amount of the estate subject to Miss Elizabeth's disposition can only be brought about by including the heritable bonds, this is a strong reason for inferring that Elizabeth Brydon meant that these should be included.

The state of Miss Mary Brydon's health being such as to render seclusion and the appointment of a factor necessary, is an additional fact strengthening the presumption that the destination in her favour was not intended to have a testamentary operation after the execution of the trust settlement.

The answer to the first three questions ought, in my view, to be that the second parties are entitled to two-thirds of the money in dispute, and that the first party as *curator bonis* is entitled only to one-third.

As regards the income of the trust, I think that Miss Elizabeth Brydon makes it perfectly clear that her trustees are to be the judges of the extent to which it is necessary to apply the trust-income for Miss Mary's benefit. They are directed to add the surplus income to the residue, and this direction implies that the income of the trust is to be administered by the trustees. It would, in my view, be a proper fulfilment of their trust for the trustees to pay over annually or in half-yearly instalments so much of the income of the trust as in their judgment is necessary to supplement the income of Mary's private estate so as to provide her with a comfortable maintenance suited to her station in life.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR was absent.

The Court answered the first question in the negative, the second in the affirmative, the first alternative of the third in the affirmative, the fourth in the negative, and the fifth in the affirmative.

Counsel for the First Party—Sol.-Gen. Dickson, Q.C. — Ralston. Agent — T. S. Paterson, W.S.

Counsel for the Second Parties—Balfour, Q.C.—Cook. Agents—Romanes & Simson, W.S.

Wednesday, March 9.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

STEEL *v.* STEEL.

Property—March Fence—Act 1661, *cap.* 41—*Remit to Man of Skill—Whether Final—Competency of Proof after Remit.*

A march fence having fallen into disrepair, a petition was presented to the Sheriff-Substitute under the Act 1661, cap. 41, craving for a remit to a man of skill, and for a warrant to execute the necessary works for putting the fence into a proper condition at the sight of the reporter. The Sheriff-Substitute remitted to a man of skill, who reported that the wall required to be rebuilt. No objection was taken by either party to the remit being made. The Sheriff-Substitute having pronounced a judgment in accordance with the report, the defender appealed to the Sheriff, who, in respect that all the questions of fact between the parties had not been determined, recalled the interlocutor and allowed a proof. No appeal was taken against this judgment, and a proof having been taken, the Sheriff decided upon the evidence that the wall was capable of being repaired without being altogether rebuilt, and granted warrant accordingly. The Court *held* that the remit was not necessarily final, and that it was not incompetent for the Sheriff to order the proof, and agreed with the view taken by him of the result of the evidence.

By Act 1661, cap. 41, it is, *inter alia*, ordained "That where enclosures fall to lie upon the borders of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance, and recommends to all lords, sheriffs, and bailies of regalities, stewards of stewartries, and justices of peace, bailies of burghs, and other judges whatsoever, to see this Act put in execution, and to grant process at the instance of the parties damnified and prejudged, and to see them repaired after the form and tenor of this Act above written in all points."

Mr John Steel, of Skellyhill, in the parish of Lesmahagow, presented a petition in the Sheriff Court of Lanarkshire against Mr William Steel, of Reddochbraes, an adjoining proprietor, craving the Court "to remit to Robert M'Lellan, stone-dyker, Hope Street, Lanark, or such other person of skill as the Court shall think proper, to examine the march fence or dyke between the pursuer's lands of Skellyhill and the defender's lands of Reddochbraes, both in the parish of Lesmahagow, and to report to the Court what the present state and condition thereof is, and what works and repairs, if any, are needed to put the same into a proper and sufficient condition as a march fence or dyke, and the probable expense of such works or repairs; to grant warrant to the pursuer to execute such works and repairs as are reported to be necessary, and as the Court shall approve of at the sight of such reporter, and on the same being completed and the cost thereof ascertained, to ordain the defender to pay to the pursuer one-half of such cost and of the cost of the remit and other procedure, and with expenses."

The pursuer averred that the wall had been for a number of years in a state of disrepair and incapable of preventing cattle and sheep from straying and that it required to be rebuilt. He averred that it

was the custom of the country to keep sheep on the lands for at least part of the year, and maintained that the defender was bound to concur with him in getting the wall rebuilt and put into a state of repair. He proposed to rebuild the wall in such a way that it would keep in sheep.

