the only term used in holding divorce equivalent to it if the other facts of the case were consistent with this interpretation.

I think it very difficult to say that I could not reach the intention of a testator in any other way than through his actual words. I can conceive a case of an annuity to a wife payable on the death of her husband being paid on divorce; but it is unnecessary for me to go on multiplying examples, as in the present case, as I have stated, I am constrained, for the reasons I have, given to concur with your Lordships.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Scott—J. A. Reid. Agents—Renton & Gray, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Fraser)—Rhind. Agent—Wm. Officer, S.S.C.

Friday, October 18.

SECOND DIVISION.

[Sheriff of Argyllshire.

M'ARTHUR *v.* JONES.

Statute 1686, *c.* 11 (*Act for Winter Herding*)—*Trespass—Where held that Cattle Trespassing were not Lawfully taken Possession of.*

The Act 1686, cap. 11, imposes a penalty of half a merk on the owners "for ilk beast they shall have going on their neighbours' ground," and enacts that "it shall be lawful to the

heritor or possessor of the ground to detain the said beasts" until payment.

The owner of cattle that had been poinded under the Act presented a petition for their restitution by the poinder. It was proved that the herd of the latter had got within six yards of the cattle with the intention of taking possession of them, that they then moved along the public road, and were not turned till they had gone 200 yards. *Held* that they had not been "detained" in terms of the Act, and that the owner was entitled to their restitution.

On 16th June 1877 the defender Duncan M'Arthur, farmer, Achadunan, Argyleshire, seized and poinded five cattle belonging to the pursuer William Jones, innkeeper, Cairndow, which he alleged were trespassing on his lands. He did so in virtue of the Act 1686, cap 11, which provides "that all heritors, liferenters, tenants, cottars, and other possessors of lands or houses, shall cause herd," or enclose their cattle "so as they may not eat or destroy their neighbours' ground, woods, hedges, or planting, certifying such as shall contraveen they shall be lyable to pay half a merk *toties quoties* for ilk beast they shall have going on their neighbours' ground by and attour the damage done to the grass or planting;" and declares that "it shall be lawful to the heritor or possessor of the ground to detain the said beasts until he be payed of the said half merk for ilk beast found upon his ground, and of his expenses in keeping the same." The facts in regard to the seizure of the cattle sufficiently appear from the note to the Sheriff-Substitute's interlocutor (*infra*).

The pursuer thereafter presented this petition to the Sheriff for delivery of the cattle, and on the 19th June the Sheriff-Substitute (Home) ordered the cattle to be returned upon consignment of £1 by the pursuer pending further procedure in the action.

After various procedure, the Sheriff-Substitute, on 2d February 1878, pronounced an interlocutor finding that the defender was not entitled in the circumstances to seize the cattle, and accordingly granting the pursuer authority to uplift the £1 which had been consigned.

He added the following note:—

"*Note.*—[After giving reasons for finding that the piece of ground in which the cattle were first seen undoubtedly was part of the defender's farm, the Sheriff proceeded]—On the day on which the pursuer's cattle were seized the defender says he saw them grazing on this piece of ground below the public road, and sent his herd to seize and detain them. As the herd got within a few yards of them they all got on the road and went on before him for about 200 yards, when he succeeded in turning them, and when he had done so two of them had got off the road and were standing above it.

"The action is founded on the Act 1686, c. 11, which, after imposing the penalty of half a merk on each beast trespassing, enacts that 'it shall be lawful for the heritor or possessor of the ground to detain the said beasts until he be paid of the said half merk for ilk beast found upon his ground.'

"The Act therefore imposes a penalty which may either be recovered like any ordinary debt, or may be enforced by detaining the cattle found trespassing. It is contended for the pursuer that as the statute does not authorise cattle seen trespassing to be seized, but only those found trespassing to be detained, there is no right given to follow cattle off the ground on which they have been trespassing unless they have been first seized—in fact that the cattle must be seized on the ground before there can be any authority to detain them. The defender, on the other hand, maintains that it is competent to follow cattle seen trespassing to any distance, and to seize them at any time that they may be found . . .

"But here the cattle never were under the control of the defender's servant till long after they had got on the public road, and though when he turned them two of them were on the defender's ground above the road, this was clearly the result of the act of turning the cattle on a narrow road, not an act of trespass by them on the defender's ground. The defender's servant was therefore, in the Sheriff-Substitute's opinion, no more entitled to detain these two than any of the others—in fact they were all in precisely the same position. But when the cattle got on the road the trespass ceased. They were therefore, in the Sheriff-Substitute's opinion, not found on the defender's ground, but on the road; and there was no authority for detaining them for trespass. The defender's remedy was to sue the pursuer for the half merk for each beast, not to seize them in security after the trespass had come to an end."

The Sheriff (Forbes Irvine) on appeal adhered, adding the following note to his interlocutor:—

"*Note.*—This is a case of some nicety, but the Sheriff has come to the conclusion that the interlocutor appealed against is well founded in law. The primary object of the Scots Act of 1686 seems to be to provide for those cases where a herd of cattle or a flock of sheep, of which the ownership is unknown, is found trespassing. In such circumstances the only course open to the person who suffers by the trespass is to seize the animals *brevi manu* until their owner identifies and reclaims them, and till the fine and the expense of keep be paid.

