pursuer in the action set forth that he had a right and interest in all the fishings in the Don, and he brought his suit to set aside the title of the defender. The defender raised an objection to the title, and said you have no title to all the fishings, but that is a matter to be afterwards inquired into. In the meantime, *esto*, that you have such a title, it is only a title of tack, and that is not a ground for insisting in the action. The Lord Ordinary repelled the defence. The case went to the Inner-House. The record was made up on the merits. The pursuer in the action no longer stood on the ground that he had a right to all the fishings, but limited his allegation to a certain portion of the fishings. Then the defender renewed his objection, and said, as to that limited portion of the fishings which you now appear to possess, that does not give you a title to pursue. And it was upon that ground that the opinions of several of the judges went in dealing with the case. And so far from its being a judgment in favour of the view contended for here by the appellant, the grounds upon which it proceeded were antagonistic to it. But if the defence stated by the appellant in the Inner-House was something different (as was alleged) from what he had stated before the Lord Ordinary, the words not being identical, if any clear distinction can be extracted from the difference of expression, it may be that he is entitled to renew the discussion; but taking the words that he has used—taking the defence as it has been pleaded by him as an objection to the title to sue, and holding that there is no obstacle to his pleading it in the form in which he has put it—I yet entirely concur in the opinion which has been expressed by my noble and learned friends, that the Crown had a perfect title to pursue the action. It was agreed that no party can appear to oppose any general service which does not claim the same title which the party pursuing the service claims. But that is not quite a clear point with reference to the interest of the Crown. But assuming it to be so, it has no relevancy here. It is necessary for the appellant to go a step further, and after saying that he has obtained such a service, to set forth his pretentions to use that service against the interests and rights of another party, and that that other party, be it Crown or be it a subject, has no right to sue a reduction against him. I apprehend there is no authority for that. Here, I think, it is clear the Crown had a right and interest to sue on the grounds which have been stated by my noble and learned friend who last addressed the House, and therefore I hold that the objection to the title to sue has no good foundation.

We then get into an examination of the merits as appearing on the evidence. Into that subject I do not mean at all to go, because it has been so fully analysed by my noble and learned friend who spoke first, and by Lord Cockburn in the Court below, that it is in my mind quite conclusive upon this case. As to allowing any further inquiry, I think there has been enough inquiry already.

Interlocutors appealed from affirmed, with an alteration in one of the said interlocutors; and appeal dismissed, with costs.

Agents for Appellant—Wm. Wotherspoon, S.S.C. and Bischoff, Cox, & Bompas.

Agents for Respondents—James Hope, D.K.S., and Connell & Hope, Westminster.

COURT OF SESSION.

Friday, 27th March.

SECOND DIVISION.

BURNETT *v.* DOUGLASS.

*Superiority and Property Titles — Possession — Islands—Jetty—*Alveus—*Suspension and Interdict.* A proprietor of lands and barony on the bank of a river whose titles did not expresslyi nclude, but were *habile* under which to hold an island in the river, and who alleged exclusive right to, and possession of the island—*held* entitled (1) to interdict against the proprietor of the opposite bank—whose titles were also *habile* under which to hold the island, and who also alleged exclusive right to and possession thereof—cutting down trees or bushes, or planting others on the island, the proof having disclosed a sort of mixed possession by the two proprietors; also (2) to interdict against the respondent enlarging or extending a jetty erected by him in the *alveus* of the river opposite to lands of which the complainer was superior, and a little higher up the stream than lands on the opposite side, of which the complainer held the *plenum dominium;* and also (3) to interdict against further erections by the respondent in the *alveus* of the river opposite to the complainer's lands; but (4) interdict against the respondent entering upon the island and shooting or fishing thereon refused.

This was a suspension and interdict brought in December 1865 by Sir James Horn Burnett of Leys, Baronet, against Mr John Douglass of Tilwhilly, and the object thereof was (1) to have the respondent prohibited from entering upon and shooting over, fishing from, or dragging nets upon, two islands in the river Dee nearly opposite to the village of Banchory Ternan, and particularly from cutting down and removing any trees or bushes upon or from the same, and from planting trees, bushes, or any plants thereupon; and (2) to have the respondent prohibited from enlarging and extending further into the bed of the river Dee a certain jetty or embankment erected by him about five years before; and also from making any further erections in the *alveus* of the river opposite the complainer's lands. The complainer averred that the islands in question were his property; that they formed parts and pertinents of the lands and barony of Leys and others belonging to him; that they were originally formed by part of the mainland of his property on the north side or bank of the river Dee being detached by floods. He likewise averred that he and his authors had had the exclusive possession of the islands; had regularly let them to tenants, and drawn rent for them; that they had killed game and rabbits upon them, and fished for salmon in the Dee from and around the same by every lawful mode; that the respondent had recently set up a claim to the islands, and, in particular, had recently cut down trees and burnt furze upon the islands, and made preparation for planting them with other trees.

