the pursuers at liberty to insist on the statutory remedy being enforced if they think it has not been observed.

The third conclusion appears to proceed upon the assumption that decree *ad facta præstanda* shall be pronounced in terms of the first two conclusions, and the pursuers claim that the defenders shall not only be found and declared to be liable for, but also be decerned and ordained by this Court to pay, or to consign, £25,000, or such other sum as "may be ascertained by decree of our said Lords in the present action, or by proceedings by arbitration, or jury trial, or otherwise, in manner directed by the Acts above mentioned or therewith incorporated," to be the amount of the loss and damage sustained by the pursuers prior to the date of the institution of this action.

The fourth conclusion, which is an alternative one, is that in the event of decree not being pronounced in terms of all the three preceding conclusions, the defenders not only should be found and declared to be liable for, but likewise should be decerned and ordained by this Court to pay, or to consign, £200,000, or such other sum as may be ascertained to be the loss and damage of every kind which has been sustained hitherto, or which shall hereafter be sustained by the pursuers and their predecessors in the lands, "as the amount of such loss and damage may be ascertained by decree of our said Lords in the present action, or by proceedings by arbitration, or jury trial, or otherwise, in manner directed by the Acts above mentioned and Acts incorporated therewith."

I advert to these two conclusions together, because they are of the same character, and the objection to which they appear to me to be exposed is equally applicable to both of them. These claims, as already mentioned, are not claims for reparation of wrongs alleged to have been committed by the defenders against the pursuers. The defenders are not accused of having done anything but what they were authorised to do by the statutes under which they have acted. And the conclusions now under consideration proceed upon the assumption that they are not compellable to perform the operations to which the two prior conclusions relate. In short, the sums claimed in respect of loss and damage under the third and fourth conclusions are claims, not for the reparation of loss sustained by the pursuers in respect of wrongs inflicted upon them, but for compensatory loss sustained by them through the legal operations of the defenders in the due performance of their statutory functions. This being the case, these claims of compensation, in so far as such claims may be well founded, are claims arising under these statutes, and the validity and amount of these claims can be ascertained and constituted only in the manner, and through the tribunals, prescribed by these Acts themselves, and by the Acts which have been incorporated therewith, and which include expressly "The Lands Clauses Consolidation (Scotland) Act, 1845," and "The Harbours, Docks, and Piers Clauses Act, 1847." I therefore think that the merits as well as the amount of these claims can be tried only under proceedings of the kind prescribed by these statutes, and not under a declaratory and petitory action instituted in this Court. It may be that questions might incidentally arise in the course of proceedings before these statutory tribunals which might warrant and require the interference of the Supreme Court. But in the first instance, at all events, it is only before such tribunals proceedings for enforcing such claims of compensation can be instituted.

The result, in my opinion, is that, even assuming that the pursuers may have suffered detriment from the operations of the defenders, and also that they may be entitled to redress, they have mistaken the remedies by which alone they can obtain such redress. I have stated the grounds upon which this opinion is founded, referring for a full exposition of them to the Lord Ordinary's note; and his Lordship gives due effect to these views, for, as already stated, he does not give judgment upon the merits of these claims nor preclude their being tried in any appropriate action, but merely dismisses the first four conclusions of the summons.

As to the remaining four conclusions, the Lord Ordinary has appointed farther investigation. I concur also in that appointment, subject to his Lordship's explanation that the order is only tentative.

Lords Deas and Ardmillan concurred, and Lord Curriehill mentioned that the late Lord President did so also.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agents for Pursuers—Dundas & Wilson, C.S.
Agent for Defenders—James Webster, S.S.C.

Friday, March 1.

SECOND DIVISION.

M'TAGGART *v.* M'DOUALL

(*ante*, vol. ii. p. 96).

Property—Lateral Boundary on Foreshore—Summons—Conclusions. 1. Application of principle laid down in the previous report of this case. 2. Where a pursuer concludes to have a particular line declared as the legal march between him and another, it is competent to fix a different line within the line concluded for.

Servitude of Gathering Seaware. A right of gathering seaware for the purpose of being converted into kelp is inconsistent with the nature of a predial servitude, not being for the advantage of the dominant tenement, but a mere means of obtaining mercantile advantage. *Question*, whether there can be a servitude of gathering or cutting seaware for the purposes of an estate.

