allowed or not. But assuming that to have been well done, the Sheriff-Substitute further appointed a diet for taking the proof, and that was fixed for the 13th of February. His own judicial engagements prevented him taking the proof then, and accordingly there was an adjournment for two days in order that he might be present, and in the minute of adjournment the cause of it is properly set forth. On the 14th a motion was made for the petitioner's agent to adjourn the diet again, and the ground advanced for that motion was the absence of the petitioner's agent in Edinburgh. I doubt whether that was a sufficient cause. Any other agent would have been very glad to do that piece of work for him. But the Sheriff-Substitute took an indulgent view, and adjourned the diet till the 16th. And what is the result? That on the 16th there was no appearance for the petitioner. The effect of that, under the tenth section of the Sheriff Court Act, was that the allowance of proof fell to the ground; that the petitioner was no longer entitled to lead proof, or, in other words, had failed to avail himself of the allowance. On that failure, the Sheriff-Substitute should have dismissed the petition. But nine days were allowed to elapse, and nothing was heard of the petitioner or his agent, although the interim interdict was standing; and at last, on the 25th of February, the petitioner comes and asks a new diet of proof, and the Sheriff-Substitute grants it very indulgently, I think, but on grounds that were quite inadequate. I think that the Sheriff-Substitute should have come to an opposite conclusion. Then comes the question whether the respondent did not competently bring that before the Sheriff. I have no doubt he did. The original diet of proof had fallen; any interlocutor of the Sheriff-Substitute reviving the allowance of proof was just an allowance of proof, and under the 19th section of the statute that might be appealed to the Sheriff. I think that the Sheriff is right, and that we should adhere to his interlocutor.

The other judges concurred.

Friday Feb. 16.

FIRST DIVISION.

MAXWELL'S TRUSTEES *v.* GLASGOW AND SOUTH-WESTERN RAILWAY CO.

Sheriff — Jurisdiction — Competency. A summary application to a Sheriff for the removal of certain structures erected on a person's property by another, and which had remained unchallenged for thirteen years, held (diss. Lord Curriehill) incompetent.

Counsel for Petitioners—Mr Patton and Mr Duncan. Agent—Mr John Walker, W.S.

Counsel for Respondents—The Solicitor-General, Mr Clark, and Mr Johnstone. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This is an advocation from the Sheriff Court of Dumfries. The Sheriff (Napier) found that the question raised by the petitioners was substantially a question of heritable right upon which it was not competent for the Sheriff of a county to adjudicate. He therefore dismissed the action, and the petitioners advocated.

The petitioners complained of certain works for damming and draining executed by the defenders upon their property, which they said were injurious to their property, and they called upon the Sheriff to ordain the defenders to remove these works from their lands. The defenders alleged that the works complained of were upon their own property. They also alleged that they had been in existence for many years, while the petitioners did not aver any recent operation by the defenders.

The Court to-day found that the application to the Sheriff was incompetent.