The complainer further averred that the effect of a jetty erected some years before by the respondent in the *alveus* of the Dee was to divert the water of that river and of a hill stream called the Feugh, which flowed into the Dee a little above the island,

from their natural course, and to throw it over upon lands on the opposite side, of which the complainer was superior, and upon lands lower down, of which he held the *plenum dominium*, as also to dry the south channel altogether, and thus attach the islands to the respondent's lands. The complainer also alleged that he believed the respondent intended further to encroach upon the bed of the Dee and to divert the stream further by embankment or otherwise.

Interim interdict was granted in the Bill Chamber by Lord Mure on 2d December 1865.

Answers were afterwards lodged for the respondent, in which he alleged that he was the exclusive proprietor of the islands, as forming parts and pertinents of his lands of Tilwhilly, and that he and his authors had had the exclusive possession thereof for time immemorial, and, in any view, that he and his predecessors having had such possession for seven years past, the complainer was not entitled to interdict. The respondent admitted that he had cut down trees and burnt furze upon the islands, and had fished from and dragged nets on the larger island during the previous fishing season. He pleaded that the jetty erected by him in the *alveus* of the Dee being necessary for the protection of the bank, and without injury to the complainer, the latter had neither legal title nor interest to insist in its removal, and that he (the respondent) was entitled to maintain the same in a sufficient state of repair. He also pleaded, *separatim*, that his alleged operations in and upon the *alveus* of the Dee having been completed without objection on the part of the complainer long prior to the raising of the present process, no question as to its legality or illegality could be competently tried therein.

On advising the note and answers, the Lord Ordinary in the Bill Chamber (Lord Mure) on 30th January 1866 pronounced an interlocutor whereby he passed the note, but recalled the interim interdict, "and of new, and in the meantime, interdicts the respondent from cutting down or removing any trees or bushes upon or from the two pieces of ground or islands in question in the river Dee, or either of them, or from planting trees or bushes thereon, and also from erecting or extending in so far as already erected any wall, jetty, embankment, or other building or work in the channel or *alveus* of the said river opposite to the lands belonging to the complainer." A record was thereafter made up and closed in the Outer House, and proof was led by both parties, the import of which, as regards the matter of possession, will be found stated in the Lord Justice-Clerk's opinion. Some of the witnesses deponed that the effect of the jetty was to divert the waters of the Dee and Feuch into the north channel, and to dry the south channel in the ordinary state of the river; and that some attempt had been made to connect the jetty with the top of the island altogether by a bank or hirst of loose stones, others considered that the jetty had no appreciable effect on the course of the stream.

The case was debated on the proof before Lord Ormidale, to whose debate roll it had been transferred, who thereafter, on 25th June 1867, refused the interdict, on the ground that the complainer had failed to prove exclusive property in or exclusive possession of the islands, or that the respondent threatened or intended to encroach on the channel or *alveus* of the river Dee, or to divert its stream opposite to his, the complainer's, lands, by embankment or otherwise. In a note to the interlocutor his Lordship, with reference to the finding that, according to his reading of the proof, the complainer had not established either an exclusive title or exclusive possession in himself, and was not therefore, in his opinion, entitled to the interdict asked, he referred to the case of *Macdonald* v. *Farquharson and Others*, 14 December 1836, 15 Sh. 259.

The complainer reclaimed, and prayed for suspension and interdict in terms of the note of suspension and interdict, or at least to declare or make perpetual the interim interdict granted by the Lord Ordinary on the Bills (Lord Mure) of date 30th January 1866, or to remit to the Lord Ordinary with instructions to do so.

Gifford and Balfour, for the reclaimer, maintained that the substantial and true possession of the islands had for time immemorial, or at least for the preceding seven years, been with him, and that, even if his proof did not establish exclusive possession, he was entitled to interdict against acts like cutting or planting trees. With respect to the jetty, they maintained that, being *in alveo*, it was illegal, whether proved to be productive of real injury or not, but that it had been productive of real injury, and that there was good reason to suppose that the respondent meant to extend it. That he had maintained his right, and never disavowed his intention to do so.