This is an action at the instance of Sir John M'Taggart of Ardwell, Bart., against Colonel M'Douall of Logan. Both these gentlemen are proprietors of lands on the west side of the Bay of Luce. The conclusions are for declarator that, as proprietor of the lands and barony of Ardwell, the pursuer has exclusive right to the wrack, ware, and waith growing or drifted upon the shores adjacent to and *ex adverso* of his lands up to a line extending from certain march stones erected at the termination of the land boundary between the estates of the parties to a stone called the Caughie Stone, situated below low-water mark; or otherwise up to another line further north than the first-mentioned line drawn from the said march stones, and running to the south of an erection upon the seashore known as the Ardwell Fishyards. The defender, whose lands lie to the south of the pursuer's, and are also held under a barony title, claimed a different line of boundary running further north across the foreshore, alter-

natively either the line of the land boundary produced, or a perpendicular dropped from the said march stones upon what he calls the *medium filum* of the Bay of Luce. Both parties relied both upon their legal rights as proprietors on the seashore and on immemorial possession; and the defender also contended that, even if the boundary were fixed to be either of the lines contended for by the pursuer he had acquired by prescription a servitude of gathering wrack and ware beyond the march. The Lord Ordinary (Kinloch) dismissed the action as laid, on the ground that the pursuer, who averred that the true legal line lay to the south of the Caughie Stone, had not properly raised the question as to his legal rights, and that the proof as to possession (even if possession in such a case could be competently founded on to constitute a right) was conflicting and unsatisfactory. His Lordship stated in his note his view as to the proper mode of laying down a lateral boundary across the foreshore, holding that the rule, founded on the analogy of the case of Campbell *v.* Brown, 18th November 1813, F.C., was to take a line out at sea, showing the average direction of the sea coast, and to drop a perpendicular upon that from the end of the land boundary.

Both parties reclaimed.

At advising on 21st June 1866, the Court recalled the Lord Ordinary's interlocutor, as proceeding on too narrow and technical grounds; and, adopting the general principle as to such lateral boundaries as stated by the Lord Ordinary, remitted to Dr Keith Johnston to lay down a line representing the average direction of the sea-coast, and a perpendicular drawn to it from the end of the land boundary, with leave to lay down such other lines as the parties should suggest, or as should tend to elucidate the points at issue. An elaborate report was made by Dr Johnston, illustrating, on scientific principles, the whole question as to lateral boundaries on the foreshore, and tending to show, *inter alia*, that the principle adopted by the Court was erroneous or at least inadequate. The Court, after further argument, especially as to the question what length of coast should be taken into account in taking the average coast line, remitted again to Dr Johnston to lay down an average coast line from a point on the west side of the Bay of Luce three miles south of the march to a point about six north of it; and to drop a perpendicular upon the line so drawn. A remit was subsequently made to lay down the fishyards, and it appeared from the last report that the line last drawn cut off one-eleventh part of the area of the fishyards from the pursuer, and thus ran a very short distance to the north of the line claimed in the alternative conclusion of the summons. Objections to this report were lodged by the defender, and the pursuer also contended that the proof showed the fishyards to have been built and used for catching fish by the pursuer's predecessors, and that the difference between the line running to the south of them and the line last laid down by order of the Court being so trifling, he was entitled to decree in terms of the second conclusion.

YOUNG, GIFFORD, and GUTHRIE for pursuer.

LORD ADVOCATE (Patton) SHAND, and BALFOUR for defender.

