Now, is that proposal not binding on the landlord? If there should be a subsidence by reason of the mineral workings, is the landlord entitled to say, "I admit there is a subsidence, and that it arose from my mineral workings, but you cannot get the damage fixed by arbitration; you must bring an action in the Court of Session with the chance of having it appealed to the House of Lords." Why? Because the landlord says that he was not working the minerals lawfully, but in delict, and the tenant could have stopped his working by interdict, and therefore he must bring his action into Court. I cannot assent to that proposition. I do not know, and we have not the materials before us on which to form an opinion, that the tenant could have interdicted his landlord from working the minerals as he did. Even assuming, which I do not decide, that the law is the same between a landlord and tenant as between the owners of two separate estates, I cannot hold that the tenant could have interdicted his landlord from working. Assume that that mode of working the minerals was the very way contemplated when the lease was entered into, and the damage that happened was the very damage that the parties intended should go before the arbiter, I cannot listen to the landlord when he says that he had worked the minerals in a wrong way, and therefore the tenant must go into Court with his claim. I think that if the landlord designedly or undesignedly caused the damage complained of, that the landlord must pay for it, and that the tenant is entitled to have the loss caused by the damage assessed in the manner provided for in the lease.

My opinion is that the tenant is right in his contention, and that this subsidence was damage provided for by the clause in the sub-section upon which the defender relies.

As regards the contention that the clause applied only to damage arising from operations done above ground, and not from below by withdrawal of support, no doubt the ground might have been damaged by use made by the colliery owner above ground, and that use might have been so greatly against the tenant's interest that he could have interdicted the landlord from acting in that manner. That again might have raised the question whether it was necessary for the mine owner in the proper exercise of his rights to have used his tenant's ground in such a manner as to cause damage. Could the landlord in such a case have said, "I did the damage, but I did it in delict, and although I am liable in damages these cannot be ascertained by the arbiters, but must be settled by an action in the Court of Session." I think that the tenant has stated a relevant defence to his landlord's claim for rent, and that the damage caused to his farm must be assessed in the manner provided for in the lease.

LORD RUTHERFURD CLARK—I concur in Lord Young's opinion, but I confess I do so only with great difficulty.

LORD LEE and the LORD JUSTICE-CLERK concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Reclaimer—D.-F. Balfour, Q.C.—Baxter. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Asher, Q.C. —Vary Campbell. Agent—Alex. Heron, S.S.C.

Thursday, June 26.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

ROBINSON AND OTHERS (DALHOUSIE'S TUTORS) *v.* STEWART.

Church — Glebe — Boundaries — Decree of Presbytery.

Terms of a decree of presbytery fixing the boundaries of a glebe, which was *held* to be so clear as not to admit of construction by evidence of possession.

Early in the present century a new church and manse were built in the parish of Lochlee at some distance from the old site. In consequence of this change of site the proprietor of Lochlee and the minister of the parish presented a petition to the Presbytery of Brechin praying them to take the legal steps for making an excambion of the existing glebe for a new glebe nearer the new manse. After certain procedure, and a remit to practical men as assessors, along with the Presbytery of Brechin, and also to a land surveyor, and after perambulation of the ground, the Presbytery on 21st June fixed the boundaries of the new glebe. The minute of the meeting of that date bore—"Pursuant to the injunction of last meeting, the Presbytery proceeded to perambulate the ground intended for the new glebe of Lochlee, and having viewed the line of march formerly specified, they proceeded to fix the march stones for said new glebe as follows, viz., on a hillock at the foot of the Broad Pool of Dalhowan, and then proceeding in a straight line to the source of the burn of Glascourie, another stone near the foot of the hill; from thence, passing by the prop. of Greenbush, to the source of the said burn of Glascourie, and from thence in a straight line to Scots well, in which line there are two march stones planted; from Scots well till it issue in Brannie, and along the Brannie till it issue in the Water of Mark; from thence along the waterside of Mark to the Broad Pool of Dalhowan; and the Presbytery did, and hereby do, discern the whole arable land, hill pasture, moss and muir within said boundaries, to be the exclusive property of the minister of Lochlee, present and to come; and they discern the former glebe and privileges to belong to and to be the exclusive property of the Honourable William Maule of Panmure, and his heirs and

successors in all time coming, and the said excambion to take place from and after the date of said decision."

