by the directors of the company, the said allotment of 2000 shares to Messrs Muirhead and Waters was subsequently cancelled, and the same 2000 shares (register Nos. 7277 to 9276) were issued to the said James Muirhead alone as fully paid-up, and in satisfaction of the sum of £2000, being part of said price of £22,000 due by Aitchison & Sons, Limited, to the West End Cafe Company, Limited."

Appearance was made for Aitchison & Sons, Limited, and for Muirhead. They objected to a contract or supplementary agreement being entered into, but offered no opposition to a memorandum. They moved, however, that the proposed memorandum be amended by adding the words, "without prejudice to any question of liability of the signatories of the memorandum of association of Aitchison & Sons, Limited, with regard to the shares severally subscribed for in the said memorandum."

To this the petitioner agreed.

The following authorities were referred to—*Hartley's* case, January 12, 1875, L.R., 10 Ch. 157; *in re Whitefriars Finance Company, Limited* [1899], 1 Ch. 193.

The Court, without giving opinions, pronounced the following interlocutor:—

"Approve of the appendix appended to the petition as amended in the terms proposed at the bar: Direct the filing of said memorandum with the Registrar of Joint Stock Companies within one month from the date hereof, and direct that the said memorandum being filed, it shall in relation to shares therein libelled operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been filed with the Registrar aforesaid before the issue of said shares, reserving all questions as to the liability of the signatories of the memorandum of association of Aitchison & Sons, Limited: Find no expenses due."

Counsel for the Petitioner—M'Lennan—T. B. Morison. Agents—Auld, Stewart, & Anderson, W.S.

Counsel for the Respondents—Kennedy—Wilton. Agents—Wallace & Pennell, W.S., and W. Marshall Henderson, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

[Sheriff of Dumfries.

IRVING *v.* GRAHAM

Property—March Fence—Act 1641, *c.* 41.

A proprietor of lands brought an action to have a neighbour ordained to concur in erecting a march fence in terms of the Act 1661, c. 41. The boundary between the estates was a stream about forty feet wide, which was of value for fishing. The pursuer proposed either a fence partly on the one side of the stream and partly on the other, or alternatively that a fence should be erected entirely on his own side, and that the defender should be ordained to pay half the cost. *Held* that the Act applied solely to cases where the boundary was dry land or a stream of unimportant dimensions, and that the defender was not bound to assent to a fence partly on his own land, or (Lord M'Laren *dissenting* on this point) to pay half the cost of erecting a fence entirely on the pursuer's side.

Statute—Construction—Contemporaneous Decisions on Scots Acts.

Observations (*per* Lord M'Laren and Lord Kinnear) on the authority to be ascribed to contemporaneous decisions of the Court in the construction of the statutes passed by the Scots Parliament.

General Graham of Wyseby brought an action in the Sheriff Court of Dumfries against Colonel Irving, proprietor of the adjoining estate of Bonshaw, to have it declared "that the defender, as proprietor of the said lands of Bonshaw, which march with and are bounded by the pursuer's said lands of Wyesby, is bound to concur with the pursuer in erecting a march fence where none at present exists, and in repairing or renewing the existing fences along the whole line of the said march, with suitable weirs or water-gates thereon, so as to secure and preserve the access by both parties to the Water of Kirtle, which is on the said line of march, and to pay one-half the expense thereof."

By the Act 1661, c. 41, it is provided as follows:—"That where enclosures fall to be upon the border 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."

Colonel Graham lodged defences in which he made the following averments:—"(Stat. 9) The pursuer's contention that defender must join in fencing the pursuer's land for its whole course opposite Bonshaw is illegal and unreasonable, and contrary to the custom along both banks of the Kirtle. That custom is, that where a proprietor has grass land along the river, he fences that land from the river at his own expense, or herds the cattle thereon, and when he has land in plantation it is left unfenced. That custom exists, *inter alia*, on Wyseby, Bonshaw, Robgill, and Woodhouse. It is convenient, and works no hardships to anyone."