At advising,

Lord BENHOLME said that the objections to the last report having been repelled, there was nothing to prevent the red line laid down in obedience to the remit being adopted as the boundary, provided, on a consideration of the proof, there was no element emerging leading to a different result. It appeared to his Lordship that the pursuer did not in his summons claim more than his legal rights *ex adverso* of his property; he did not claim to have acquired anything beyond by prescription. The defender did claim to have acquired a servitude right beyond his legal boundary. This right on the proof presented two aspects—as a right of cutting seaware for kelp, and of gathering or cutting it for the purposes of the estate. The former was inconsistent with the nature of a servitude, as it had nothing to do with the advantage of the estate which was represented as the dominant tenement, but was a mere means of obtaining mercantile advantage. But when the manufacture of kelp came to an end on the introduction of Spanish barilla, the seaware was applied to a new use in connection with the turnip husbandry, a use which was consistent with the nature of a predial servitude. Other considerations, however, induced his Lordship to doubt whether the privilege of gathering seaware could be reckoned a servitude. That privilege might be acquired by grant, but it was questionable whether a right of going upon the lands of a neighbouring proprietor for the purpose of taking up what was waif and stray could be reckoned among the ordinary servitudes. It was unnecessary, however, to say more, as the proof did not show sufficient grounds for such a contention; and the defender's plea of servitude was therefore out of the question. His Lordship read passages of the proof to show that there had, in fact, been no peaceable possession of a servitude. On the whole, there was nothing to induce the Court to interfere with the legal line of march between the parties. As to the legal line, there was no absolute authority for what the Court had directed Dr Johnston to do; but the analogy of previous cases and the reason of the thing supported the view they had taken. An interlocutor would be pronounced with reference to the plan on which the line had been laid down under the remit, which plan would be authenticated by the signature of the presiding Judge. As to the competency of doing so under the summons, his Lordship could not doubt that the rule of construction of the summons contended for by the defender and adopted by the Lord Ordinary was far too strict. A party might claim more than he was entitled, but it was for the Court to say how much he was entitled to.

Lord NEAVES concurred.

Lord COWAN—When this case was advised upon the argument addressed to the Court on the reclaiming notes by the parties respectively against the interlocutor of the Lord Ordinary, we had occasion to explain the legal views and principles on which the decision of the questions at issue appeared to depend. As proprietor under Crown titles of barony lands sea-bounded, and with a special grant of wrack and ware, the pursuer has the undoubted right and privilege of cutting and gathering seaware on the foreshore *ex adverso* of his estates. The defender, possessing under similar titles, has the same right and privilege *ex adverso* of his lands. Under neither set of titles, however, is there any grant to either proprietor to exercise any right or privilege beyond the proper march or boundary of their respective estates seawards. And hence have arisen the questions under this record.

The summons at the pursuer's instance contains conclusions of an alternative march or boundary, up to the one or other of which south-

wards he maintained the sole and exclusive right of cutting and gathering seaware *ex adverso* of his estate to be in him. The defender, on the other hand, disputed this contention, and alleged the true boundary to be farther northwards than either of the march lines contended for by the pursuer; and he also alleged alternatively that by possession there had at all events been constituted a servitude in his favour which he was entitled to vindicate, even if the true march of the properties seaward were different from what he alleged.

The Lord Ordinary, after allowing a proof by commission of the disputed allegations of possession contained in the record, found that the pursuer had not established that either of the alternative lines set forth in the summons was the boundary, and for that reason he assoilzied the defender from the conclusions of the action "as laid." We were at one in holding that his Lordship, in dismissing the action, had proceeded on grounds too strict and technical, and that it was essential for the just ascertainment of the rights of the parties first of all to ascertain, irrespective of possession by either party and the pleas thence arising, what was the legal boundary between their properties seawards, on the one side or other of which the pursuer and defender were respectively entitled to exercise their right of gathering seaware on the foreshore *ex adverso* of their several estates. It is unnecessary to resume the grounds on which we resolved on this course. It was after mature consideration that we arrived at the conclusion that the objects in view would be attained, and the legal principles applicable to the case carried into full effect, by remitting to the eminent geographer and surveyor named in the interlocutor of 21st June 1866 (1) "to lay down on the Ordnance Survey map a line to seaward opposite and parallel to the west coast of the bay of Luce, representing the average line of the said coast;" and (2) "to lay down also a perpendicular falling on the said average line of coast from the end of the land boundary, between the estates of the pursuer and defender." A discussion followed upon the report made under this remit by Dr Keith Johnston, and the result was a remit of new on 11th January 1867 to lay down a straight line on the Ordnance Survey map representing the average of that part of the coast of the bay comprehended within the points therein specified, and to lay down a perpendicular line falling on that straight line "from the point at which the line of the land boundary of the estates of the pursuer and defender, if produced below the lowest march stone, would strike the high-water mark of ordinary spring tides."