In December 1888 Alfred Robinson, of New College, Oxford, and others, the tutors-nominate of the Earl of Dalhousie, brought an action against the Rev. John Stewart, minister of Lochlee, and the Moderator and Clerk of the Presbytery of Brechin, as representing said Presbytery, seeking, *inter alia*, to have it declared that the march between the entailed lands and estate of Brechin and the glebe of the parish of Lochlee ran in the lines marked on a plan produced along with the summons.

The Rev. John Stewart lodged defences. He denied that the line of march set forth by the pursuers was the true one, and produced a plan on which the march was differently set out. He alleged that the boundary claimed by the pursuer was inconsistent with the decree of Presbytery and with the possession since the date thereof.

The Lord Ordinary (KINNEAR) allowed parties before answer a proof of their averments, and the pursuers having reclaimed, the Court adhered.

Proof was led with regard to the natural features and lie of the ground, and the possession of parties.

On 22nd November 1889 the Lord Ordinary, having considered the proof and whole cause, assoilzied the compearing defender from the conclusions of the summons, and decerned.

"*Opinion.*—The only question which requires consideration is, whether the decree of the Presbytery is so explicit in its description of the boundaries of the glebe as to exclude the inference which must otherwise have been drawn from the evidence of possession. The evidence is all in favour of the defender, but it is said to be inadmissible because of the clear and unambiguous language of the minute of the Presbytery.

"The pursuers' construction of this minute, however, is not consistent with the conclusions of their summons. It is a material part of the argument that what the minute describes as the source of the burn of Glascourie must be a certain definite point, because the boundary on the west, according to the pursuers' construction, is described as running in a straight line from a march stone marked B on the plan produced to another march stone marked C, and thence in a straight line to the source of the burn, and the boundary on the east as a straight line from the source of the burn to the march stones E and F. It is a necessary part of their case therefore to identify the source of the burn, and they maintain that the true source is a perennial spring at the point marked W on the plan. If this be so, the glebe must extend as far to the north as the spring at W, and accordingly Mr Cunningham says, that reading the minute of the Presbytery with reference to his survey of the ground, the true march appears to him to be, as he has laid it down in dotted lines on the plan, from B C on the west to W, and thence to E F on the east. On the pursuers' theory, and assuming the source of the burn to be the spring at W, there appears to me to be no reasonable construction of the minute which will not carry the northern point of the march at least as far as W. But the conclusion of the summons is that the march shall be declared to be a line commencing at A on the plan, thence proceeding in a straight line through the march stones marked B and C until it meets the line described as the march on the east at the point marked D Now the point marked D is 150 yards from the spring at W. The difference may not be of very material importance considering the size of the glebe. But it is impossible to pronounce a decree of declarator which shall fix the boundary line within the glebe instead of at the true march, thereby excluding an appreciable portion of the glebe land, although it be only a very small portion. But the conclusions of the summons lay down a perfectly distinct and well defined line as the line of march, and the pursuers cannot have decree in terms of these conclusions if this is not the exact line.

"But it is not desirable that the case should be decided on so narrow ground, because the real difference between the parties is much more substantial, and on this larger question I am of opinion that the pursuers have failed to show that the glebe should be confined within the boundaries proposed by Mr Cunningham. The burden lies upon them in the first instance, because they are seeking to disturb the existing state of possession. I agree that if the terms of the minute which embodies the decree of the Presbytery are perfectly clear and explicit no amount of possession will enable the minister to prescribe a right beyond the boundaries thereby fixed. But there are two points in which it appears to me that the language of the minute is by no means so clear as the pursuers have represented it, and on these points, I think, evidence of possession is admissible and of great value. It is not evident from the language of the minute alone, and without going beyond it, whether the line from the second march stone to the source of the burn at Glascourie is meant to be a straight line, and it is not clear what is meant by the source of the burn.

