of delaying for five years the final extrication of the two estates, a delay which manifestly must have in some measure embarrassed the management of the trustees in the administration of the trust-estate, and I think that the judgment of the Court I have already quoted, points at a modification, greater or less, of the rate of interest upon the sum of £25,600.

Now, instead of a great modification of the interest of this sum, I think a simpler course would be to adopt a lesser modification upon the interest of the whole capital, and I would propose that on his whole capital the General should be entitled only to interest at 4 per cent. from 1859 to 1864.

After 1864 I see no reason to allow him less than the legal interest, at 5 per cent.

I have only further to observe, that from 1859 downwards, the General must give credit for his possession of the mansion-house and house farm of Stonebyres of a fair sum as rent, to be fixed by arbitration.

Lord Cowan and Lord Neaves concurred with Lord Benholme.

Lord Justice-Clerk—I concur generally in the opinion which has been given by Lord Benholme, that the trustees of James Douglas are liable only for the actual proceeds of the estate as invested by James Douglas down to 1859, the period at which it was fixed by the Court that the estates were subject to be divided; but I differ in regard to the period between 1859 and 1864, and I think that the same rule should be applied to that period as to the preceding, and that the same principle of accounting should regulate it. The whole estate was vested in the trustees by James M. Douglas, who acted in *optima fide;* and his trustees were bound to vindicate the position he had taken up. They could not, while the question was being determined, at their own hand alter the investment; moreover, from the time of serious challenge, they, by bringing the multiplepoinding into Court, placed the administration of the estate under control of the Court. They did not act as proprietors of the estate, and they would have acted rashly if they had done so. The Court decided in 1859 that the estate of Archibald Monteith was to be separate from James' estate; but it was not till 1864 that General Douglas elected not to take the estate of Stonebyres. The General during all this time claimed to retain possession, and to pay no more than the estate originally cost, rejecting altogether the sums expended by James. It appears to me that this claim was made in such circumstances as to paralyse the trustees. It remained uncertain whether he would take the money or the estate, and I am unable to see how the claim for interest during this period can be maintained. I feel the effect of the former judgment as somewhat different from my views; but the interlocutor of the Court does not exclude the opinion I now give.

Agent for Trustees of J. M. Douglas—Melville & Lindsay, W.S.

Agent for Judicial Factor on Major Monteith's estate—Alexander Howe, W.S.

Agents for James Douglas—Dundas & Wilson, C.S.

Friday, June 7.

HUNTER *v.* COCHRANE.

Commonty—Decree—Possession—Negative Prescription—Nonuse—Proof—Onus. A decree of the Court of Session in 1764 being construed to find that certain specified lands were held by two proprietors as a commonty, (1) Held that the successor of one could not constitute, as against the successor of the other, an absolute right of property, unless he could establish not only disuse by the latter during the prescriptive period, but his own exclusive possession by acts inferring an absolute right of property. (2) Held that the proof established no cessation of possession by one party, and no exclusive possession by the other. (3) Held that, standing the decree, the *onus* lay upon the party challenging or asserting a possession inconsistent with it.

This is an action brought by Mr Hunter of Easter Colzium against Mr Cochrane of Harburn, for division of the lands of Broadbents, in the parish of Mid-Calder and sheriffdom of Edinburgh, which the pursuer alleges to be a commonty belonging to him and the defender. The pursuer alleges that he has possessed the lands as a commonty upon titles conferring upon him an express right; which titles, and the possession which had been had upon them, had been interpreted by a decree of the Court of Session in a question between his and the defender's predecessor in the year 1764, which established a right of common property in these common predecessors in the lands in question. He also alleges that he and his predecessors and authors have, since the date of the said decree, possessed the said lands by exercising rights of commonty upon them, and especially by the pasturing of sheep. When the case came into Court, the defender objected to the title of the pursuer to insist upon a division of the commonty, maintaining that his titles and the decree foresaid gave him no higher right than one of servitude; and further, that, even if the pursuer had once had a right of common property in the lands, he had lost it by not exercising it for forty years, and that he (the defender) had had for the same period a continuous, adverse, and exclusive possession, which had destroyed any rights the pursuer ever had. He claimed the lands of Broadbents as his exclusive property, though he did not dispute that the pursuer might have servitude of pasturage over them. The defender had no title conveying the lands of Broadbents to him expressly, but he claimed them under a clause of parts and pertinents of the lands of Crosswood Burn, which form part of the estate of Harburn, of which he is proprietor.

