Friday, July 17.

SECOND DIVISION.

[Lord Young, Ordinary.

GORDON PLACE *v.* EARL OF BREADALBANE.

Property—Possession—Absence of Evidence.

A dispute having arisen as to the property in a certain piece of land lying on the margin of two estates, parts of which had been let under joint leases to one tenant, an action of declarator was raised by one proprietor against the other—*Held* that the defender was entitled to be assoilzied, there being a total absence of evidence as to the property in the subjects, and possession having been with the defender through persons holding a lease from him.

Process—Evidence—Admissibility of old Map.

Question—Whether an old map made by pursuer's ancestor and kept in the possession of the family throughout, was admissible in evidence.

Opinion (per Lord Ormidale) that in a dispute as to boundaries the natural lie of the ground can only be at most an adminicle of proof.

This was an action raised by Mr Gordon Place of Crianlarich against the Earl of Breadalbane, seeking to have it found and declared that certain lands, as marked on a plan in process, belonged to him in virtue of his titles. The facts of the case were fully stated by the Lord Justice-Clerk in delivering judgment.

The interlocutor reclaimed against was as follows:—

"10*th March* 1874.—The Lord Ordinary having heard counsel for the parties, and considered the proof adduced and whole process—Finds that the pursuer has failed to establish that the lands of Strongarvie, referred to in the record, belong in property to the pursuer, and have always been possessed by him and his authors, and those deriving right from them, as their property: Therefore assoilzies the defender from the whole conclusions of the summons, and decerns: Finds the pursuer liable in expenses," &c.

The pursuer (reclaimer) contended that an old map of his estate (against the admissibility of which in evidence the Lord Ordinary decided) would, if it were admitted, be a valuable item of proof where there was no evidence at all, and that, as such, it should be admitted.

Authorities—Taylor, 698, §§ 713, 1282; Starkie on Evidence.

At advising—

LORD JUSTICE-CLERK—My Lords, the summons in this case concludes that it ought and should be found and declared that a certain piece of ground, which is described by its boundaries and by reference to a map, forms part of certain lands which are here stated to be "all and whole the lands of Innerheriff and lands of Crenlarich, with the shealings of Stronowa, and whole pertinents thereof, all lying in the barony of Glenfalloch, parish of Killin, and shire of Perth, and also all and whole the shealing of Corientran, with the pertinents, lying in the lordship of Glendochart, parish of Killin, and Sheriffdom of Perth," and which is known as Strongarvie, pertains heritably in property to the pursuer in virtue of his rights and titles. Before stating what occurs to me as the position of the case with regard to the proof, I may explain what I have come to think is the true configuration of the ground in dispute. Apparently these lands which are here in question are near the water-shed which separates the estate of Loch Dochart from the estate of Glenfalloch. I see by the plans in process that all the streams to the north of this bit of ground run to Loch Dochart and Loch Tay. The Falloch runs to Loch Lomond. In the course of this stream, and close to—apparently very near—its source, these subjects in question lie. Stronowa, which is one of the pendicles of land here referred to—the shealings of Stronowa—lie upon the east, upon the left bank of the Falloch. There is no dispute about that, and no dispute as to the right of property there. On the right, and immediately *ex adverso* of Stronowa, which is apparently of some importance, on the right bank of the stream, and towards the south or south-west, there rises a precipitous hill, represented upon the model before us—a hill apparently of very considerable height—2000 or 3000 feet as the witnesses say. The side or slope of that hill, with the exception of the disputed ground, belongs entirely to Glenfalloch, showing clearly that these lands are upon the boundary line. The other side of that hill belongs to Loch Dochart, and goes by the name of Corientran. The precise denomination of the front slope of that hill, which belongs to Glenfalloch, I have not been able to see; I think it is called the Twisten Hill in the evidence, and I think it forms part of the lands of Cullietur, but it apparently has no distinct name in the titles, so far as that evidence goes. Therefore the nature of the ground is this, that there is Stronowa on the one side, and Corientran on the other side, separated by this piece of ground in dispute. the one side of the hill belonging unquestionably to Loch Dochart. Now, it is said that the pursuer is entitled to a strip of land running from the Falloch up to the summit level of the hill, and thereby intersecting the slope of the hill, which belongs in property to Loch Dochart. That is the disputed ground, and the shape is something like an isosceles triangle, with the apex on the line of the mountain and the base of it along the line of the stream. That being the state of the ground, the question is, is there any title on the part of the pursuer to this particular ground in question, which is called Strongarvie in the summons? In the first place, it is quite clear that the lands of Stronowa and the lands of Corientran belong to the pursuer, and therefore he has a title so far as to acquire contiguous lands as a pertinent of either of the subjects. But, then, on the other hand, the name of Strongarvie does not appear in any of the titles. It also appears, and perhaps not immaterially, that while the lands of Stronowa lay in the barony of Glenfalloch, Corientran belonged to the lordship of Glen-Dochart. I think that not immaterial. There is indication in the evidence that infeftment was separately taken in Corientran. One can understand that, if in fact it was not part of the barony of Glenfalloch, but was part of the lordship of Glen-Dochart, and in the disposition granted in 1825 to Mr Place's predecessor it is so expressly described. Corientran is described as lying within the lordship of Glen Dochart. That makes it more probable that there should be interjected, as