The defender pleaded, *inter alia*—"(3) The fence sought by pursuer not being a march fence in the sense of the statute, the action ought to be dismissed with expenses. (5) The properties being separated by an important stream, and the *medium filum* being their boundary, the defender is not bound to join in fencing pursuer's land, and ought to be assoilzied. (6) A fence between the estates, such as prayed for, being impossible of erection without material change

on the method of possession, and the pursuer having failed to adduce the authority and crave for the steps necessary, the action ought to be dismissed."

On 11th March 1898 the Sheriff-Substitute (CAMPION) remitted to the Rev. John Gillespie, LL.D., minister of Mouswald, to report on the following points:—"(1) As to the width and character of the Water of Kirtle, so far as it forms the march between the estates of Wyseby and Bonshaw, and whether said water of Kirtle forms a sufficient barrier against trespass by cattle crossing from one side of the river to the other; (2) the nature and character of the banks and land on both sides of the Water of Kirtle, so far as it forms the march between said estates, and to what extent the banks and land form a natural barrier against such a trespass; (3) whether a fence or fences can be constructed along the margin of the Kirtle either wholly on one side, or partly on the Wyseby side and partly on the Bonshaw side with a crossing or crossings of the water also fenced, and with convenient watering-places for stock without involving material alteration in the possession; and (4) the description of fence or fences recommended, if any, with the probable cost of the same; also whether, in the opinion of the reporter, the same, if constructed, would be for the mutual advantage of the estates of Wyseby and Bonshaw."

Dr Gillespie lodged a report, in which he stated that the bed of the stream was from 30 to 45 feet wide; that at several places it did not form a sufficient barrier to prevent cattle crossing from one side to the other, though at others the banks were sufficiently steep to form a natural barrier, and that fences could be constructed along the margin of the Kirtle, partly on one side and partly on the other, with crossings of the water also fenced, and with convenient watering-places for stock without involving material alteration in the possession.

On 21st June 1898 the Sheriff-Substitute pronounced the following interlocutor:—"Finds (1) that the pursuer's lands of Wyseby are separated from the pursuer's lands of Bonshaw for a distance of 1078 yards or thereby by the Water of Kirtle, the *medium filum* of the said stream being the boundary between the two estates; and (2) that the Water of Kirtle is a shallow stream which does not form a sufficient barrier against trespass by cattle crossing from one side of the river to the other: Finds that in the circumstances of the case as appearing from Dr Gillespie's report, the Act of 1661 is applicable to the case, and that the pursuer is entitled to obtain the construction of a fence which shall serve as a march between the properties of the pursuer and the defender: Therefore repels the pleas-in-law stated for the defender, in so far as these have not already been disposed of, and decerns," &c.

Note.—"The pursuer and defender are proprietors of the lands of Wyseby and Bonshaw, which are for a distance of 1078 yards separated by the Water of Kirtle, the *medium filum* of said stream being the boundary between the two estates.

"Now, I think it clear that the Water of Kirtle is a shallow stream, insufficient for the greater part, if not practically for the whole, of the 1078 yards to form an effectual barrier against the trespass of cattle crossing from one side of the water to the other. It may be and no doubt is the case that at certain parts the banks of the river rise abruptly from the stream, and are at those parts so steep as to form a barrier against trespassing cattle. But granted that cattle once get into the stream, there exists even then no complete protection against cattle gaining access to the lands on the opposite side. It is not disputed that questions of trespass have arisen in the past, though these may have been settled by mutual concession and arrangement, and must inevitably do so again in the future unless some effectual fencing is provided.