Clark and W. M. Thomson contended, for the respondent, that the complainer's case being based on an allegation of exclusive property in the islands, he was not entitled to interdict, in respect that his proof fell short of establishing such exclusive right. And with regard to the jetty, it was maintained for him that there was no room for interdict, seeing that there was no intention to encroach further into the stream, and at any rate that it was not opposite the complainer's lands.

At advising—

Lord Justice-Clerk — The application in this case is made by Sir James Burnett of Leys, praying that the respondent Mr Douglass of Tilquhilly shall be interdicted from entering upon or interfering with two pieces of ground forming islands in the river Dee; from cutting or planting trees on either of these islands; or from shooting on or fishing from them. It concludes also for interdicting the respondent from *ut supra*, as to jetty.

The petitioner sets out a title which does not expressly include these two islands, or either of them, but which confessedly is *habile* as a title under which they may be held in property, and which title, if followed by forty years' exclusive possession, would establish a right of property in him. He avers that he has had such possession in virtue of the title, and is proprietor. As such proprietor he seeks to have the interdict granted against trespass or interference with the lands. The matter of the jetty raises a distinct question, which I propose to speak to after considering the case presented in the former portion of the prayer.

The respondent, Mr Douglass, is proprietor of the lands of Tilquhilly with their pertinents; he has no express title to the islands any more than Sir James, but he has, like Sir James, a *habile* title of possession, under which, with prescriptive possession, he would equally establish a right of property in them. He affirms as positively as Sir James does the fact of immemorial possession as having been enjoyed by him and his predecessors in these lands, and equally affirms a right to the property.

A very long proof has been gone into by both parties, although the process of suspension and interdict is really one of a possessory nature, and un-

suited to such investigations. Sir James has endeavoured, in his proof, to show that at a period long beyond the memory of living man, and somewhere about the last century, or even previously, the river Dee suddenly, having previously occupied the south channel, formed a new channel on the north, and so divided the two islands in dispute from the lands of Leys.

I think that the evidence on that point, besides being misplaced in a suspension and interdict, is unsatisfactory. I am disposed to hold that there is just as good evidence adduced on the part of the respondent, to the effect that the islands were formed by a sudden inroad of the river through the lands of Tilquhilly, and that a new channel was formed on the south. On this point I concur with the Lord Ordinary.

As to the occupation of the islands, it seems to me that a material difference exists as to the state of possession proved as to the larger and smaller islands. I think that the petitioner has failed to present any evidence, except of the slenderest kind, as to acts of possession exercised over the smaller. None of the witnesses adduced by Sir James seem to me to speak to any single act of possession of any kind other than fishing or shooting on the smaller island; and the counter evidence of Mr Douglass greatly preponderates as to this. The first fact as to possession of this larger island which is spoken to is that of the cutting of a trench on the island, with the view of diverting a portion of the stream, and saving the north bank from continued encroachments by the river, which are proved to have been considerable. This was cut, according to the evidence, by the predecessor of Sir James Burnett, but the trench was filled up a few years after. This seems to have taken place about 1812. It certainly points to an exercise of a right of property, though the evidence as to the history of the operation itself, or the cause of the filling up of the trench, are not very full or satisfactory.

The next fact established is, that General Burnett occupied the larger of the two islands as a sort of rabbit warren from about 1814 till 1821 or 1822. Both parties claim the occupation of General Burnett as a possession which they are entitled to impute to their titles. It appears that General Burnett was brother of Sir Robert, then proprietor of Leys, and Sir James imputes the possession to the permission of his brother. But as it appears that, at the time, he was tenant of the haugh of Minnonie on Tilquhilly, which haugh was adjacent to the island, he is said by the respondent to have held this possession only as his tenant. The real evidence seems to me to favour the respondent's view on this not material point of the case. Before this time, if we credit the witnesses Dinnie and Malcolm, the possession was with Tilquhilly, and so soon as General Burnett ceased to keep the rabbits, the island is occupied by Scroggie, a tenant of Tilquhilly, who sublet it to Mr Ogg, who again, on the expiry of Scroggie's lease, in 1826 or 1827, agreed with Mr Lumsden, the respondent's predecessor, for a renewal of the lease in his own favour, and paid him the rent of £2 a-year till 1829 or 1830. Up to this time the evidence of possession, except in so far as concerns the trench, seems to me to be with the proprietor of Tilquhilly. But at 1830 Mr Ogg, the tenant, quarrelled with Mr Lumsden, refused to pay rent to him, told him that he disputed his title, obtained authority from Mr Thomas Burnett, as acting for his father, the then proprietor of Leys, to possess it for a small rent; and he corroborates his statement by a receipt, accidentally preserved. He says, that from 1830 to 1848 he paid an annual sum to the proprietor of Crathes, and to no one else, for the island. Mr Lumsden took no steps to remove Ogg, sued him for no rent, and left him to occupy it under Leys for no less than eighteen years. This is a very strong case of possession in the proprietor of Leys. I cannot, in the face of this fact, regard the possession as having during that period been in the proprietor of Tilquilly. He may have fished or shot on the island, but the island, partially cultivated as we learn from Ogg, or pastured by him, was actually embraced in a contract of lease from the predecessor of the petitioner, and rent from time to time paid to him as proprietor.