The defender, while admitting that the wall was in a state of disrepair, and stating that he was willing to bear his proportion of repairing the whole boundary between them, or even of rebuilding the wall "if necessary," maintained that he was not bound to share in the expense of making it suitable for sheep, on the ground that it had always been of the nature of a cattle fence, and that his own lands were only used for the pasture of cattle.

The Sheriff-Substitute (FYFE) on 12th May 1896 pronounced the following interlocutor:—"Closes the record, and having heard parties' procurators, before further answer, and under reservation of all pleas, remits to James Kerr, architect and land surveyor, Lanark, in the presence of parties or their agents, to examine the march fence or dyke in question, and to report (1) what is the present condition thereof; and (2) whether any, and if so what, reconstruction or repair is necessary to provide an efficient march between the property of pursuer and defender, and the probable cost thereof, distinguishing the work necessary for, and the cost of, a cattle fence and a sheep fence respectively."

Mr Kerr put in a report in which he stated, *inter alia*, that the march fence "is in a very dilapidated state and requires to be rebuilt."

On 30th June the Sheriff-Substitute pronounced an interlocutor by which he found that it was necessary to re-construct the fence, and granted warrant to the pursuer to erect a sheep fence to the satisfaction of the reporter.

The defender appealed to the Sheriff (BERRY), who on 1st September recalled the interlocutor appealed against, allowed a proof, and remitted to the Sheriff-Substitute. No appeal was taken by the parties against this interlocutor and a proof was led, the result of which was to establish that the fence was capable of being repaired.

The Sheriff-Substitute on 22nd December found that "the fence required to be rebuilt," and granted warrant to the pursuer to execute the work at the sight of the reporter.

Note.—"If it were competent to still consider the question whether the fence in question is repairable, I should feel very much inclined, upon consideration of the proof, illustrated by the photographs produced, to hold that the fence at no great expense might be repaired so as to make it of its kind a fair fence for many years to come. But I think we are now beyond that question. A remit has been made to a man of skill. True, the interlocutor making it does not use the words 'of consent,' but I do not think this is imperative to make it a remit in the sense of section 10 of the Act of 1853, and as regards the present condition of the fence, I think the parties must be held as having elected to ascertain this fact by remit, and so being precluded from proof." . . .

The defender appealed to the Sheriff, who on 17th March 1897 recalled the interlocutor and found "that the fence in question is to some extent dilapidated, and requires to be repaired so that it may be restored to a proper condition as a march fence of the height of four feet above ground as it was originally;" granted warrant to the pursuer to execute these repairs at the sight of the reporter, and remitted to the Sheriff-Substitute.

In the course of his note the Sheriff observed—"In giving effect to what the proof indicates, I do not think that the rule as to the conclusive character of a remit of consent is transgressed. I am not satisfied that the circumstances justify the conclusion that the defender consented to the remit, and apart from that, the report of the remittee is not to my mind sufficient in itself for the guidance of the Court. The part of it which is said to be conclusive is, that the dyke 'is in a very unsatisfactory state and requires to be rebuilt.' That does not necessarily imply that the dyke must be taken down and a new fence substituted for it. To rebuild a dry stone dyke may simply be to repair it by rebuilding or replacing in a proper way where necessary the stones that have fallen down. To do anything else here would be so uncalled for that in the light of the proof it seems not impossible that no more may have been intended by the reporter; or again, it is possible that he may have been led by the terms of the remit to assume that the only question raised was as to the kind of fence which should be substituted for the existing dyke, and so may not have applied his mind to the question whether the dyke itself admitted of repair. At all events, if it was his opinion that the dyke was beyond repair, he ought to have said so explicitly. In the circumstances I think we must be guided by the clear import of the proof."

After further procedure, the Sheriff on 9th July, in respect that the pursuer declined to execute the warrant granted to him on March 17th, dismissed the action.

The pursuer appealed to the Court of Session, and argued—The remit to a man of skill was the proper course for the Sheriff-Substitute to take in a proceeding under the Act 1661, c. 41, and he was entitled to order the fence to be rebuilt in accordance with the views of the reporter—*Paterson* v. *Macdonald*, June 16, 1880, 7 R. 958. The remit here was clearly one of consent. No appeal had been taken against it by the defender, who met the reporter and discussed the question with him. Accordingly, the findings of the reporter on the question whether the fence could be repaired or must be rebuilt were final, and could not be modified by the proof—Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 10—*Pearce Brothers* v. *Irons*, February 25, 1869, 7 Macph. 571. The proof, though granted in general terms,

was really intended only to deal with the question whether the fence was to be for sheep or cattle, and not with the question whether it was capable of being repaired.