"The question is, whether in the circumstances this is a case where the Act of 1661 is applicable, and pursuer entitled to have defender ordained to be at equal pains and charges with him in the erection of a march fence. Having carefully considered Dr Gillespie's report—and at the request of the agents gone over the ground that I might fully understand the same—I am of opinion that it is. In the report four stretches of fencing are recommended, with two fences crossing the water, comprising in all 570 yards of fencing for the 1070 yards the stream forms the boundary between the two estates. The whole probable cost of the fencing recommended will probably only amount to £49, and the reporter is of opinion that the fences recommended, without involving material alteration in possession would be for the mutual advantage of the estates of Wyseby and Bonshaw. The fences recommended are partly on one side of the stream and partly on the other, with convenient watering-places and two fenced crossings. I do not understand that the agents now contend that if a march fence is to be erected, this is not a more satisfactory and economical mode of carrying out the work than to erect a fence down the centre of the stream, even if this be practicable. But I have appointed parties' agents to meet with me, as if we once get the question whether there is to be a march fence or not disposed of, they may prefer and be able from the suggestions in Dr Gillespie's report to adjust the details of its erection."

The defender appealed to the Sheriff (LEES), who on 18th October 1898 adhered to the interlocutor of the Sheriff-Substitute.

Note.—"The estates of the two parties are separated by the Kirtle, and as the stream is shallow and easily accessible at various parts, cattle from either side have at times crossed it and trespassed on the lands opposite. The defender, who apparently was the greater sufferer in this way, applied for and obtained an interdict against the continuance of this annoyance, and the pursuer now asks that his neighbours be ordained to join in the construction of a march fence between their estates. The Sheriff-Substitute remitted to the Reverend Dr Gillespie of Mouswald to examine the

subjects, and report on certain specified points. The remitee has given in a very clear report, and the Sheriff-Substitute, having heard parties on it and on the cause, has repelled the defender's pleas. Against this judgment the defender appeals, and he pleads that he is entitled to a proof as to his averments, as to (1) the custom in regard to fencing between the two estates and in the neighbourhood; (2) the fact of whether the erection of a march fence would be of advantage to him as well as to the pursuer; and (3) whether it would be possible to erect a fence such as is proposed. He contends that the interlocutor of 21st June is actually or virtually a refusal of proof, and therefore appealable. I take the case on this footing. I think the defender's averments as to custom, and as to the removal of the hedge on the pursuer's side are too vague to remit to probation, and his plea that the fence would not be of mutual advantage is negatived by his own pleadings and also by Dr Gillespie's report. It is obvious that the erection of a fence between the estates at various places, as specified in the report, would certainly be of mutual though not of equal advantage to the parties. But it is not necessary that it should be of equal advantage to them; it is sufficient if it is of mutual advantage to a material extent. The question that then arises is, whether the Sheriff-Substitute is entitled to dispose of the case without proof by the parties? I think the course he proposes to take is countenanced, if not expressly sanctioned, by authority. By the 10th section of the Sheriff Courts Act of 1853 he was entitled to make the remit which he made. And in the important and instructive case of *Pollock* v. *Ewing*, May 25, 1869, 7 Macph. 815, it will be noticed that the case was disposed of by the Supreme Court in exactly the way the Sheriff-Substitute is following in this case. I do not think the case of the *Magistrates of Kilmarnock* v. *Reid*, January 22, 1897, 24 R. 388, forbids the view now taken. To some extent, indeed, it seems to save such a case as the present; and the later case of *Steel* v. *Steel*, March 9, 1898, 25 R. 715, on which the defender relies, appears to me not to be adverse to what is now being done. In giving judgment the Lord President said—"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.'

"Now, here there do not at present at anyrate seem to be any matters requiring to be cleared up, as Dr Gillespie's report shows a fence can be erected, and the remaining averments on record are more of the nature of narration than anything else, and if there were such matters, the question would arise whether an order for proof was the appropriate course to obtain the desired information. Lord M'Laren expressly says it would not be the appropriate way, and I read the opinions of the Lord President and of Lord Adam as implying that they shared their colleague's view.

"I am therefore of opinion that the course the learned Sheriff-Substitute is taking is the appropriate one in the circumstances, and I trust that the meeting which he invites will lead to a friendly settlement of this matter. A perusal of the correspondence that has passed between the parties seems to me fortunately to leave room for this hope, and if the matter were put by the parties into the hands of their agents I think a satisfactory result would not be difficult to obtain."