"There is no presumption of law that a line of march which is described by specifying the points between which it is to run must be a straight line. There may be a presumption of fact which will be stronger or weaker according to circumstances, but which may be rebutted by other evidence, if evidence be admissible. But to raise this presumption it would appear to me that the straight line must be a convenient and suitable line for a boundary, and the evidence is that in the present case a straight line would be so far from suitable that it is highly improbable that such a line would be selected by practical men. The question which thus arises on the construction of the minute of 1803 cannot in my opinion be determined by reference to the previous

minute containing the report of a committee. It is said that the judgment of any court must be read with reference to the proceedings. But that is only for the purpose of ascertaining the question which the court was required to determine. To control the terms of a final deliverance of the Presbytery by those of a report of committee, which might or might not have been adopted, would appear to me to be altogether inconsistent with the settled rules for the construction of written instruments. I cannot assent to the view that the committee's report is imported by reference into the minute, so as to make it a part of the decree of the Presbytery. As I read the minute, the Presbytery, when the question had been matured by the previous proceedings, proceed to the ground that they may view the proposed glebe for themselves, and lay down the marches according to their own judgment. That they took their committee's report into consideration is highly probable. But whether they followed it exactly or not can only be ascertained by comparing the terms of the report with the terms of the final decree. If they are not identical, the rights of parties must be determined by the final decree, which must speak for itself, and is not to be interpreted by any previous recommendation of a committee, which the Presbytery was not bound to follow. If the language is clear the decree must be conclusive. If it is susceptible of two constructions, the possession which has followed for the period of prescription must determine the extent of the right.

"On similar grounds, I think the defender is entitled to found on prescriptive possession to explain what is meant by the source of the burn. It is said that the true source is proved to be the spring at W., because that is the highest perennial spring to which the water of the burn can be traced. But this spring is considerably within the watershed; and it appears that at all times of the year there is water coming into the burn from the higher ground beyond the spring. When Mr Cunningham visited the ground in dry weather there appears to have been very little water coming into the burn from the higher ground. When Mr Bett saw it there were dozens of streams. It is said, however, that at any time this is mere surface water which cannot with any propriety of language be described as the source of the burn. But the question is not whether it would be more accurate to describe the perennial spring as the true source of the burn; but whether the Presbytery, who were describing the line of march by features of the ground which were apparent to the eye, must be supposed to have meant the spring, or to have meant the highest point from which the burn appeared to derive its supply of water. If this were to be determined without the aid of any other evidence except for the purpose of ascertaining the character of the ground, it would appear to me to be a somewhat doubtful question. There is weight in the pursuers' argument. But there are considerations on both sides. This is just one of those points, therefore, on which evidence of possession may be very useful, and on which prescriptive possession will explain the title.

"If the possession which has followed the decree may legitimately be appealed to in order to explain it, the evidence appears to be conclusive in favour of the defender. There may be a question whether the minister has possessed as glebe the whole ground within the line of the watershed, or only the line described as the brow of the hill. But it is certain that he has always gone at least to the brow of the hill, and has never been confined to the area described by a straight line drawn across the corrie to the spring at W. The pursuers object, and I think rightly, to the admission of evidence of general understanding as to a matter which is not of public right. But the evidence of importance is that of actual possession from the remotest time to which the memory of the witnesses will reach until the year 1853, when the glebe was taken on lease by Lord Dalhousie. The parties are agreed that the leases throw no light upon the question of boundaries. But the evidence of Mr Stewart shows that Mr Low, who was minister at the date when the first lease was granted, believed that the march extended from the march stones by the watershed, and this belief was entirely in accordance with the possession which he enjoyed during his incumbency. There seems to be no room for doubt therefore as to what the parties must have understood in 1853 to be the glebe included in the lease, and there is no question as to the extent of the ground of which the defender was allowed to resume possession in 1887, when the lease came to an end.

"The summons is so expressed as not to admit of any decree by which the march should be defined unless it is described exactly in the conclusions. The defender must therefore be assoilzied, on the ground that his glebe extends considerably beyond the limits described."

The pursuers reclaimed, and when the case came up before the Inner House they asked to be allowed to amend the declaratory conclusions of the summons by substituting the point W for the point D set forth in the summons, and on the plan produced therewith.

The pursuers argued—With this alteration the march which they set forth was in conformity with minute of Presbytery. In construing that minute it was competent to refer to the previous minutes of Presbytery, and only to them, to remove any ambiguity there might be. Evidence of possession was not admissible—*Davidson* v. *Magistrates of Anstruther Easter*, January 28, 1845, 7 D. 342; *Buttey & Company* v. *Inglis*, November 3, 1877, 5 R. 58—March 21, 1878, 5 R. (H. of L.), 87, *per* Lord Blackburn, p. 102.

Argued for the defender—The minute of 21st June 1803 was ambiguous, and in construing it the Court should be guided by the evidence of possession, which was in

favour of the construction contended for by the defender. The Court was not entitled to look at the previous minutes.