there certainly is, between Stronowa and Corientran, the face or slope of this hill all of which belongs to Glenfalloch except this triangular piece. Therefore the titles really afford no solution of this question, and therefore the pursuer must necessarily prove possession. The possession is not doubtful at all, in one sense. The possession of this piece of ground has been uniformly since 1787—and I rather think for a longer period—in the person of a tenant holding under Glenfalloch. But that truly does not solve the question. There is no doubt that both Corientran and Stonowa, and the face of the hill, whatever its proper denomination may be, has uniformly been in possession of a single tenant, for the very plain reason, apart from ownership, that as a hill grazing it was much more commodious to possess it as one farm than to have separate tenancies. Apparently the whole of this disputed ground, and the whole of these subjects, have been included in the lease of Cullietur which was held by Robert Grieve, and afterwards by his son, from 1801. That is therefore the state in which the actual possession is. On the other hand, it is of importance to notice that Glenfalloch was the tenant of Loch Dochart, principally in Stronowa and Corientran, and that the right the tenant had was a service granted, so far as these subjects were concerned, as a tenant of Loch Dochart. But the fact remains, that Grieve is in possession under a right derived immediately, not from Loch-Dochart, but from Glenfalloch, and therefore what Mr Place has to make out is this, that the lease which was granted to Grieve of this particular bit of ground was a sub-lease granted by Glenfalloch, and not as proprietor. The question is, whether he has made this out. I do not consider he has made it out at all. I can find no indication which would entitle me to conclude in terms of the affirmative of the summons. It may have been so, but there is not the slightest proof, and on the whole my impression is that there is a strong presumption to the contrary. And the reason for that, I think, is this. It is said by both parties that if this ground were given to the one or the other their properties would be severed, and access would be precluded from one part to the other. Now, as regards Stronowa and Corientran, that can hardly be so; on the contrary, it is proved that access was obtained from the ground that belonged to Glenfalloch, and, independently of that, from what is stated in regard to the titles it is extremely probable that there was land interjected between those two portions of Loch-Dochart estate. But, besides that, according to the contention of the defender, the natural boundaries are the true boundaries, and if so, most unquestionably Glenfalloch is on the south-east of the mountain-ridge, and on the north-west of the stream,—the natural boundaries which one would expect from the configuration of the ground; whereas, on the other hand, those lines which are depicted on the plan, so far as I have been able to read the proof, have no foundation in natural features, but are merely arbitrary lines which are laid down and intersect this hill-face where there is no suspicion even of separate title on the one side or the other. I need not go into that, because I think the result of the proof is, that there is no evidence whatever to show that the tenant Grieve from Glenfalloch is a sub-tenant under Loch-Dochart. The only thing remaining to be noticed is that item of evidence which was supposed to be furnished by an estate plan. The Lord Ordinary has refused to admit it. I am unwilling—and I do not think it is necessary in this case—that we should come to any precise opinion as to whether it should have been excluded or not; but I am quite clear that in the circumstances I have stated it does not furnish any evidence of any kind—evidence of title, of course, it could not furnish, and I do not think that, standing by itself, it was any evidence whatever. Whether it could not have been taken, although a private plan, entirely in the possession of one party, as an adminicle as regards possession, or as corroborative evidence of possession, if there had been other evidence to which we could have referred, is another question. It is quite certain that a private plan of this kind may be evidence in some important views—that is to say, everything within the estate itself might be proved with considerable certainty—any dispute between tenants as to their holdings—any dispute as to the contents or acreage of particular parts of the estate of Loch Dochart, between those deriving their rights from a common author—but as to being evidence of boundary between the estate and a third party, who was no party to the plan, and who is not shown to have seen or known of it,—taken by itself,—I do not think it affords any assistance in the settlement of this case; and that being so, I am unwilling to disturb the interlocutor of the Lord Ordinary, although, perhaps, in other circumstances, I should not like to lay down the general proposition that a private estate plan, although kept in the possession of one of the parties, cannot be received in a question of boundary or of possession. On the whole matter, I am of opinion that the pursuer has failed to establish his right to this piece of ground, and that the result the Lord Ordinary has arrived at is altogether inevitable.

Lord Benholme—I agree with the views which your Lordship has expressed, and I do not think that any evidence which has been adduced is sufficient to warrant us interfering with the conclusion at which the Lord Ordinary has arrived.