The Rev. Mr Hutchison succeeded Mr Ogg as occupant of this island, and he arranged with the proprietor of Leys to pay rent for it. He entered upon possession, and has remained in possession since under that title of possession. But while apparently the tenant of Leys—the precise sum paid by him for rent, being 5s. per annum, has been constantly (since 1858 at least) and without objection, retained by the proprietor of Tilquhilly upon an asserted title of property in the island, a fact of which the proprietor of Crathes was certainly informed in 1858. As to this period, it is not easy to see how either of the parties can be held to be in exclusive and undisputed possession. Ogg's possession, commencing in 1826 and 1827 as under a lease from Tilquhilly, is continued, but as a tenant of Leys, from 1830 to 1848; while Mr Hutchison's, beginning under a title from Leys, continues as a payer of rent to both parties, and that for a period much longer than that which usually governs possessory questions. There is evidence on both sides as to fishing and hunting; that of the respondent, as I think, predominating.

One recent act of possession, apart from the payment of rent, is spoken to by Sir James Burnett, but by him only. He speaks to seeing some trees cut down three or four years ago, on which occasion he says he complained through his agent, and the cutting was stopped. The next act, he says, was the planting of the trees which led to the present suspension. The evidence as to this is scanty. It is not explained how Mr Douglass, consistently with the assertion of a right of property, abstained on the complaint being made. He certainly affirms a right to cut these trees. Now, if he had not maintained the right, the facts proved would not have justified an interdict.

I am unable to come to any clear conclusion as to the right of property being in either party. A declarator, or mutual declarator, must be brought in order to have that question determined. As to possession, I am unable to affirm that the proprietor of Leys has so failed in his proof that he has had no possession at all. Ogg's possession from 1830 to 1848, and the fact of the lease in favour of Mr Hutchison from 1848 to 1865, and receipt of rent, are not easily reconcilable with the alleged total absence of possession on the part of the petitioner. For ten years of Mr Hutchison's possession it does not appear that the proprietor of Leys was aware of rent being claimed or exacted by the proprietor of Tilquhilly, and might hold himself the undisputed proprietor. As to Tilquhilly, though it cannot be said that the retention of the rent out of stipend was a very direct way of exercising a right of property, yet I am not prepared to say that there

was not in that act an assertion of right with a sort of possession, and there are strong acts of possession proved by fishing and shooting. On the whole, finding possession in the two parties, and seeing the only extrication of their competing rights is a declarator, I think that we should reject the portion of the prayer which seeks to interdict trespass, but to grant it against the operations of cutting wood and planting trees which go to alter the condition of the subject, and which may permanently affect the right of property if found ultimately to be in the petitioner. In this way we shall maintain possession, but prevent alterations on the subject.

It is said, that as the basis of the application is an alleged property right, and the petitioner has failed to instruct a right of property, the application must be dismissed *de plano*, and the case of *M'Donald*, 15 S. 259, was referred to as supporting that view. The case was one in which Mr M'Donald of St Martins endeavoured to prevent Mrs Farquharson of Invercauld from fishing in a loch. Both parties had titles substantially the same in lands on the margin, except that in Mrs Farquharson's titles her superior reserved a right of hunting and fishing. Mr M'Donald had no pretence of right to exclude Mrs Farquharson. She, as proprietor of the lands adjacent to the loch, had the right, as accessory to her lands, of fishing for trout, which was the fishing in question, and he had no title to the *solum* of the loch, or other title in respect of it other than his right to a certain portion of the land abutting on the loch. This case is therefore not in point.