The defender appealed to the First Division of the Court of Session, and argued—The Act 1641 c. 41, gave no authority for the erection of a fence anywhere except on the boundary between the two estates. Its object was to "part the inheritance," not to strengthen the marches. If that had been desired, the pursuer should have instituted proceedings under the Act 1669, c. 17—*Pollock* v. *Ewing*, May 25, 1869, 7 Macph. 815. Here the only fence which the pursuer could get would be one down the *medium filum* of the stream, which was the actual boundary, and that, it was admitted, was out of the question. When the cases of *Crawford* v. *Rig*, July 21, 1669, M. 10,475, and *Pollock* v. *Ewing*, *cit. supra*, were considered, they were not authorities for the pursuer. In both cases the stream was inconsiderable, and in *Crawford* v. *Rig* it was clear that the defender must have consented to the fence. Nor was the defender bound to agree to the proposal of the pursuer that the fence should be entirely on the Wyseby side, but the expense should be borne mutually. There was no authority in the statute for that, and no reason why the defender should be at the expense of fencing the pursuer's lands.

Argued for the respondent — The Act 1661, c. 41, applied even where a stream was the boundary, and the proper course was, as here proposed, to build a fence partly on one side and partly on the other. All the cases were authorities for that. *Crawford* v. *Rig* and *Pollock* v. *Ewing*, both cited *supra*, also *Seaton* v. *Seaton*, January 9, 1679, M. 10,476. It was true that in these cases the boundary stream was narrower, but mere width was not the criterion. The only question in such cases must be, was the stream sufficient to form a barrier against cattle straying. The object of the statute was to protect the lands from trespass. It was said that the pursuer's proper course was to proceed under the Act 1669, c. 17, but that argument would be equally applicable in the cases cited above, or in any other case where the change of possession involved by the proposed fence was, as here, inconsiderable. But if the alteration of posses-

sion was objected to, the pursuer was entitled and willing to erect a fence entirely on his own side of the burn, and the defender was then bound to pay half the cost.

LORD PRESIDENT—It is quite clear from the terms of the Act of 1661 that the fence, or, to use the word of the statute, the dyke, which is to be made at the charges of both proprietors is one which parts their inheritances. Now, in the old cases to which we have been referred, the Court seems to have been confronted with the question whether the circumstance that the ground upon which the fence—if it is to fulfil its function of parting the inheritances—would be placed is covered with water, precluded the application of the statute. In the cases which have been before the Court the size of the water was, to use a current phrase, negligible—that is to say, the ground covered by the water itself did not hold any separate character or value as intervening between the agricultural or pastoral ground on the one side and on the other, and accordingly the Court held in those cases that the Act might be applied by neglecting the water altogether, and by allowing the fence to be put on the dry ground of the persons seeking to put the statute in force. It is quite plain that that was somewhat a stretch of the terms of the statute. At the same time I say nothing against these decisions, because they seem to have proceeded upon a logical enough theory of the duty of the Court to give effect to the provisions of the Act, although there might be theoretically and on paper some difficulty in applying them. At the same time it seems to me, relying on a firmer and more indubitable test than any decisions, and that is a statute passed eight years afterwards, that the dominant idea was that the dyke which was to be paid for by what is called mutual expense must have this quality—that it parted the inheritances, because in 1669 the Legislature figured the case where it was impossible to put the fence on the true boundary, and instead of authorising the Court to put it, not on the true boundary but somewhere else, they actually adjusted the boundary to the requirements of the fence, because, seeking a line of ground which admitted of a fence being put upon it, they said—"We will put up the fence there, and we shall adjudge the ground on the one side and on the other to the parties respectively, in order to complete the identity of the fence with the true march," and they carry that out so far that money was to be given where there was not identity of value between the part given to the one and the part given to the other. And therefore it seems to me that in substance—to put it at the lowest—the fence for which this claim can be made must be one that parts the inheritances.

