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 possesson 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

said Annabella Anstruther in her confirmation as executrix-dative foresaid.

Dugald Anstruther died intestate on February 8th, 1843. His personal estate, which consisted mainly of shares in the ship 'Falcon,' fell to be divided among five persons. One of these, the defender Annabella Anstruther, was decerned executrix-dative, the amount of the estate being £1254, 5s. 4d. Matthew King became her cautioner in the confirmation, and the defender Miss Vulliamy is his representative. The mother of the pursuer, who was entitled to a fifth share of the estate, died in 1852, and was survived by her husband, who died in 1853. The pursuer attained majority in 1863. The pursuer further alleged:—"The said John Macfarlane was at sea when the said Dugald Anstruther died; and except during a few days in the year 1846, when the ship which he sailed as master happened to be loading at Glasgow, he continued to be absent from Scotland till the year 1851. His wife was absent along with him from and after the year 1845. On returning to this country, and ascertaining his rights in reference to his wife's share of the said Dugald Anstruther's executry-estate, the said John Macfarlane, in the year 1852, demanded from the said Annabella Anstruther, as Dugald Anstruther's executrix, an account of her intromissions, and payment of the amount of his wife's said share. At the date of his death, however, he had not succeeded in getting payment. The pursuer was, when her father died, unable, from her youth, to take any charge of her affairs, having been then only about eleven years of age; but she has now reached majority; and having recently learnt the existence of her rights as now claimed, she proceeded to take steps for the vindication thereof. She has repeatedly desired and required the said principal debtor, and the said representative of the said cautioner, to make payment of the sums now sued for; but they refuse, or at least delay to do so, whereby the present action has been rendered necessary."

The defenders Mr and Mrs Vulliamy pleaded—"(1) The pursuer is bound, *ante omnia*, to discuss Annabella Anstruther, the principal debtor. (2) The action is barred by *mora* and taciturnity. (4) The pursuer's claims are sopited, and the obligations of the cautioner and his representatives discharged by the acts of the pursuer's predecessors and authors. (5) The debt sued for having been paid, the defenders are entitled to absolvitor. (6) The pursuer, the said John Fulton Anstruther, and the said Annabella Anstruther, being acting in concert for the collusive purpose of extorting payment from the defenders of a claim settled and paid, or, at least, abandoned and discharged by the parties interested, the defenders are entitled to absolvitor."

On 18th May 1869 the Lord Ordinary (ORMIDALE) sisted the action until the pursuer should have had a reasonable opportunity of discussing the other defender, Annabella Anstruther. And on 9th June he pronounced this interlocutor:—

"The Lord Ordinary decerns against the defender, Annabella Anstruther, *qua* executrix-dative to the deceased Dugald Anstruther, in absence, to make payment to the pursuer, *qua* executrix-dative to the deceased John Macfarlane, of the sum of £139, 7s. 4d. sterling, with interest thereon, in terms of the conclusions of the summons, with expenses."

Thereafter a search was made for the principal debtor Annabella Anstruther, for the purpose of executing a warrant of imprisonment against her but without success.

The defender Mrs Vulliamy presented a minute to the following effect:—"Maclean for the minuters, with reference to the pretended discussion of the principal debtor, stated and asked leave to instruct the following facts:—*First*, That the pursuer is the neice of the principal debtor, and has since her childhood resided and now resides in family with her at Port-Glasgow. *Second*, That the principal debtor is possessed of monies and furniture and other estate in Port-Glasgow. And *third*, That the pretended search for the person of the principal debtor was a collusive and fraudulent device on the part of the pursuer and her, between whom it had been arranged that the latter should absent herself from Port-Glasgow at the time when the search was to be made. The principal debtor accordingly went to Glasgow for the day. After the search was over she returned to her house in Port-Glasgow, and has resided there continuously ever since."