Argued for respondent — In all cases where there was any question at issue between the parties, the fact that there had been a remit such as this did not preclude them from proving their averments. The Sheriff was not satisfied that the report was sufficient to enable him to decide the case, and was quite justified in ordering a proof. No appeal was taken against his order, and accordingly the Court were entitled to look at the proof as well as the terms of the report. There was no ground for limiting the proof as the appellant suggested, and the evidence showing that the fence was capable of being repaired there was no reason for ordering it to be reconstructed—*Lord Advocate* v. *Sinclair*, November 26, 1872, 11 Macph. 137; *Pollock* v. *Ewing*, May 25, 1869, 7 Macph. 815.

Lord President—I suppose the Sheriff in administering the Act 1661, c. 41, may quite competently and perhaps very naturally make a remit to a man of skill in order to inform himself, but what course is to be followed in the sequel must depend on the nature of the report given by the man of skill as the result of his investigation. It by no means follows that because there has been a remit, and parties attend and give information to the reporter, his report, should he form and express a definite opinion, is to be treated as final. The right of parties to prove their averments, where there is a disputed matter of fact, cannot be abated by the circumstance that the Court, on its own motion or on the motion of one of the parties, has obtained information on some special points by means of a report from a man of skill. I by no means say that it is within the rights of either party to insist upon a proof in a plain-sailing case of a march fence. All I say is that the parties are not precluded —if otherwise it is appropriate—from leading parole evidence.

Here the primary question raised on the record is this, can the existing fence be repaired, or is a new fence necessary?—and when the Sheriff-Substitute proceeded to conclude the matter on the report of Mr Kerr, the defender appealed to the Sheriff, and the Sheriff held that there still remained certain matters of fact which required to be cleared up, and allowed a proof. I am not concerned to say whether this was an appropriate decision or not, but neither party appealed, and proof was led. As the result, we have a large volume of evidence to the effect that the fence is capable of being repaired, and the question is, why should this be disregarded? Only if it could be shown that the Sheriff acted incompetently in allowing a proof. But for the reasons I have stated I cannot hold the Sheriff to have been precluded from obtaining fuller information than was contained in the remit. Accordingly, I hold that the rights of parties are that the fence should be repaired, and in saying that I do not of course mean to imply that some parts of it may not require to be rebuilt, but only that the present fence, looking to its nature and character, is adequate provided only that it is put into a proper state of repair. If that be right, then it follows that the pursuer cannot obtain an order for the erection of an altogether new and more expensive kind of fence. The pursuer has declined to execute the order of the Sheriff to get the fence repaired. If he remains of that mind, then the logical result is that we must adhere to the final judgment of the Sheriff-Substitute. If, however, he thinks better of it, I daresay your Lordships will be willing to allow him an opportunity still to have the fence repaired in this process.

Lord Adam—I am of the same opinion. I agree that the procedure which has been followed in this case is not to be commended. After the record was closed the Sheriff-Substitute made a remit to a land surveyor. Now, in the first place, that remit was made, not only in the ordinary course of procedure, but it was the thing asked for in the prayer of the petition. In the next place, I observe that the remit was made to a Mr Kerr, but the fact that both parties had confidence in Mr Kerr, and consented that the remit should be made to him, does not constitute him an arbiter whose opinion was to be final and conclusive. Accordingly, that being the nature of the procedure, it seems to me that Mr Kerr's report could not be regarded as final. When the case came before the Sheriff on appeal the Sheriff was not satisfied that the report of Mr Kerr exhausted the subject-matter of the dispute, and that further light was necessary. The course he took to obtain further information was not perhaps a very usual one, but I think it was competent. He allowed a proof, in perfectly general terms. If the allowance of proof was competent, then we cannot refuse to look at the evidence merely because we think that it was not the most advisable course to follow. No appeal was taken against the Sheriff's interlocutor. Being competent therefore, we are bound to look at the evidence which was led in the proof, as well as at the other evidence on the matters in dispute which is before us. That being so, I think it is not doubtful that the Sheriff has arrived at a right conclusion; that looking to the nature of the fence it is capable of being repaired, and that the case is one for the restoration of the old fence, and not for the building of a new fence of another kind. I suppose the law of a fence in this regard is the same as the law of a church, which is, that the heritors are not bound to rebuild the church so long as it can be repaired at a reasonable cost. That being so, I agree that we should adhere to the Sheriff's judgment, but I also agree that the pursuer should have an opportunity of considering his future procedure. I understand that the reason of

his refusing to carry out the order of the Sheriff to repair was that he might get a final interlocutor which he could appeal against, and so get a judgment of this Court on the matter.