The Lord Ordinary (Jerviswoode), before whom the action depended, allowed parties a proof of their averments, and appointed the pursuer to lead in the proof, although the pursuer contended that the *onus* lay upon the defender, who sought to dispossess him from the lands by establishing a possession of them adverse to and destructive of his express titles. A lengthened proof was led as to the use of the commonty since the date of the decree of 1764, and especially during this century. Thereafter the Lord Ordinary found (1) that the pursuer had failed to prove that since the date of the decree, or for forty years prior to the date of the present action, he had possessed the lands; and (2) that the defender had possessed for forty years and upwards, "by pasturing sheep and cattle, by killing game thereon, and by excluding the pursuer, his predecessors, and authors," from using the lands for such purposes. His Lordship therefore assoilzied the defender, with expenses, saying, *inter alia,* in a note, that he was of opinion that

"the great weight of the real evidence of the use of the subjects is with the defender."

Against this interlocutor the pursuer reclaimed.

MACKENZIE and MACLEAN for him argued. The decree of 1764 fixed the rights of parties as common proprietors of the Broadbents; that, to overcome an express right, continuous adverse and exclusive possession was required; that the pursuer's use of the subject only required to be such as to show that he did not abandon his right, but asserted and used it; that the proof showed that, since the date of the decree, he had exercised the right of pasturage over it in a way sufficient to preserve his rights of property.

FRASER and DUNCAN, for the defender, maintained that the decree of 1764 only gave the pursuer's predecessor a right of servitude; that, even if it established a right of property in him, that had been lost *non utendo*, and by the exclusive use of the subject disclosed by the proof, to have been had by him and his predecessors in Crosswood Burn.

At advising—

LORD JUSTICE-CLERK—The question raised in this case involves the application of some important principles of law. The pursuer is the proprietor of the estate of Easter Colzium, and his titles contain *per expressum* a conveyance to a subject described as the commonty of Broadbents. He institutes the present action in order to have the subject divided under the provisions of the Act for division of commonty. The defender is proprietor of the lands of Crosswood Burn, of which he affirms the lands of Broadbents to be a portion. His title does not bear any special reference to these lands, The lands of Broadbents, on his view, are proper parts and pertinents of Crosswood Burn, not common to him and to the proprietor of Easter Colzium, but exclusively his own. He objects to the action as one based upon an assumption of mutual right, whereas, on his view, the right of property is absolute in him. Such a defence, if established, is necessarily fatal to the action.

It appears that a question arose as to the rights of the parties, then in right of the subjects held by the parties respectively, as to this same piece of ground in the year 1764; and we are referred by the pursuer to the decision of this Court as finally fixing the rights of parties. He affirms that, upon a sound construction of the decision, it decided that Broadbents was held in property by the proprietors of Crosswood Burn and Easter Colzium in common, and he appeals to it as having, between parties then in the full right of the same properties, definitively settled the question.

The defender contests the proposition that the decree does in effect decide the question of joint property. It was argued by the defender's counsel that the decree, in effect, decided only that the proprietor of Easter Colzium had a servitude right, and that the right of the then proprietor of Crosswood Burn was absolute.

I am unable to concur in this construction of the decree. It seems to me to be inconsistent with the words used, and with the whole tenor of the action as disclosed in the decree itself. There is no finding of the right of property being in one subject to the burden of a servitude right in the other. The contention was exclusive property on the one hand, as opposed to alleged common property on the other. The proof and the pleadings all tend to the same result.