The Lord Ordinary allowed the proof craved, and thereafter pronounced this interlocutor:—

"*Edinburgh*, 14*th June* 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it proved, as matter of fact, 1st, That the pursuer is the neice of the principal debtor, Miss Annabella Anstruther, and has since her childhood resided and now resides with her in family at Port-Glasgow; 2d, That said principal debtor is the owner of some furniture and other estate; 3d, That no attempt has been made by the pursuer to attach or make available said furniture or estate towards payment of her claims in this action; and 4th, That the search founded on by the pursuer as having been made by her for said principal debtor with a view to her incarceration, in order to enforce payment of the claims against her in this action, was a mere colourable and collusive proceeding, not intended to operate any real discussion of said principal debtor: Finds, in the foregoing circumstances, and in respect the pursuer has had ample time and opportunity for discussing said principal debtor, which she has not availed herself of, that the defenders, Mr and Mrs Vulliamy, are now entitled to absolvitor: Therefore assoilzies said defenders from the conclusions of the action, and decerns: Finds said defenders entitled to expenses; allows them to lodge an account thereof, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—This action, which the Lord Ordinary thinks there is some reason for believing was from the beginning got up not very fairly towards the defenders, who are now assoilzied, has been in dependence for no less than six years. Nor can it be said that this great delay has been unavoidable or occasioned by proceedings in Court. On the contrary, it has arisen entirely from the procrastination of the pursuer herself and her advisers, indulged in by them for no legitimate purpose that the Lord Ordinary can see. He thinks it therefore high time that such a system of procrastination, which has been justly complained of on the part of the defenders now assoilzied, should be put an end to.

"The summons in this case is peculiarly constructed. In place of concluding for one decree against all the defenders, the cautioners as well as the principal debtor, superseding extract against the former till the latter should be discussed, the

summons concludes for decree against the cautioners only after the principal debtor has been discussed, and in the event only of the sums sued for then remaining unpaid. The Lord Ordinary, therefore, having regard to this peculiar structure of the summons, by interlocutor of 18th May 1869 sustained a plea of the defenders to the effect that the action should be sisted *quoad* the cautioners till the principal debtor should have been discussed; and the pursuer, acquiescing in that interlocutor, took decree against the principal debtor on 9th June thereafter. It was in virtue of this decree that the pursuer, after great delay, went through the form of a search for the person of the principal debtor with a view to her incarceration, and, founding on that search, she has maintained that there has been such discussion as entitled her to decree against the cautioners. The latter then lodged the minute No. 30 of process, setting forth the circumstances in reference to which they contended, in effect that the alleged discussion was a mere colourable and collusive proceeding; and they craved to be allowed an opportunity of proving the facts and circumstances alleged by them. The Lord Ordinary accordingly, by interlocutor of 23d February last, after hearing parties 'on the minute for the defenders, No. 30 of process, and the proof therein asked not being opposed by the pursuer, who at the sametime stated she did not admit the statements therein,' allowed the parties the proof referred to.

"The proof was adduced on the 28th of March last, but the debate was postponed till the summer session at the desire of the pursuer, and to afford her 'an opportunity of producing the correspondence which took place between the pursuer and Mr Macallum and Mr Barclay' (her country and town agents), 'or at least of considering whether that correspondence ought not to be produced.' Certain letters bearing to be written by the pursuer to her Edinburgh agent, Mr Barclay, were produced so recently as the 17th of last month; but it is obvious that these letters do not complete the correspondence. They make reference to letters of Mr Barclay, not one of which has been produced.