The LORD PRESIDENT said—The petitioners here complain of certain injury done by the defenders' operations on the *solum* of the river Nith and a piece of ground on the bank thereof which they say belong to them. The Sheriff sustained the defender's third plea-in-law, and found that the application raised a question of heritable right. It appeared or the Court that, whatever might be the merits to demerits of that judgment, the case could not be disposed of on the ground on which the Sheriff had disposed of it. We therefore, after the debate, ordered the questions raised to be specially argued. I could not adopt the view confidently pleaded by the railway company, when they contended that the moment a defender in the Sheriff Court alleged that he had a competing title the Sheriff was to stop short without even considering the titles. I think that altogether unsound. It was even contended that a simple averment without producing any title was sufficient to stop the machinery; so that if a party was assailed, all he had to do in order to shut his adversary's mouth was to draw an old sasine out of his charter-chest which had no bearing on the question, and say—That is my title. The question was afterwards argued upon other grounds, and it is necessary to keep in view the position of parties. The company having obtained statutory powers to make their railway and to build a bridge over the river, proceeded to do so. These works have been in existence for many years. The petitioners now say that the company has made a weir below the bridge which impedes the current, and so destroys the banks of the river. They also say that this structure is erected on their property, and injures it. They farther complain that a pipe of large dimensions has been laid in their ground and projected into the river, whereby their property is sometimes flooded. The railway company alleged that the lands belonged to them. The writings produced show that this cannot be so. The petitioners pray for removal of the work, and also of a deposit which has been made in the river in consequence of them, and for the repair of the damaged banks The petition does not say how long these works have existed; but both parties are agreed that they have been there for many years—the petitioners say for thirteen years and the defenders for sixteen years. The questions which arise are — Can the Sheriff entertain an application for the removal of the structures in these circumstances? and if so, can he do so under a petition, or is a summons required? I have no doubt that if the Sheriff has the power a petition is the proper form of addressing him. I don't recollect of any case in which a Sheriff was approached by an ordinary summons to compel the performance of operations. The question remains as to the power of the Sheriff. The company say they had authority from Parliament to make the railway and bridge, and that the operations complained of were executed long ago, and were necessary to protect the bridge. They found upon section 16 of the Railway Clauses Act, which they say authorised them to do what they have done, and they say that, as the structures have existed so long, without some other proceeding to establish the petitioners' right the Sheriff has no power to remove them. There are some matters, I think, in this petition which the Sheriff might have dealt with had they stood alone. But I doubt his power to remove the structures. The application was not for a curative remedy, but to remove the structures which had stood so long, and which had been erected under the ostensible authority of an Act of Parliament. It is said some stones have been recently added, but that is not the substantial matter of complaint. There is a demand to repair the banks and to remove the deposit. If the petition had been limited to this I think the Sheriff would have been the proper person to deal with it. But the possession of the *solum* of the river although for a limited purpose, has been with the company, and so has that of the ground, and I think that a declarator is necessary as to the structures. In regard to the minor matters, they are so much linked with the

others that they cannot well be separated, and if they are to be insisted in I think it had better be done by a separate petition.

Lord CURRIEHILL differed. He said — The petitioners complain of operations by the defenders on their property, which, they say, are unlawful and without authority. They therefore pray for their removal and for repair of the damage caused. Now, reading this petition without any answers, I ask myself—Is it competent? Has the Sheriff no power to decide? And if he has, is the application in proper form? In my opinion, the Sheriff has jurisdiction, and the application is in a competent form. The defenders have given in a defence which is relevant, and, if established, entitles them to absolvitor. They say the ground was their own, and that their operations were executed under the authority of the Railways Clauses Act, and acquiesced in by the late Mr Maxwell. These allegations, however, are all expressly denied. No proof has been allowed. Are we to dismiss the petition on the mere statement of the defenders? There seem to be four objections to the petition—(1) It is said the question involves a competition of heritable rights. The competition is not raised on the face of the petition. I am not sure that a competition can be raised by a defender even where he produces a title, but here, where he does not, I am clear he cannot. (2) It is said petition is not a competent form of trying the question. I believe we are all agreed that that objection is not well founded. (3) It is said the defenders are entitled to the benefit of a possessory judgment. I think they are not. I think there is a fallacy here, arising from the use of the word removing. This is not a removing of a person from lands, but a petition for the removal of works. But further, a possessory judgment cannot be pleaded without a habile title. No title here is produced at all, and the only one we are referred to is a bounding title, which does not include the ground on which the works are erected. (4) It is said these works have been performed under the authority of an Act of Parliament. If this is proved it is a conclusive defence. But parties have not been allowed a proof; and I cannot dispose of this objection without assuming allegations by the defenders which are not admitted by the petitioners.