At advising—

LORD PRESIDENT—Proof was granted in this case as I understand by Lord Kinnear generally for the purpose of clearing up the facts as regards the natural features and lie of the ground, but not to the exclusion of evidence of possession if it was thought desirable on either side, and if it was thought to help the construction of the minute of Presbytery. It was not decided that evidence of possession would control the terms of the minute if the minute would not bear any construction but one with reference to the other circumstances of the case. On the contrary, if not ambiguous, the minute could not be controlled by contrary evidence of possession.

Now, I have come to the conclusion that the minute of the 21st June 1803 is not liable to any ambiguity, and if so, and if the lines of the boundary of the glebe can be clearly laid down on the map, the minute is not liable to construction at all, and comes to have very much the nature of a bounding charter.

With regard to the argument that in construing the minute the previous proceedings of the Presbytery are to be looked at, I rather think that they have the effect of darkening counsel, and do not throw any light on what the Presbytery actually had in view in 1803, so that I am driven therefore to a consideration of the terms of the minute itself, which I find to be plain, and to give a solution of the question.

An excambion was being made of the old glebe of Lochlee for a new glebe, which was to be substituted in its place, and of course it was natural and indeed necessary, in fixing the boundaries of the new glebe, that these should form the subject of a careful delimitation by the Presbytery, and accordingly they set themselves to work in this way. A reference was first made to a line of march formerly specified, which I gather to have been a kind of rough statement of what was to be the quantity of ground to form the new glebe. I do not think there is any reference there to what may be called a fixed line of march, but only to a line of march specified in a rough way to be definitely laid down afterwards by the Presbytery; and according to that view they proceed—as they themselves state—to perambulate the ground intended for the new glebe, and to fix march stones generally, of course in the lines previously suggested; but still it was in the power of the Presbytery to say what should be the precise line of the new boundary, and accordingly they expressed themselves thus—"They proceeded to fix the march stones for said new glebe as follows, viz., on a hillock at the foot of the broad pool of Dalhowan"—that is a well-established point, for we are informed where the pool was, though it is now dried up, and accordingly the line of march starts just from where it was—"and then proceeding in a straight line to the source of the burn of Glascourie, another stone near the foot of the hill." Now, that may mean that the Presbytery proceeded in a straight line towards the source, or that they proceeded in a straight line to the foot of the hill, but as they actually perambulated the whole line of march on that side in a straight line, and left a stone at the foot of the hill, I do not think it matters much in which way they were held to have acted. The decree proceeds—"From thence passing by the prop. of Greenbush to the source of the said burn of Glascourie." Now, it is contended that the "straight line" is not there repeated. But a line "passing by the prop. of Greenbush" was on the straight line to the source, and therefore the words must mean that the Presbytery pursued the course which they had begun, and on which they were going to lay down march stones.

That fixes the march on the one side. Then having left the source of Glascourie they proceeded "in a straight line to Scotswell, in which line there are two march stones planted, from Scotswell till its issue in Brannie, and along the Brannie till its issue in the water of Mark, from thence along the waterside of Mark to the broad pool of Dalhowan." Now, about the straight line from the source of Glascowrie to Scotswell there is no doubt. It is one where two march stones are planted, and accordingly we find, drawing such a straight line, that it passes two march stones.

These seem to me to be perfectly intelligible boundaries, and now that we know the features and nature of the ground this minute is shown to be not uncertain, and evidence of possession cannot be admitted to control its meaning. The evidence we have also is not of the nature of contemporaneous exposition. It is not the fault of the minister. It is impossible that we should have that in construing so old a document; but it is important that that is not the nature of the evidence, and that it is all necessarily of more recent date.

I am sorry, therefore, that I cannot agree in the views of the Lord Ordinary. I think the minister is confined in his possession to the conveyance of the two straight lines of which I have spoken, and also, though the pursuer made a mistake of fixing the point D as the point of convergence of the two straight lines, as if it had been the source of the burn of Glascowrie, I think they amend their summons and adopt the letter W on the plan, covering the point of convergence which is really the source of the burn, being the well from which the stream proceeds. What is above that is clearly just the gathering of the water, the true source of the burn is the fountainhead, a well from which the burn proceeds.

LORD ADAM and LORD M'LAREN concurred.