LORD M'LAREN—I hold, in common with your Lordships, that an application to a sheriff for the repair or the rebuilding of a march fence is an administrative proceeding falling within his summary jurisdiction, and that it is quite a competent, and indeed the normal and usual, first step in such a process to make a remit to a practical man to report. I have no conception that, because the pursuer or the defender is reasonable and does not object to the remit, he is barred from challenging the opinion of the reporter, or disabled from moving for further inquiry. It is only when a party consents to a remit which is *extra cursum curiæ* that he is held to have put the judge in the position of an arbiter and to be barred from getting the case restored to the ordinary procedure. But a remit in the case relating to a march fence was not *extra cursum curiæ*, and accordingly when the report was made, and one of the parties was dissatisfied with it, there was nothing to prevent him from bringing the matter before the Sheriff on appeal. I venture to doubt the expediency or utility of ordering a proof as the Sheriff has done. I would have been more disposed to make a second remit to the reporter calling attention to the points in regard to which the first report was found to be deficient. It would also have been a competent proceeding to conjoin another practical person along with the reporter, had that appeared to be expedient. But an order for proof having been pronounced, no appeal was taken, and the order being competent, we are bound to consider the evidence and make the best of the case on the materials that are before us. Now, it is to be observed that the Sheriff-Substitute, who was prepossessed in favour of the fence being rebuilt, upon hearing the proof came to the conclusion that unless the parties were barred—as he thought they were—from challenging the report, the wall was capable of being repaired. It would be a strong thing in the face of the opinion of the judge who heard the evidence, and of the Sheriff, who perhaps is more cognisant of such questions than we are, to hold that this fence was not capable of being repaired, and must add that in my opinion the preponderance of the testimony is that the fence can be repaired. I agree that this is the proper solution of the case.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff dated 17th March 1898, and the interlocutors subsequent thereto: Find in fact that the fence in question is to some extent dilapidated and requires to be repaired, and is capable of being repaired so that it may be restored to a proper condition as a march fence of the height of four feet above ground as it was originally: Find in law that the pursuer is entitled to have the fence so repaired, but not to have a new fence built, and decern: Find the defender entitled to expenses in both Courts (the expenses in the Sheriff Court to be on Scale II.), and remit," &c.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Chree. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender—Ure—Deas. Agents—D. Lister Shand & Lindsay, W.S.

Wednesday, March 9.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

MELLIS *v.* MELLIS'S TRUSTEE.

Succession—Testament—Revocation—Republication—Codicil to Will Revoked but Subsequently Revived.

In the repositories of a testator five writings of a testamentary nature were found at the date of his death, viz. (stated in order of the dates of their respective signatures)—(1) A general trust-disposition and settlement containing a clause revoking all former testamentary writings; (2) a codicil relative to No. 1, but written on a separate piece of paper; (3) a general trust-disposition and settlement containing a clause revoking all former testamentary writings; (4) a codicil relative to No. 3; and (5) a codicil relative to and written upon the same piece of paper as No. 1. The deed No. 5 proceeded upon the narrative that the testator had reconsidered "the foregoing trust-disposition and deed of settlement" (namely the deed No. 1), and had "resolved to make the following alterations and additions thereon," and it concluded with these words, "and with these alterations and additions I hereby homologate and approve of said trust-disposition and deed of settlement in all other respects." *Held* that the testator's estate fell to be administered in terms of the deeds Nos. 1 and 5 only, and that all the others, including the first codicil to deed No. 1, were revoked.

Succession—Vesting—Direction to Convey Heritage to Daughter at Postponed Date—Conditional Institution of Issue of Daughter.

A testator directed his trustees, *inter alia*, (1) to pay from the rents of his heritable property an annuity of £20 to his half-sister; (2) during the lifetime of his widow, provided she did not marry again, to pay two-thirds of the remaining free rental to her; (3) to pay one-half of the remaining third of the free rental to his daughter as an ali-