The first question discussed at the debate before the Lord Ordinary was whether or not it had been established that the search for the principal debtor, on which the pursuer founded as discussion of her, was a *bona fide* or a collusive and colourable proceeding. The Lord Ordinary thinks it must be held that the proof supports the latter view. It shows, according to his reading of it, that Mr Anstruther, the uncle of the pursuer, is and has been throughout the prime mover in the whole matter. The correspondence, one-sided and defective as it is, produced on the part of the pursuer on the 19th of last month (Nos. 35–46 of process) of itself sufficiently shows this. And if so, there can be no doubt as to the true character and object of the alleged search, for, according to the testimony of Mr Anstruther himself when examined as a witness for the pursuer, he ascertained from, or, as the Lord Ordinary has little hesitation in thinking, arranged with Mr Macallum, who is said to be the pursuer's country agent at Greenock, the day and hour when a messenger-at-arms was to be sent to Port-Glasgow to search for the principal debtor; and accordingly on that day, and previous to that hour, care was taken to have her taken out of the way. As for the pursuer herself, when first examined she stated that she knew little or nothing of the action at all, that she never authorised it, and that she never would have thought of incarcerating her aunt, the principal debtor, and never authorised any such step to be taken, or search for her being made with a view to her apprehension and imprisonment. On her re-examination, however,—in the meantime having been tutored by her uncle, Mr Anstruther,—she retracted to some extent her previous testimony, and endeavoured, the Lord Ordinary thinks very unsuccessfully, to explain it away. The conduct, indeed, both of the pursuer and her uncle, on the day of their examination, was so reprehensible that the Lord Ordinary is disposed to think that he is chargeable with having been remiss in the strict discharge of his duty in not marking his sense of it at the time in a manner that would have operated as a better check to the repetition of such behaviour than any remarks he can now make on the subject. Be that, however, as it may, the Lord Ordinary is sorry to feel himself obliged to say that he can place no reliance on the testimony of the pursuer, so far as favourable to herself. She and her aunt directly contradict each other on the material point,—her knowledge of the aunt going out of the way preparatory to the search being made. She denies any such knowledge, while her aunt distinctly swears to the opposite conclusion. But without entering into any further detail, the Lord Ordinary has merely to say that he thinks no serious doubt can be entertained, on a consideration of the whole proof, that the finding in the preceding interlocutor, as to the true character of the alleged search, is well founded.

"It was, however, maintained, in the second place, for the pursuer, at the debate before the Lord Ordinary, that let the character of the search be what it may, and supposing it to be thrown aside altogether, the charge of horning or payment given to the principal debtor was, in this, as it is in every case, sufficient discussion. The Lord Ordinary cannot adopt this view, and it certainly could not have been entertained by the pursuer herself, or her advisers, when the Lord Ordinary allowed to the defenders a proof of the averments in the minute, No. 30 of process, 'the same not being opposed by the pursuer.' But independently of this consideration, the Lord Ordinary thinks that the contention of the pursuer is not only not supported, but opposed by the authorities—and in particular, he would refer to Stair, 1, 17, 5; Erskine, 3, 3, 61; and Bell's Principles, sections 252–3; and also to Menzies' Lectures (pp. 209-10, 1st ed.) where the law and the decided cases in illustration of it appear to be very distinctly explained. With reference to these authorities, and keeping in view that it has been proved in this case that the principal debtor is possessed of some estate, and, in particular, of some furniture, and a claim on her uncle's bankrupt estate, which has not been attempted to be attached and made available, it does not appear to the Lord Ordinary that it can be held there has been discussion of the principal debtor in respect merely of the charge of payment which was given to her. Nor can he hold the two cases of *Henderson*, 3 S. p. 133, and *Macdonald*, 7 S. 845, cited and relied on by the pursuer, to be adverse authorities. The reports of these cases are exceedingly meagre; but the Lord Ordinary had the advantage of having the session papers in them examined before him at the bar, and also the fuller report of *M'Donald's* case as given in the Scottish Jurist. The result was to

satisfy the Lord Ordinary that in *Henderson's* case the Court must have been influenced by the specialty that the party there charged stood in the position of a judicial cautioner in a process of advocation, and that in *M'Donald's* case the alleged cautioner was, in the special circumstances which there occurred, viewed and dealt with as being in no better or more favourable a position than the principal debtor himself. The Lord Ordinary must therefore hold that the authority of Stair, Erskine, and Bell remains unaffected by the cases of *Henderson* and *M'Donald*, and that the cases of *Arnot* v. *Abernethy*, Mor. 3587; *Stewart* v. *Fisher*, Mor. 3588; *Brisbane* v. *Monteith*, ib.; *Milin* v. *Græme*, ib.; and of *Douglas* v. *Lindsay*, Mor. 8125,—which appear to be very much in point, must still be held to be governing precedents.

"If the Lord Ordinary be right so far, he thinks there can be no doubt that the defenders, Mr and Mrs Vulliamy, are now entitled to absolvitor, and that it would be imposing on them a hardship for which there is no sufficient justification to keep the present action depending over them any longer."

The pursuer appealed.

RHIND, for her, pleaded that a cautioner could not be relieved, except by a positive act of the creditor in giving time, by arrangement, and that mere delay or forbearance was not sufficient. Cases quoted—*Crichton* v. *Ranken*, 26th May 1840, 1 Robinson's App. 132; *Young* v. *Edmunds*, 6 Bingham's Rep. 84.