Under this remit Dr Johnston's second report, dated 14th January 1867, was made, stating that he had laid down in red ink on the Ordnance Survey map the straight line and perpendicular line directed by the Court.

When the cause again came into the roll it was found that the Ordnance map on which the two lines had been thus laid down did not show the precise position on the foreshore of "the fishyards" mentioned in the conclusions of the summons and in the pleadings. These "fishyards," it may be explained, consist of the ruins of an enclosure that had once been used for fishing, but which from time immemorial have been a mere heap of stones, on which there had grown seaware through time. No other objection whatever was stated by either party to the accuracy of either of the lines as laid down by the reporter in terms of the remits to him. They were taken and held to be correctly delineated on the map, and but for the necessity of having the precise position of "the fishyards" marked on the plan the cause must, at that time, have taken end. A new remit, however, was necessary, as the parties did not agree as to this matter, and would not adjust it; and on 22d January 1867, a remit was again made for the sole purpose of having the fishyards laid down on the map; whereby its relative position to the perpendicular line forming the boundary might be seen. This was done by the reporter, as appears from his report of date 12th February 1867; and certain objections taken to it were held by the Court, at last discussion, to be of no moment, and were overruled. We have now, therefore, before us, in the successive reports of Dr Johnston, and in the lines delineated on the copy Ordnance map No. 125 of process relative thereto, all the elements necessary for fixing the march or boundary seaward between the properties of the pursuer and defender.

On renewed consideration of the able arguments urged by the parties now and formerly, I am satisfied that the directions embodied in the interlocutors of 21st June 1866 and 11th January 1867 for the ascertainment of the legal march between the properties of the parties seaward were consistent with the legal principles applicable to the case, and that the perpendicular line laid down on the Ordnance map No. 125, accurately defines the legal march between the foreshore *ex adverso* of the pursuer's estate, and the foreshore *ex adverso* of the defender's estate, on the assumption that the possession by the parties respectively as appearing from the proof has not been such as to affect their relative rights in this matter of cutting and gathering seaware.

Then, as regards the import of the proof, the Lord Ordinary has explained in the note to his interlocutor of 25th February 1866 his views of it, which appear to me to be substantially correct. The proof throughout appears to me conflicting and unsatisfactory to such a degree as to render it impossible to hold either, on the one hand, that the pursuer has, by possession, established a right to go beyond the legal march seaward in the exercise of his privilege of gathering seaware on the foreshore *ex adverso* of his property; or, on the other hand, that the defender has established any servitude or other right of gathering seaware on the foreshore *ex adverso* of the pursuer's estate to the north of the legal march as now ascertained. I adopt the views explained in the opinion of Lord Benholme on this part of the case. Generally it appears to me that the struggle which has been kept up between the parties, their servants and retainers, for so many years has originated in the mistaken views respectively entertained on the one side and the other as to what truly constituted the legal boundary or march of the foreshore. And this being the case, I cannot see any legal ground for holding that possession of the character appearing from this proof can affect the legal position and rights of the pursuer or defender. More particularly as regards the defender's assertion in his plea that by possession he has acquired a servitude of gathering seaware *ex adverso* of the pursuer's lands. No such right can be acquired except by grant—which is not here asserted to exist—or by prescription; and this mode of constituting a right of servitude Mr Erskine describes to take place "where the consent of the owner of the servient tenement is presumed, from his suffering the party claiming the

servitude to continue in the exercise of it for forty years together without any attempt to interrupt him." And afterwards he says that "no deed or title in writing is necessary other than the title to the lands for the use of which the servitude is claimed, for the long acquiescence of the owner of the lands burdened fully supplies the want of a written declaration establishing the servitude." Now, this being the established rule when prescriptive possession is founded upon, it is manifest that the proof before the Court is not of a nature to support the claim of a servitude right over the foreshore *ex adverso* of the pursuer's lands, although such a servitude were otherwise maintainable in law, which I greatly doubt.