Lord Neaves—I concur in the opinion which has been expressed by your Lordship and in the grounds on which it rests. I do not think that much practical importance attaches to the question about the admission of this plan, but I think we should adhere to the interlocutor in that respect, and upon this ground: An anonymous plan, or a plan produced *ex parte* on one side, is *prima facie* not evidence, because it is neither the deposition of a living witness, nor is it, so far as we know, the clear report of a dead witness (which is admissible, of course, in Court) so that we can know who it is that speaks and what weight is attachable to it. I think some plans are not only good evidence but most important evidence. Nothing can be clearer than this, that where a succession has diverged upon a pedigree that may be disputed, or where the possession of estates once consolidated has diverged, any plan that can be traced back to the common author or common ancestor is good evidence. In the first place, it comes out without any trace of partiality or interest of any kind attaching to it, and ought to have reasonable effect as a good and valid plan, as distinguished from one coming from a suspected source. But then that implies either that it has come from a common

author, or that it shall have subsisted for such a length of time, and been so used and passed from hand to hand, that we shall have a good assurance that it has been seen by sufficient persons to impugn its correctness if it were incorrect; and that it remained unimpugned is a proof against all who may have seen it, as *prima facie* evidence at least that it was in the belief of the party at the time uncontradicted and unchallenged. But this plan we know nothing about at all. There is no evidence of its antiquity of such a kind as to make it a valid plan; and that it is anything more than a private memorandum about the estate,—that the parties who took possession of the estate sat down to amuse themselves by making plans, sketches, and boundaries, just as they pleased. It will never do to say that merely after the lapse of 30 years,—by the mere lapse of time and no other circumstances,—it has become admissible evidence. I do not attach much importance to it, for really it is not corroborated in any way. In other respects, what can we do? Here is an action brought containing certain statements and insisting on certain conclusions. These statements are not proved, and therefore I do not think we have any alternative but to adhere to the interlocutor of the Lord Ordinary and assoilzie the defender, and I think that that is right since there has been no evidence to the contrary. At any rate, the party who allowed matters to remain in that condition so long has himself to blame for his inability to clear up those rights which he now asserts, but which are so mixed up as to make it difficult to unravel them. I think it impossible to follow any other course than that which your Lordship has suggested.

Lord Ormidale—While I have arrived at the same conclusion, I must confess that it is with some reluctance that I have found myself obliged to say that there seems to be no alternative here but to assoilzie the defender. My reluctance is caused by what I cannot help thinking is the absence of good and complete and satisfactory proof on the part of the defender that this ground belongs to him; but still there is a great deal in the observation made by the defender's counsel,—and it is perhaps sufficient,—that no *onus* lay upon him to prove that the ground belonged to him. It was enough that the pursuer failed to prove that the ground belonged to him, and therefore the defender might very well have declined to lead any proof at all, and stood upon the position which he thought would be quite satisfactory to him, that the pursuer had failed entirely to establish his case. Now, with regard to the question whether the pursuer has failed to prove his case, I entirely concur in the observations made by your Lordship. Not only in there no trace in any of the titles or papers that were founded upon in this case of the name Strongarvie, except in the disputed map, but furthermore, the name of Strongarvie, so far as we can judge by the proof, is, at least among the present generation and to the people living in the neighbourhood of that ground, entirely unknown. Not only has not a single witness been adduced by the pursuer to say he ever heard of the name of Strongarvie being given to that or any other piece of ground, but witness after witness for the defender—shepherds and people living in the country—when the question was put to them "Do you know Strongarvie?—have you ever heard the name?"—did not know any such place and had never heard of it. I think that is a remarkable circumstance, and tells very strongly against the pursuer. But though the name Strongarvie does not appear in the titles, and does not appear to be known among shepherds and others, who, one would fancy, would have heard or known of it, it might be made out by pursuer that it belonged to him by possession, but it is impossible to say that he has established his case by possession. I can easily understand that he was under very great difficulties in regard to that. Perhaps it was impossible, owing to the very great length of time—very nearly 100 years—during which it had been possessed under leases which rendered it almost impossible for anybody to distinguish what was possessed under lease from the one party or under lease from the other. That may be a misfortune the pursuer has to encounter, but we cannot help it. We must look at this matter of possession, and therefore I think I am entitled to say he has established no possession. As regards the natural lie of the ground, that would not go far. It would not have been sufficient in itself although the natural lie of the ground had been conclusive, so far as it went, in favour of the pursuer. It would not go far, and can only be an adminicle; but the natural lie of the ground, as any one would see from that model, is as much in favour of the one as of the other. Therefore, there is nothing on that point. As regards the plan, I think your Lordship has placed it on its right footing. At the same time, I would not have been indisposed to admit the plan in evidence had there been corroborative evidence to entitle us to do so. But not only is there no corroborative evidence, but it strikes me as a very singular circumstance that, while it was brought out in the testimony of Hugh Maclure, C.E., that this particular plan corresponds at three several points with plans on the other side belonging to the Breadalbane family, these plans, so far as I can see, have not been produced or offered in evidence. Therefore this plan, about which we know nothing, has been very properly held to be inadmissible, and I think your Lordship's observation was quite sound that it could not go any length in support of the pursuer's case. Therefore, on all grounds which have been stated, I think the Lord Ordinary's judgment here is sound.

The Court pronounced the following interlocutor:—

> "Refuse said Note, and adhere to the interlocutor complained of with additional expenses, and remit to the Auditor to tax the same and to report.

Counsel for Pursuer — Watson and Asher. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Defender—Dean of Faculty (Clark) and Pearson. Agents—Davidson & Syme, W.S.