LORD SHAND was absent.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusions as amended, and remitted to the Lord Ordinary to proceed as should be just.

Counsel for Pursuers—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defender—Sir C. Pearson—Law. Agents—Menzies, Coventry, & Black, W.S.

Thursday, June 26.

FIRST DIVISION.

PATERSON, PETITIONER.

Process—Judicial Factor—20 and 21 Vict. cap. 56, sec. 4.

Held that a petition for appointment of a judicial factor on a trust-estate, where the trustees had ceased to be able to act in terms of the trust-deed, was properly presented to a Division of the Court, and not to the Junior Lord Ordinary.

Maurice Paterson, John Wordie, and Alexander Donaldson were appointed to act as trustees under an antenuptial contract of marriage, dated 10th October 1874, entered into between William Macpherson and Miss Ann Amelia Boswell. It was *inter alia* declared in the contract "that so soon as the acting trustees under these presents are reduced to two, they shall be obliged to nominate and appoint at least one other trustee to act along with them in the management of the said trust; and there are hereby conferred upon the said trustees who may be assumed from time to time the whole powers, privileges, and exemptions conferred upon the trustees hereby named."

The trustees accepted the office conferred on them, but Alexander Donaldson died on 23rd August 1889.

The present petition was presented by Maurice Paterson on June 24th 1890 to the First Division. He averred that since the death of Alexander Donaldson he and the other surviving trustee had been endeavouring in terms of the marriage-contract to obtain the consent of some person to act as trustee under the said antenuptial contract, but had been unable to find anyone willing to accept the office. He accordingly craved the Court to appoint a judicial factor on the trust-estate.

The petitioner argued—That petition was competently presented to a Division of the Court — Distribution of Business Act; *Dixon's Tutor*, July 17, 1867, 5 Macph. 1052.

The Court, holding that the petition was competently presented to a Division of the Court, ordered intimation and service, and appointed a judicial factor *ad interim*.

Counsel for Petitioner—Shaw. Agents—Cairns, M'Intosh, & Morton, W.S.

Saturday, June 28.

FIRST DIVISION.

[Sheriff of Forfarshire.

CLARK *v.* CLARKES.

Bankruptcy — Cessio — Sale of Heritable Estate.

Held that the trustee in a *cessio* has power to sell the heritable estate of the debtor without making application to the Sheriff under sec. 15 of the Act of Sederunt anent Process of Cessio (22nd December 1882).

Cessio of the estates of David Wilkie Clarke was granted by the Sheriff of Forfarshire and James Constable Robertson, accountant, Dundee, was appointed trustee in the *cessio* by deliverance dated 7th and extracted 23rd May 1889. On 29th May David Wilkie Clarke granted disposition *omnium bonorum* in favour of the trustee. On 27th September 1889 the trustee exposed for sale by public roup certain heritable property in Dundee belonging to the cessioned estate. The property was purchased by George Clark, and the subjects were disponed to him by disposition dated 30th November, 2nd, 6th, 7th, and 13th December, and recorded 30th December 1889.

The present action was raised by George Clark against David Wilkie Clarke and his son James Clarke for the purpose of obtaining warrant to eject them from certain premises included in the subjects disponed to him by the trustee in David Wilkie Clarke's *cessio*.

The defenders averred that the only competent mode in which the trustee on a cessioned estate could sell heritable property belonging to the estate was by making application to the Sheriff under sec. 15 of the Act of Sederunt anent Processes of Cessio (22nd December 1882), which provides that "on an application by the trustee or by any creditor, the Sheriff may at any time call a meeting of the creditors to consider and dispose of any matters specified in such application." Mr Robertson had not conformed to this procedure in selling to the pursuer. He had made no application to the Sheriff under the section quoted, nor had any creditor done so. He had not obtained the authority or consent of the Sheriff, or even of the general body of creditors. The pretended sale to the pursuer and disposition following thereon were therefore null and void.

The defenders pleaded—(1) The pursuer has no title to sue.

On 28th March the Sheriff-Substitute (CAMPBELL SMITH) found that the defences were not relevant, therefore repelled them, and granted warrant of ejection as craved.

The defenders having appealed, the Sheriff (COMRIE THOMSON) on 16th April dismissed the appeal and adhered to the interlocutor appealed against.

"*Note.*—It appears to me that the defender here is a mere squatter or tenant at will, and that he has set forth no title, and