The question then, unaffected as I think by decision, is presented for solution in a case in which a party seeking an interdict, and showing a *habile* title, and proving a series of acts of possession extending during a very considerable period, and as pregnant or more so than the acts of possession which, in connection with that title, may at a future period, in conjunction with other facts and documents, be found to prove him to be proprietor, shall be left unprotected from acts which may permanently affect the subject. The effect would be merely to hold all the proceedings in this case void, and to render necessary a new application raising the *species facti* now detailed, and asking interdict on that ground—a result far from desirable, because leading, in order to satisfy a mere point of form, to unnecessary expense.

I am satisfied that we are not called upon to throw out the application on the simple ground that it rests upon an alleged right of property not established in this process of suspension. The averments state the fact of forty years' possession under the applicant's title, had he proved exclusive possession for thirty-nine years, but failed in proof of possession for the fortieth, he would have equally failed; but could a remedy have been refused? Had there been clear unequivocal possession for seven years before the date of the application, I should have thought myself bound to have given interdict. The party would then have instructed all that was necessary for a possessory judgment, but would have failed in instructing that he was proprietor by possession during the period necessary to establish a right of property; therefore the view of the absence of a complete proof of property seems to be insufficient to justify a rejection of the application. If the duration of possession does not preclude the remedy, a limited possession under a title, which may be one of property, does not prevent it being within the period necessary to prove property.

If there be a partial possession, it may be proved within the averment of possession, and, being proved, brings under the consideration of the Court such a condition of the rights of parties as to warrant a remedy commensurate with the right requiring to be preserved.

I am not prepared to affirm that Sir James may not be the proprietor of the island—that he has not proved that he is so in this summary process of suspension and interdict does not foreclose the question. I think that he has proved acts of possession—not sufficiently numerous, continuous, or exclusive as to show him to be a proprietor, but which, as acts of possession attributable to a good title of property, entitle him to appeal to us to prevent the subject as so possessed from being dealt with by another who has exercised other acts of possession, but who has, as I think, equally failed to prove continuous, exclusive, and uninterrupted possession for forty or for seven years. In the view of an ascertainment of right in a competent process, I think that we should preserve the subject from being, by one of the competitors, put into a situation inconsistent with a continuance of possession such as has been enjoyed.

As to the jetty — it is said that the prayer is limited to a portion of the Dee which is opposite to the lands of the petitioner held in property, and that, there being no jetty so situated, the application cannot be granted.

What was meant to be interdicted is clear. A jetty is described in the statement appended to the prayer as having been erected on the south bank, at a point eastward of that at which the Feuch discharges itself into the Dee. This is the subject matter of the complaint; the respondent, in answer, refers to his statement in the sixth article, in which he gives an account of that jetty, and two pleas in law are taken.

No plea is raised as to the description of the possession being erroneous, and under these circumstances we are called upon to construe the words opposite "lands belonging to him" as limited to the lands of which the petitioner has the *dominium utile*. I think we may read it as lands belonging in superiority or *in dominium utile* of the petitioner. The operation is one in its nature affecting the whole lands lying opposite to or below the position of the jetty.

If so, is there room for the interdict? The jetty was constructed by a tenant of the fishings of Tilquhilly in the deepest part of the south channel, an operation to which an opposite proprietor is entitled to object, apart from any necessity of proving actual injury. A proprietor is entitled to fortify his banks, but he is not entitled to project a pier or jetty into the *alveus*. Though constructed in 1860, there is evidence of additions being made by one of the fishing tenants of the respondent in the form of stepping stones, and of additions being made by parties engaged in fishing discharging stones brought in their nets there. There is no evidence of any repudiation by the respondent or his author of the act of forming the jetty or of the additions from time to time made to it, and I see no satisfactory assurance, without our interference, that the process may not be continued till the south channel is entirely shut up; and I am therefore inclined to think that we should to that extent grant interdict. I hold it no answer to a demand against the increase of an illegal jetty that similar illegal erec-

tions have been made by the party complaining; these may in their turn be objected to. It is no good justification of one illegal act that another has been committed by the other party.

The result of these views will be, if your Lordships concur with me, substantially to make perpetual the interdict granted by Lord Mure *ad interim*, in the Bill Chamber, on the 30th January 1866, as to operations of a nature affecting permanently the condition of the larger of the two islands and as to the jetty.