Now, when I turn to the present case I find that the fence proposed would not part the inheritances. These two properties meet in the middle of a river—to avoid controversy I will call it a stream—but a stream about the importance of which it may be sufficient to say that its breadth, according to the reporter, is 42 feet. Now, I say that these two inheritances where they meet do not consist of agricultural or pastoral ground but on the contrary of ground covered by a stream which is not negligible in sense or in law as were the streams in the former cases. And when I turn to the proposal which is here made, I find that in boldness the present pursuer far transcends the courage and the success of his predecessors in the decided cases. There is no case in which the Court has forced a defender on one side of a stream, even ever so small, to receive on his side a fence and pay for it without his consent, and in this case Mr Campbell, standing to his guns, says—"I will not take your fence either in whole or in part on my side, on what is not the true boundary at all." It seems to me that he is quite within his legal rights in doing so, and I cannot justify myself in applying the statute to what is not a boundary fence.

But the importance of adhering to the statute comes out in this. This is no illusory defence which is advanced for the defending proprietor. It is perfectly plain that this fence, so far as it is on his side of the water, will shut him out—I do not say completely, but will obstruct him—from access to this stream, which is his to reach and to enjoy, and there is no instance of the statute being applied to a fence which would have the effect of shutting the proprietor out from the enjoyment of part of his inheritance.

On this ground I am, for my part, clearly of opinion that the statute does not apply to this case. The logical result of that seems to me that all the interlocutors in question must be recalled and the action dismissed.

And I go on to say that I cannot reconcile myself to making the defender pay for the fence entirely on the pursuer's side. I do not think that I go against the previously decided cases, because they are distinguishable from the present by the circumstances which I have already pointed out, that the Court seems to have held themselves justified in ignoring or disregarding the inconsiderable stream which had formed the boundary, and dealt with the matter as if it were not there. In this case the facts entirely preclude such an extension of these cases. I think we are here dealing with inheritances where the boundary does not run between grazing ground on one side and grazing ground on the other. I think the inheritance on the one side and on the other is water, and the appropriate enjoyment of the subjects is the enjoyment of a running stream.

Accordingly I cannot, as I have said, believe myself justified in holding the defender liable even if the fence were run entirely on the estate of the pursuer. I do not think the statute compels him to pay for that. I think the burden of making such a fence, if the pursuer finds it more convenient that there should be a fence-wall, being merely an incident arising from the geographical position of his property, lies on himself, and that he cannot com-

pel the defender to participate in that expense.

LORD ADAM—The Act of 1661, cap. 41, certainly deals with the construction of march fences, and a march fence is, in the words of the Act, a fence which divides the inheritance of one proprietor from the inheritance of another—that is to say, divides one property from another. That is a march fence. And of course in applying the Act in an ordinary case, when you are on dry ground there is no difficulty, a mutual march fence will in that case be erected one-half on one side of the march and one-half on the other. But the question which arises in this case differing from the ordinary case is, what are you to do when you come to, not what is a dry fence, but what is called a wet fence? That is the question here.

Now, what sort of a stream have we to deal with here. Is it a stream on the *medium filum* of which a fence can be erected as a mutual march fence which would really be a practical march fence? Now, the stream we have to deal with here is a stream which we are told by the reporter is 42 feet wide; and it is a stream of this kind—that it is more or less valuable for fishing purposes. That is not disputed; so that if you were to erect a march fence down the middle of that stream you would be in fact interfering to a very considerable extent with the legal rights of fishing on one side and on the other. But then in this case it is said, and it would appear from the reporter's statement, it is impossible and impracticable to erect a fence down the *medium filum* of the stream, and in these circumstances a march fence cannot be erected down that stream. That is quite clear, and the reporter says so. Well, if that is so, does not that put this case outside the Act? I think it does. I am not saying anything against the decision in *Crawford*, where the stream was inconsiderable. That is not the case here. What the reporter reports is this—that it being impossible to erect a march fence on the *medium filum*, a certain portion must be erected on the property of one person and the other portion on the property of the other. Now, where is there the least sanction in the Act for authorising the pursuer to cross this stream—the 20 feet of the river on the defender's side—and take from him possession of a portion of his own ground on his own side of the river, and there erect, as he says, for mutual benefit what he calls a march fence? It is impossible to say in such circumstances that anyone could call that a march fence. And where is there authority for such proceedings to be found in the statute? I know of none. But then it is said, though I may not be entitled to come on and take your property I will erect the fence or such part of it as may be necessary, or the whole of it, on my own ground, and then make you pay the one-half of the expense. Well, I ask again, where is there any sanction in the previous cases or in the Act itself for such a proceeding? I can find none; and accordingly I think the only course we can adopt in this case is to dismiss it as one to which the Act of 1661 does not apply. I concur with your Lordship.