"It further appears that to justify this seizure the cattle must be on the ground of the seizer, and in the very act of committing a trespass. Where, as in the present case, they are allowed to pass the border, by however short a space, the arrest cannot legally be made. It would otherwise be difficult, if not impossible, to fix any limit or to know how far the right might be extended. The person suffering by the trespass might follow and poind the cattle in their owner's byre, or the sheep in their owner's fold,—a thing which the Act cannot have contemplated. Nor is the person aggrieved deprived of his remedy by this view of the Act. It appears from the tenor of the authorities that actual poinding of the cattle is not essential, and that the sufferer by the trespass may still have the benefit of the Act, and may enforce payment of the statutory penalties, provided that he brings his action at once, and *de recenti* supported by 'such evidence as the nature of cases of this sort admits of,' both as to the fact of the trespass and as to the number of the animals trespassing. (*Shaw and Mackenzie* v. *Ewart*, March 2, 1809, F.C. 237.) By following this course he is also relieved of the burthen of tending and feeding the cattle.

"In a question like this, under a statute

peculiarly Scottish, not much help is to be expected from the practice of any other country except by way of analogy or illustration, but it is not uninteresting to observe that the law of England seems to agree with ours in this particular. In a passage which is still referred to as authority by the lawyers of that country, Lord Coke says—'If a man come to distreyne for *damage feasant*, and see the beasts on his soyle, and the owner chase them out of purpose before the distress is taken, the owner of the soil cannot distreyne them, and if he doth the owner of the cattle may rescue them, for the beasts must be *damage feasant* at the time of the distress.' (Coke, Inst., p. 161.)

"So in *Clements* v. *Milner*, 3 Espinasse 95, an action for seizing a cow alleged to be trespassing, Lord Eldon directed the jury that if the defendant in the act of coming up to distrain the cow had actually got into the field where the cow was committing the trespass before she had been turned out of it, the justification was proved, and they should find a verdict for the defendant. If they were of opinion that the cow was actually out of the *locus in quo* before the defendant had got into it, though he might be in the act of approaching in order to distrain her, they must find for the plaintiff."

The defender appealed to the Court of Session, and argued—Whenever the defendant's servant with an efficient dog and with the intention of taking possession of the cattle got within six yards of them they must be held to have been in his possession sufficiently for the purposes of the Act.

Authorities—*Clements* v. *Milner*, 3 Espinasse 95; *M'Arthur* v. *Miller*, Dec. 3, 1873, 1 R. 248.

Argued for defender—What was created by the statute was a security for a debt grounded on possession. There was not that in the present case, for before the seizure was effected the cattle were 200 yards along the public road, where they could not be lawfully reduced to possession. Possession must be obtained on the ground.

Authorities—Ersk. iii. 6, 28; *Carlberg, &c.* v. *Borjesson, &c.*, Nov. 21, 1877, 5 R. 188.

At advising—

Lord Justice-Clerk—This is a very narrow case, but I am of opinion, and without much difficulty, that both the Sheriffs are right, and that although there was a *conatus* to detain the cattle they were not actually detained till past the ground of the appellant. That seems to me to be the result of the evidence, and I am not at all inclined in any way to stretch the Act in question, which is one of a highly penal nature, and has been so little put in force that there is not a single case in the books relating to it.

The whole question is, Whether there was an inchoate detention? for I think a detention commenced may be completed although the object has got beyond the place or the custody where it originally was. Were the cattle detained at all before they got to the road? I think they were not, and if it be admitted that the detention did not begin till then, I think the circumstances would not fall under the statute.

In regard to the two cattle which are said to have remained on the pursuer's ground, they were in a different position, and it is possible that they might have been properly detained, but the evidence in connection with them is very obscure, and as the *onus* lay upon the appellant I do not think we have materials sufficient to enable us to come to a conclusion in his favour in regard to them.

On the whole matter, I think the Sheriffs were right, and that the appeal should be dismissed.

Lord Ormidale and Lord Gifford concurred.

Appeal dismissed, with expenses.

Counsel for Pursuer (Respondent)—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Appellant)—Solicitor-General (Macdonald)—Mackintosh. Agent—John Gill, S.S.C.

Saturday, October 19.

FIRST DIVISION.

[Lord Ormidale, Bill Chamber.

MAULE *v.* TAINSH.

Process—Act of Sederunt 11th July 1828, *sec.* 72—*Suspension of a Decree pronounced in Defender's Absence, and Extracted, without Application to be Reponed.*

After a decree *in foro* had been granted owing to the alleged negligence of the defender's agent, and had been extracted, and the reclaiming days allowed to pass without any application to be reponed being made—*held*, on the authority of the case of *Lumsdaine* v. *Australian Company*, December 18, 1834, 13 S. 215, that a note of suspension of the charge upon the decree fell to be refused.

In a petitory action at the instance of James Tainsh, liquidator of the firm of William Stewart & Company, timber merchants, Leith, against John Maule, builder, in the earlier stages of which the defender had appeared, decree was on the motion of the pursuer's counsel given against him by the Lord Ordinary (Rutherfurd Clark) "in respect of no appearance by counsel or agent for the defender at repeated callings of the cause this day in the procedure roll." The days allowed for reclaiming elapsed without any application being made by the defender to be reponed, and the decree was extracted, and a charge given thereon. Maule then presented a note of suspension of the charge, and on consignation the Lord Ordinary on the Bills (Ormidale) sisted execution. He afterwards, after hearing counsel, refused the note, and added the following to his interlocutor:—

"*Note.*—It cannot be doubted, and was not disputed, that the decree in question must be dealt with as one *in foro*, and that the reclaiming days were allowed to elapse without the complainer availing himself of the opportunity they afforded of getting reponed.

"The decree being now extracted, and a charge having been given thereon for a balance of £32, 11s., the complainer has presented the present note of suspension, in which he refers to an action of reduction which he has also brought, and yesterday executed, against the respondent.

"According to the complainer's statement the decree was allowed to pass against him through