SHAND and MACLEAN, for Mrs Vulliamy, answered that there was no authority where the delay had been so great as in the present case.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has dismissed this action on the ground that the principal creditor has not been discussed. I am inclined to agree with his Lordship, because I think that the proceedings in the search were collusive; but I prefer to put my judgment on another ground. I am of opinion that there is a prejudicial plea which is sufficient to dismiss the action, viz., that the cautioner is relieved from his obligation, in respect that the creditor has allowed twenty-six years to elapse without taking any steps to realise the debt; and further, that there have been transactions between the creditor and debtor which are sufficient of themselves to loose the cautioner. Even if it were made in good faith, a claim against a cautioner which is delayed for twenty-six years ought not to be sustained, not on the ground that the creditor has given the debtor time, which implies an arrangement by which the position of the debtor is improved and that of the cautioner injured, but on the ground of lapse of time. Simple delay for so long a time is sufficient to loose the cautioner. But there are statements in the record by the defender, admitted by the pursuer, which show that proceedings took place between the parties sufficient to release the cautioner. It appears that the executry-estate consisted mainly of shares in a vessel called the 'Falcon,' and it is not denied that in 1850 John Fulton Anstruther became proprietor of one-half of the ship 'Falcon,' during the lifetime of John Macfarlane, father of the pursuer. Thereafter it is alleged by the defender that John Fulton Anstruther executed a bond and vendition in security for £1500 over his share of the ship 'Falcon,' in favour of his sisters, including the mother of the pursuer, which bond was granted and received by the parties as payment and discharge of all claim at their instance against the executry-estate of Dugald Anstruther. That statement is denied in words by the pursuer, but the bond and vendition is admitted, and it is explained that the deed was granted in connection with a claim of the grantees for their shares in their father's estate, and not in the estate of their brother Dugald. I think that transaction amounts to a payment of Mrs Macfarlane's share of the executry-estate. Looking to the whole circumstances of the case, which has been in Court since 1864, I think we shall only do justice by dismissing the action, and holding that the cautioner has been liberated by the lapse of time and the actings of the parties.

LORDS COWAN, BENHOLME, and NEAVES concurred.

Defender assoilzied accordingly.

Agent for Pursuer—James Barclay, S.S.C.

Agents for Defender—J. & R. D. Ross, W.S.

Thursday, November 10.

FIRST DIVISION.

GOURLAY AND OTHERS *v.* WATT AND MACMILLAN.

Contract — Fraud — Relevancy — Issues. Circumstances in which the purchasers of a vessel were not allowed an issue in an action of damages against the sellers, except upon a relevant allegation of fraud; and there having been a contract test or criterion fixed upon, viz., that the ship should be *de facto* classed A 1 at Lloyds for a certain number of years, which test had been complied with, issue of breach of contract refused. Amendment of record allowed so as to admit a more specific allegation of fraud; and issue of fraud adjusted and approved.

In January 1869 Messrs Henry Gourlay & Company, acting for the pursuers, purchased from the defender Watt a ship named the 'Spray of the Ocean.' A sale note passed between the parties in the following terms:—"*Dumbarton, 20th January* 1869. —Messrs Henry Gourlay & Company, Glasgow.— I have this day sold you the ship 'Spray of the Ocean,' of 805 tons register, to be classed nine years A 1 at Lloyds from the date her first class expires, with sails repaired, for the sum of £5600 sterling, £2000 cash down, and balance when finished. The ship to be at our risk till out of the Leven. (Signed) WILLIAM WATT." The ship was at this time in the dry dock of Messrs A. Macmillan & Sons, Dumbarton, of which firm the defender Macmillan is a partner. The pursuers immediately paid the £2000 as agreed on. The defenders proceeded to make certain repairs in the ship, and on 15th February delivered her to the pursuers, who on 19th February paid the balance of the price, and on 25th February she was registered in the pursuers' names as owners. In March the defenders handed to Messrs Henry Gourlay & Company a certificate of character of the vessel from Lloyds, stating that she had been classed and entered in the register book of the said society with the character A 1 for nine years from 1867.

The pursuers averred that when the vessel was delivered she was in an utterly unseaworthy condition; that the defenders knew that to be the case; but nevertheless induced the pursuers to