LORD M'LAREN — This case does not appear to me to raise any question regarding the application of the Act of 1661 to a river or stream of such magnitude that it would not be practicable for cattle to cross it. In such a case it seems plain enough that the stream is itself a sufficient fence, and if it is also the boundary between the two estates, the application would fail, not because the statute was not applicable, but because the properties were already sufficiently fenced by natural boundaries. The case would be in its legal aspect very much the same as that where two estates were separated by an impassable precipice, making it impossible to contemplate trespass across the line. But we are dealing here with a stream which, although wider than some of those already considered in the decisions under the statute, is admitted to be not of sufficient width to prevent the straying of cattle. In point of fact cattle wade across it, and the motive of the statute is the prevention of such trespass.

I agree with your Lordship that the decision of the Sheriff Court cannot stand, because it is in my view not in accordance with the statute and the decisions interpreting it that a defender can be made to submit to having a march fence erected upon his property. But then an alternative suggestion is raised by the decisions, and as I understand would be accepted by the pursuer, although I cannot say that counsel actively supported it, and that is that a fence might be constructed by the pursuer entirely on his own side of the stream. Now, if, as I understand, that alternative is before us, I am unable to assent to the decision in which I understand the majority of the Court are prepared to concur. In the case of *Crawford*, as I followed the report of the case which was read to us, two questions were raised—first, whether the statute applied to a wet march or only to a dry march; and second, if it applied to a stream, then what was the proper way of carrying out the obligation to fence. The objection that the statute did not apply to a wet march was expressly negatived, and the statute was applied with the qualification—I think not without deliberate consideration—that as the defender was entitled to object to any curtailment of his own possession, the pursuer could only have his decree on condition that the fence should be entirely on his own side of the stream. If I am wrong in my view of the case of *Crawford*, I err in company with the judges of the Second Division who decided the case of *Pollock* v. *Ewing*, because in the opinion of the Lord Justice-Clerk, which was concurred in, there is a careful review of the previous decisions, and his Lordship expressly observes on the case of *Crawford* as an authority having the meaning which I venture to attribute to it. The decision in *Pollock* v. *Ewing* is given in professed conformity

with and as consequent of the decision in this ancient case of *Crawford*. Whatever doubt might exist as to the point on the effect of the defender's objections in *Crawford's* case, there can be no doubt that the objection was considered in the case of *Pollock*, because the very ground of the defender's contention was that it would alter the state of possession of his property if the fence were carried out as proposed—one-half on his side of the stream and one-half on the other side. Their Lordships held that the defender was not bound to submit to exclusion from any part of his estate; but for reasons which are perhaps not very fully brought out in the report, but which are plainly implied, the Court gave the pursuer a march fence on condition that it should be erected entirely on his own side of the stream. The reason for subjecting the defender to his share of the cost of construction would be nothing other than that the motive of the statute was protection against trespass. If the defender was not damnified—as he could not be if the fence were placed on the pursuer's side of the stream—then he could not complain if he were called on to bear his share of the cost. It does not appear to me that the width of the stream materially affects the legal question which we are considering, for though it is wider than those mountain streams which have been held to be no obstacle to the carrying out of the provisions of the Act of 1661, it is not wide enough to be a fence of itself. I am unable to see that the ground of the decision in *Pollock* v. *Ewing* was that the subject in dispute was altogether inconsiderable or negligible, because if it was negligible then I should have thought the manner of laying out the fence would be to carry out the reporter's recommendation and to divide this negligible quantity equally. But I think it was not negligible, because the defender was successful in his objection to having a portion of his estate—small as it was—put into the possession of the neighbouring proprietor.