Lord DEAS concurred with the Lord President. He said—The statements in the petition as to when the operations complained of were executed are somewhat vague, but the necessary reading of them is that it was at least thirteen years ago, because it was in the lifetime of Mr Maxwell, who died in 1853. The case is to be dealt with on the footing of what is stated in the petition, and there is no room for doubt that the works were erected thirteen years ago. They were not erected recently, but beyond the possessory period of seven years. Now, the railway company have been all along in the peaceable possession of the drain and the weir. They may not have had possession of the ground as property, but they have had possession of the structures. A person may be as much in the occupation and lawful possession of a thing on his neighbour's ground as of his own ground. I have no doubt of the jurisdiction of the Sheriff in regard to heritable property in all possessory questions, but he has jurisdiction in these only. The Sheriff's interlocutor is not happily expressed, because he has jurisdiction in possessory questions, as we held in the Lochmaben case and other cases. His jurisdiction in regard to heritable rights over another's property is the same as in regard to heritable property. But where one proprietor allows his neighbour to make a drain or a weir on his property, and allows it to stand before his eyes for a number of years—I don't think seven years are necessary—I doubt if it is within the jurisdiction of any Court to try that matter of right in a summary form. It is not the nature of the thing that here excludes the Sheriff; it is the lapse of time. You can only apply by summary petition where extraordinary despatch is required, but a thing that has stood unchallenged for thirteen years does not require extraordinary despatch. I should be disposed to take that view, although there was here no title whatever, and it was quite clear that the operation was on the petitioners' ground. It is not necessary to produce a title in regard to such a matter. Suppose my neighbour builds his house on the very verge of his own boundary, and throws his eaves-drop on my property, could any judge, after I had allowed it to stand for many years, determine the question of right in a summary application for the removal of the eaves-drop? Certainly not. As Mr Erskine says in his Principles (2, 1, 15)—"Where the property of a subject is contested, the lawful possessor is entitled to continue his possession till the point of right be discussed; and if he has lost it by force or stealth, the judge will, upon summary application, immediately restore it to him." But that question does not arise here, for the company had express powers by section 16 of the Railways Clauses Act to do what they did. It appears to me that a great deal of the difficulty of this case has arisen from the way the case has been pleaded on record by the railway company; but I have a very clear opinion that the petition on the face of it was incompetent.

Lord ARDMILLAN concurred on the ground that this application was presented, not for the purpose of regulating but of inverting possession, but reserved his opinion as to the power conferred by section 16 of the Railways Clauses Act, which he thought it was premature to decide, an observation in which the Lord President concurred.

Neither party was found entitled to expenses in the Inferior Court, but the respondents were found entitled to expenses in this Court, subject to material modification, as the first debate of the case had been entirely thrown away.

MORRIS *v.* GUILDRY OF DUNFERMLINE.

Corporation—Laws—Usage—Proof. Held (alt. Lord Kinloch) (1) That it was competent to prove by parole the usage of an old corporation (having no written laws till 1852) as to the admission of members; and (2) That according to the usage proved and the laws of 1852, a son-in-law of a member was not entitled to admission as a son-in-law after his wife's death. *Question*—whether it was in the power of the members in 1852 to alter the previous usage.

Counsel for Pursuer—Mr Gordon and Mr Thomson. Agent—Mr George Wilson, S.S.C.

Counsel for Defenders—Mr Patton and Mr John Hunter. Agents — Messrs Morton, Whitehead, & Greig, W.S.

By the existing rules and regulations, framed in 1852, for administering the revenue and managing the affairs of the guildry of Dunfermline, which has existed since the fourteenth century, it is provided that "sons and sons-in-law of guild brethren" shall be admitted to the guildry on certain specified terms more favourable than those applicable to "any individual having neither by birth nor marriage any claim or title."

The pursuer, James Morris, married a daughter of Andrew Reid, a member of the guildry. She died on 29th March 1862, and in October 1862 the pursuer applied for admission to the guildry as the son-in-law of a guild brother. He was refused admission in that character, on the ground that his privilege had been lost by the prior death of his wife.

The pursuer thereupon raised this declarator of his right to be admitted in the character of a son-in-law. The Lord Ordinary (Kinloch) gave effect to his pleas. He was of opinion that the decision of the guildry was erroneous. "In common parlance, the pursuer was still Mr Reid's son-in-law. All his relations by affinity, contracted in that name, continued in force. He was the brother-in-law of Mr Reid's sons and daughters, and he could not marry the latter just because he remained their brother-