I reject, therefore, as inadmissible the defender's proposition, that the question of common property was not decided. The result is, that by a final judgment of this Court, proceeding upon a consideration of the parties' titles and the then state of possession, the predecessor of the pursuer was found entitled to the property of this land in common with the proprietor of Crosswood Burn.

This decree, however, is not necessarily conclusive of the question now raised. It is possible that a condition of matters may have supervened, altering the rights so declared. But this imposes upon the party who seeks to deny effect to it a very serious *onus*. As it appears to me, the decree must have effect given to it, and we must deal with the parties as vested in the rights therein declared, unless two separate things concur. One is the loss of the benefit of the decree by the party in whose favour it was pronounced, by virtue of the negative prescription; and the other is the acquisition of the exclusive, as opposed to the common, right of property by possession under his titles of the subject for the prescriptive period as sole proprietor. These conditions must concur. It would not be sufficient for the case of the defender that there was a simple failure to exercise right of property for forty years on the part of the pursuer; it is necessary to show, in addition, such a possession as to broaden his own title, and this can be accomplished only by proof of exclusive and absolute possession for a period of forty years subsequent to the decree by which it is found that he is only a proprietor in common. Such a condition of the fact occurred in the case of the *Earl of Wemyss* and the *Magistrates of Perth* touching the island of Sleepless. The right, as ascertained by an ancient decree, found that the island was the property of the town, subject to a partial servitude of pasturage. When the question occurred again, after the lapse of a long period, the Court sustained the relevancy of a defence that the town had not exercised any act of possession under their decree for a period of forty years; while Lord Wemyss, under his title of parts and pertinents, had exercised such acts of possession, of a character so absolute to his neighbouring barony, and exclusive of right in the town, as to be inconsistent with the right of the town to the property so possessed.

The question is, Has the defender, on whom that *onus* emphatically lies, shown the loss of right by the negative prescription on the part of his adversary, and a possession so exclusive and so clear and indisputable, so as to alter the condition of his right as fixed by a solemn judgment of the Court?

The question does not, I confess, appear to me to admit of being solved by considering the evidence in the case under the aspect under which the Lord Ordinary has regarded it, if we may judge from his note.

His view of the evidence may be correct; but it does not seem to me that, assuming its correctness, it justifies the legal result to which his Lordship has come. If the question had been an open one, and unaffected by the previous decree of the Court, the view of the Lord Ordinary is probably just. There are acts in the proof of the kind of possession had by the defender which are more pregnant as inferring a right of property than the acts of possession on the part of the pursuer during a period of forty years. The construction of a fold upon the land, the burning of heather, the actual herding on the ground, the acts, particularly during the period of the tenancy of a person named Noble, which go to show the driving off of sheep from the commonty, point to the assertion of right, and a

state of possession indicative rather of absolute than common property. In a competition where the matter had not been determined judicially before, these facts would have been material; but when it is not proved, as I think it is not, that for any period of forty years together there was a cessation of actual pasturage of the Colzium sheep; when we find, on the contrary, by evidence which it is impossible to gainsay, that the shepherds of Colzium did constantly, except perhaps during Noble's time, view the Broadbents as a part of their farm, and follow a course of pasturing apparently in practice at the date of the decree, by collecting their flocks from below, so that they might range over that very ground. Can I hold that there was no right exercise in virtue of the decree by the proprietors of Colzium. The period during which exclusive possession is affirmed to have taken place commences about 1814. If the facts stated by the defender and by a number of the Colzium shepherds are true, there was not only no cessation of possession, but a constant assertion of it. Take the period about 1839, when Mr Hunter first became connected with the property, can we reconcile them with the assertion that the decree was given up? I do not find that any admission by any writing, by any act, brought clearly before the proprietors and inferring the non existence of their right. The acts of alleged removal of the Colzium sheep never seem to have been brought under the notice of any proprietor of the land, except Mr Laing, who is very far from admitting that the act was lawful. I doubt if it is proved that they were done even in the knowledge of the Colzium shepherds, and they may be to a certain extent explained by the necessary separation of the sheep. As to shooting over the ground, I think the evidence of the pursuer's sons, fortified by Mr Pott's, is nearly as good as the defender's. On the whole, I come to the conclusion that for no one period of forty years has it been shown that the possession has been exclusively with the defender, and that for no period of forty years has the pursuer failed to exercise a right of pasturing the common under his decree.