I must qualify what I have said by adding, that if we were coming to the consideration of the Statute of 1661 for the first time, I should probably be in agreement with your Lordships that this was too severe a strain to put upon this statute by legal construction. But this is a Scots Statute, and it has been interpreted by decisions which are almost contemporaneous, and there can be no doubt that in the contemporaneous construction of the old Scots Acts of Parliament the Court held themselves entitled—and I do not doubt quite rightly—to assume a latitude of construction which we should not think admissible in applying to the more carefully drawn and more elaborate statutes of the present time. Nevertheless, it has been the practice to treat the old decisions on Scots Statutes as having very much the force of the statutes themselves, and I should be against reconsidering or reopening a question on a construction of a Scots Statute which, as I think, is settled by an early decision, especially when that decision has been accepted by the Judges of the other Division of the Court in a comparatively recent case.

LORD KINNEAR—I agree with your Lordship in the chair, and agree so entirely with all that you have said, and Lord Adam has said, that I have very little indeed to add. But I may say that I concur in the view stated by Lord M'Laren in the last sentence of his opinion, that very great weight ought to be given in the construction of statutes of this date to the contemporaneous decisions of the Court. But then the only decision of importance which can be called at all contemporaneous with the statute we are construing is that of the *Earl of Crawford* v. *Rig*, and as I read it, and as I think it was read by the Court in the case of *Pollock* v. *Ewing*, it creates in my mind no difficulty in assenting to the reasoning of your Lordship in the chair, but on the contrary is in accordance with it. The question in that case, as stated in the objection quoted by the Lord Justice-Clerk in *Pollock* v. *Ewing*, was this—"that the march was not a dry march but a burn, and that the Act cannot be understood but of dry marches." That is the defence which the Court repelled; and the judgment given in *Crawford* becomes very clear from the immediately following part of the interlocutor, "The Lords repelled the plea"—that is, the plea that the march was not a dry march—"and ordained the stripe of water to be wholly within the dyke, or if the defender pleased, that it run a space within the dyke and a space without the dyke." They were dealing, therefore, with what is properly described as a stripe of water. Now, I do not think that is a kind of description which could reasonably be applied to such a stream as the Kirtle, according to the account given by the reporter in this case. The Lord Justice-Clerk—and the other Judges concurred with him—in the case of *Pollock* v. *Ewing* took exactly the same view which I think your Lordship and Lord Adam take. It seems to be quite clear from what the Lord Justice-Clerk says. He says that the defence in the case before him was, as it was in the case of *Crawford*, that there could not be a march fence on a water boundary, and then his Lordship goes on to distinguish between the case of a considerable stream and that of a mere rill or rivulet. In the former case he says that a fence along one side of the stream could with no sort of propriety be described as a fence parting the inheritance; and in the latter case he thinks that a fence along the margin seems reasonably to satisfy that statutory requirement. In this view, the question in any case where two properties are separated by a stream would seem to be whether a fence on one side of the stream would in a reasonable sense be a fence upon the boundary or not.