Lord Cowan concurred. He thought the complainer was entitled to interdict to the extent proposed to be granted, as, though less, it was clearly within what he asked, and was warranted by the facts and the proof, even supposing exclusive right in the complainer to the islands might not have been proved in the present case. His Lordship stated that he had a very clear opinion as to the complainer's right to object to the jetty in question, even though it may have been in existence for some years, which fact of itself would not, he thought, bar the complainer's right to have it removed as an illegal erection, because, perhaps, its evil effects might only now be beginning to be seen. The complainer's superiority title was sufficient to entitle him to appear and have the superiority lands protected from damage, but here the Court did not require to rely upon that title alone, for damage was being done to the complainer's property lands immediately further down through the erection of the jetty complained of by the great body of the water being diverted into the north channel.

Lord Benholme and Lord Neaves concurred.

The Court unanimously recalled Lord Ormidale's interlocutor, and returned substantially to the one pronounced by Lord Mure in the Bill Chamber when disposing of the question of interim interdict, and so granted interdict against the respondent to the extent of prohibiting him from cutting down trees or planting others on the larger island, and also from making any extensions of the existing jetty, or from building new ones in the *alveus* of the stream opposite the complainer's lands. *Quoad ultra* they refused the interdict craved, and found no expenses due to either party.

Agents for Complainer—James C. Baxter, S.S.C.
Agent for Respondent—M'Ewan & Carment W.S.

Monday, March 30.

SHEARD *v.* YOUNG'S TRUSTEES.

Reduction—Assignation—Fraud—Essential Error—Concealment and Misrepresentation. Circumstances in which the Court, on advising a proof, reduced a deed on the ground of essential error on the part of the granter, fraudulently induced, and on the ground of concealment and misrepresentation.

This was an action in which the pursuer was Mrs Elizabeth Macadam or Sheard, residing in John Street, Ayr, and the defenders were the trustees of the late James Young, doctor of medicine in Ayr, and brother-in-law of the pursuer, and the action *inter alia* concluded for reduction of a certain assignation of £1000 Consols made by the pursuer in favour of Dr Young, prior to the latter's death, and which was said to be reducible on the ground of fraud and essential error. The pursuer's allegation was that for many years Dr Young had managed her (the pursuer's) business, and had, *inter alia*, deposited in his hands a sum of money corresponding to £1000 value in British Consols; that on or about the 3d February 1866, he obtained from her an assignation in his own favour of these Consols; that the said assignation was obtained from her by misrepresentation and fraudulent concealment practised by the said Dr Young, and that the same was signed by her under essential error as to its tenor and effect, and under the belief that it was a mere matter of form and would have no effect on her estate. The pursuer also alleged that no consideration was given for the said deed, and that at the time she signed it she was between seventy and eighty years of age. There was a conclusion for count and reckoning, and a claim under it for £3000.

The defenders denied the pursuer's averments, and averred that the pursuer fully understood the effect of the deed, and that the same was prepared by an agent employed for the purpose, in terms of her repeated instructions, and executed by her in presence of the said agent and Dr Young, who carefully explained to her the nature and effect of what she proposed to do.

The Lord Ordinary reported the case upon issues proposed by the pursuer, which were—

"Whether the pursuer, in granting the assignation, translation, or conveyance, dated on or about the 3d day of February 1866, of which No. 21 of process is an extract, was under essential error as to the tenor and effect of the said deed?

"Whether the pursuer was induced to grant the said deed by fraudulent concealment practised by the said deceased James Young, or false and fraudulent representations made by him as to the tenor and effect of the said deed?"

His Lordship added the following note:—

"The defenders objected to the pursuer's proposed issues, No. 29 of process—1st, That as no sufficient case was laid by the pursuer on essential error, the first of the proposed issues was inadmissible; and, 2d, that as no sufficient case was laid on the head of concealment, the second of the proposed issues, so far as it was founded on that ground, was inadmissible. It appears to the Lord Ordinary that the points thus raised require the serious attention of the Court, and he very much doubts whether the proposed issues are maintainable, so far as objected to. It is not averred by the pursuer that she had no mind to grant any deed; and although in condescendence 18 she states that at the time she executed the deed in question her mind had been weakened by illness, she does not propose to take any issue founded on fraud and facility. Her averments, however, in condescendence 18 and 19, taken together, may be held as supporting the issue founded on fraudulent misrepresentation, and accordingly no objection was stated to that issue, so far as founded on that ground. But the question is—Are these averments sufficient to support the issues, so far as founded on essential error and concealment? In condescendence 19 the pursuer substantially admits that the deed in question was read over to her before she subscribed it, and it is not said that it was of a complicated nature, or otherwise in itself difficult to understand. It will also be noticed that the pursuer does not