His Lordship then shortly noticed the defender's argument—that the pursuer's was a mere right of servitude, assuming him to have one; and said, he could not agree to the proposition that, pasturage being a right consistent with mere servitude, the proprietor's right would he lost and reduced to a mere servitude right if it were proved that no act inferring property was proved to have been done by the pursuer.

The other judges concurred.

Their Lordships therefore recalled the Lord Ordinary's interlocutor; found the defender liable in expenses since the date of his lodging defences; and remitted to the Lord Ordinary to proceed with the cause.

Agent for Pursuer—W. Traquair, W.S.

Agents for Defender—Jardine, Stodart, & Frasers, W.S.

Saturday, June 8.

FIRST DIVISION.

MORISON AND MILNE *v.* BARTOLOMEO AND MASSA.

(*Ante*, vol. iii, pp. 94, 366.).

Reparation—Verdict—Insurance—Ship—Assignation. Pursuers of action of damages for injury to ship by collision obtained verdict and moved that it be applied. They produced assignation in their favour, by insurers, of claim against injurers of ship; objection by defenders, that pursuers had already recovered compensation from insurers, repelled, and verdict applied.

The pursuers, owners of the schooner "Scotia" of Aberdeen, sued the defenders, the owner and master of the barque "Ghilino" of Genoa, for damages on account of injury done to the "Scotia" through the barque of the defenders having come into collision with it. The defenders brought a counter action against the owners of the "Scotia," on account of injury done to their barque "Ghilino" by the said collision. The actions went to trial in April last.

In the course of leading the evidence the defenders, owners of the "Ghilino," proposed to put in a policy of insurance on the "Scotia" for £350, and a receipt by the owners of the "Scotia" for the sum in the policy, in abatement of damages. The pursuers objected. It was agreed, after discussion, that the evidence should be received: that the jury, in assessing the damages, should leave out of view the sum already received by the owners of the "Scotia" from the underwriters, on account of the collision, and that there should be indorsed on the verdict a special finding by the jury that the sum in the policy had been received by the owners of the "Scotia."

In both cases the jury found for the owners of the "Scotia," finding them, in the action in which they were pursuers, entitled to £566 damages. The special finding was indorsed on the verdict.

J. M'Laren (with him Young) for the pursuers, now moved the Court to apply the verdict, and produced an assignation in their favour by the underwriters of their claim for damages against the wrongdoers.

Asher (with him Gifford), for the defenders, opposed. He contended that the owners of the "Scotia," having already, admittedly, received £350 from the underwriters on account of the collision, could not recover the full damage found by the jury, but only the difference between what they had already received and the sum in the verdict. In point of fact, all that the jury had found, as the loss and damage due to the pursuers, was the difference between the whole sum of damage and the sum received from the underwriters. The effect of payment by insurers to the parties insured, for injury suffered, was to put them in the place of the insured, with full right to recover any compensation that might be recoverable from the party doing the wrong—*Stewart* v. *Greenock Marine Insurance Company*, 13th Jan. 1846, 8 D., 323; Addison on Contracts, 845. Therefore, whenever the underwriters paid the owners of the "Scotia" the sum in the policy, they became vested with the right to receive compensation from the defenders; and, if they did not choose to press their claim, still that did not entitle the owners of the "Scotia" to insist. If the owners of the "Scotia" had gone in the first instance against the wrongdoers, they could not now have gone against the underwriters, and, in like manner, having gone first against the underwriters, they were barred from recovering damages a second time from the defenders.

Lord President—I think that any difficulty there might seem to be in the case is removed by the assignation. With that before us, the owners of the "Ghilino" have no longer any interest to oppose. The damage inflicted by them has been