Now, it does not appear to me to be possible to hold that the mere width of the stream in any particular case affords a criterion for determining that question. Nor does it seem to me to depend upon whether the stream in itself is an effectual

barrier. There are very few streams in this country, if there are any, so wide that cattle cannot cross them in shallow places; and streams that are not of great uniform depth may be valuable for fishing. But the distinction between one stream and another for the purpose of the statute seems to be, that in one case each proprietor of the stream may have a material interest in retaining the property and possession of his own part of the water, and that in another he may have no practical interest in the stream whatever except in so far as it defines the boundary; and the decision in *Pollock* v. *Ewing* seems to me to proceed upon the view that in that case the defender's interest in the march stream was so inconsiderable that it might be wholly disregarded. I do not know whether that is entirely in accordance with legal right; but at all events, in the present case I think, for the reasons your Lordships have given, that the defender has an interest so material as to make it worth while to retain his property and possession of the river Kirtle where it bounds his lands, and that if that be so, the pursuer has no right or title to deprive him of any part of his right in the river.

I therefore entirely concur in the views stated by your Lordships that the fence here proposed is not a march fence in the sense of the statute, because it will not answer the statutory description since it will not part the two estates of the pursuer and defender, but will encroach on the defender's estate at one part and encroach on the pursuer's estate at another, so as to alter the possession if not the property of the two estates. I say "if not the property," because I really do not know what would be the effect in law of a judgment affirming the judgment of the Sheriff as regards the property. It is perfectly clear that the Courts have no authority under this statute to alter rights of property at all, because where that is necessary the party must appeal to a totally different statute which enables him to compel his neighbour to submit to excambion. But for that very reason it appears to me to be obvious that a judgment of this Court directing a march fence to be erected might be held to mean that the line on which the fence stands is the true march between the two properties; and therefore unless the difference between the true march and the march fence is immaterial, I should be disposed to think that we should be bringing parties into hazard of serious difficulty and litigation hereafter in the course of the management of their estates if we were to sustain the judgment of the Sheriff Court.

The Court pronounced this interlocutor:—"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute, dated 21st June 1898, and all subsequent interlocutors: Dismiss the action, and decern: Find the appellant entitled to expenses," &c.

Counsel for the Appellant — W. Campbell, Q.C. — Deas. Agents — Richardson & Johnston, W.S.

Counsel for the Respondent—A. O. M. Mackenzie. Agents — Fraser, Stodart, & Ballingall, W.S.

Tuesday, October 24.

FIRST DIVISION.

CAMPBELL *v.* CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Motion for New Trial—Omission of Notice to Keeper of Rolls—A.S., 16th February 1841, *secs.* 36, 44.

The A.S., 16th February 1841, provides (sec. 36) that where the party against whom the verdict has been given in a jury trial held during session intends to apply for a new trial without lodging a bill of exceptions, he must give notice of a motion for a rule to show cause why the verdict should not be set aside within ten days of the trial of the cause, and (sec. 44) lodge a copy of the notice with the Keeper of the Inner House Rolls. *Held* (*a*) that the ten days referred to in sec. 36 were the ten days next ensuing, whether in session or vacation; (*b*) that the provision for lodging a copy of the notice with the Keeper of the Rolls was peremptory and not merely directory, and therefore that where such copy was not lodged within the specified ten days, the motion could not be entertained.

The Act of Sederunt, 16th February 1841, regulating proceedings in jury causes, contains the following provision (sec. 36)—"When the party against whom the verdict has been found intends, without lodging a bill of exceptions, to apply for a new trial in causes which have been tried at the sittings after the end of the session, or during the Christmas recess, or at the circuits, such party shall give notice of a motion for a rule to show cause why the verdict should not be set aside and a new trial granted, within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, or ten days after the trial of the cause, if the cause has been tried during the session, or immediately before the sitting down of the session." By section 44 it is provided, *inter alia*—"When the motion is to be made before the Division, a copy of the motion must also be lodged with the Keeper of the Inner House Rolls."

In the trial of an action by W. B. Campbell against the Caledonian Railway Company, the jury on 15th July 1899 found for the pursuer.

Within ten days thereafter the Caledonian Railway Company gave notice to Campbell of their intention to move for a new trial. They did not, however, lodge a copy of the notice with the Keeper of the Inner House Rolls.

The Court rose for the long vacation on July 18, and resumed on October 17. On 21st October the Caledonian Railway Com-