The legal march being thus fixed, it remains to be considered whether the action at the pursuer's instance must be dismissed, or whether it may not be made available to the pursuer as fixing the march between the respective properties seaward in reference to the use and privilege of gathering seaware *ex adverso* of his estate. This matter of pleading was fully before the Court when the case was advised on June 21, 1866. It then appeared to all of us that should the legal line of march be within the demand made in the conclusions of the summons, there was no technical rule of pleading which stood in the way of effect being given to what was in itself just and reasonable. It is undoubted that neither of the lines of march specifically concluded for has been made out by the pursuer. The march now ascertained is to the north of both of those lines, and intersects to a small extent the area of the "fishyard." This notwithstanding it is, I apprehend, within the power and competency of the Court to declare under this summons what the true boundary is, so that there may be no room for those disputes which have hitherto existed regarding the portions of the foreshore *ex adverso* of their estates over which the parties respectively were entitled to possess and enjoy the right of gathering seaware under their respective titles. The pursuer, if he chooses, may have declarator to that limited extent, and it would, indeed, be unfortunate after all the expense that has been incurred, were any technical rule of pleading to prevent effect being given to the judicial recognition under this summons of the pursuer's right to the extent now ascertained. As regards this last point, I have the authority of the late Lord Justice-Clerk to state his concurrence in the views entertained by the Court, and which, indeed, will be found embodied in the opinion delivered by him in June 1866.

The Court found neither party entitled to the expenses of the proof, but *quoad ultra* found the pursuer entitled to his expenses, which were modified at two-thirds.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agent for Defender—George Cotton, S.S.C.

Saturday, March 2.

FIRST DIVISION.

MACINTYRE *v.* MACRAILD (*ante*, vol. i. p. 216).

Process—Pleading—Admission on Record. A party to a process of interdict having in the Bill Chamber admitted the genuineness of a document and taken a judgment on that footing, alleged on record, after the note was passed, that the document was a forgery, and that his admission had been given previously in the belief that the document was another one which he had signed. Held that he could not be allowed to plead forgery unless he obtained and produced a decree of reduction and improbation.

This is an action of suspension and interdict at the instance of Duncan Macintyre, doctor of medicine, against Donald Macraild, surgeon, and is brought for the purpose of enforcing an alleged agreement by the latter to refrain from practising within certain limits. The complainer prays the Court "to interdict, prohibit, and discharge the respondent from practising medicine or surgery at the slate quarries of South Ballachulish, and in the adjacent villages of South Ballachulish, Brecklet, and Carnock, where the workmen at the said quarries reside, and from otherwise interfering with the professional practice of the complainer and his asssistant, William Willoughby Cole Burton, member of the Royal College of Surgeons of London, at the said quarries and in the said villages."

The agreement sought to be enforced is contained in an obligatory document produced in process, bearing date at Fort-William, 28th November 1864, and said to be written and subscribed by the respondent Mr Macraild.

The note of suspension and interdict made distinct reference to this document. It set forth expressly in its fifth statement that the respondent, "of this date (November 28, 1864), wrote with his own hand and signed the obligation herewith produced." And the obligation was accordingly produced with the note of suspension in the Bill Chamber.

Answers were given in for the respondent to the note of suspension, and the following is the answer to the above-mentioned fifth statement:—"Admitted only that, at the request of the complainer, who represented to the respondent that he was apprehensive that the workmen might wish to have the respondent as their sole doctor, the respondent granted the obligation founded on, and which is referred to. It was the composition of the complainer, though written over by the respondent. *Quoad ultra* denied."

In a separate statement of facts made on his own part, the respondent again said (statement 5), "The respondent thereupon wrote and signed the obligation founded on, which was prepared by the complainer."

The Lord Ordinary having passed the note and granted interim interdict, the respondent reclaimed to the Lords of the First Division, who confirmed the Lord Ordinary's interlocutor. The discussion turned throughout on the terms of the document admittedly granted by the respondent.

The case having come into the Outer House on the passed note, a record was made up by a revisal of the reasons of suspension and answers as these were presented in the Bill Chamber. In his revised answers the respondent made the following statement:—"This pretended obligation is a forged document, and was not written or signed by the respondent, who never knew or heard of its existence till it was produced in the suspension and interdict, and was not aware of its contents till the proceedings were at avizandum in the Inner House. The respondent never wrote or signed any obligation, save that referred to in article 6. . . . With reference to the statement made by the suspender at adjustment, that the respondent, in debating the case before the Lord Ordinary and the Inner House, admitted the genuineness of the document now alleged to be forged, it is explained that the document was