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-

pany gave notice to the Keeper of the Rolls of their intention to move for a rule.

On the case being called in the Single Bills, counsel for the pursuer objected to the competency, and argued that the provisions of the Act of Sederunt had not been complied with, in respect that the notice given in July was not given to the Keeper of the Rolls, and the notice given in October was more than ten days from the date of the trial of the cause. The notice to the Keeper of the Rolls was indispensable, otherwise there was no provision whereby the case could be brought promptly before the Court, and the ten days referred to were the ten days ensuing—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5. If the A.S. had meant sederunt-days, it would have said so.

Argued for the appellants—The notice given in July was sufficient, because it was given to the opposite party, which was the essential thing. If not, the notice given in October was good, as it was within ten sederunt days of the date of the trial—*Cockburn* v. *Hogg*, February 16, 1897, 24 R. 529. In any event, the provisions of the Act of Sederunt were directory and not peremptory, and the Court might dispense with their observance—*Boyd, Gilmour & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104.

LORD PRESIDENT—I think the second notice has no plausible claim to competency. This trial took place in session, and it is provided that notice of appeal must be given within ten days—that is, not ten sederunt days but the ten days next ensuing. Accordingly I pass to a consideration of the first notice. Now, it happens that the requirements on a party desiring to appeal are contained in two sections of the Act of Sederunt 16th February 1841. Section 36 prescribes the period during which notice of appeal may be given, and section 44 provides that "when the motion is to be made before the Division a copy of the notice must also be lodged with the keeper of the Inner House rolls." Now, it seems to me that there is no reason for holding section 36 to be merely directory unless we are also to hold that the provision of section 44 is one which may also be dispensed with at our discretion. I think that is out of the question, and when we consider the use of the provision which has been violated we see that the reason for it is perfectly obvious. The object is to secure that the case should come before the Court promptly. Now, the Act of Sederunt might have imposed on the dissatisfied party the duty of bringing the appeal before the Court within a specified time, but what it does is to provide that he shall give notice to the keeper of the Inner House rolls, whose duty it then is to bring the case before the Court. If the lax view which is now urged upon us were sound, there is no saying when a case might come before the Court, because there would be no machinery for bringing it on which could be brought into action. At present the procedure is automatic.

I therefore think that the notice to the keeper of the rolls is an integral part of the provision for the disposal of appeals, and those provisions in the Act of Sederunt have by the antecedent statutes the effect of rules statutorily authorised.

LORD ADAM—I concur.

LORD M'LAREN—This is a case where ten days' notice of motion for a new trial, and not six, is prescribed, and therefore the argument for the appellant could only succeed if we were to hold that the days of vacation were not to be counted, but it is quite clear that the provision in the Act of Sederunt means days in the ordinary sense and not sederunt-days, because this provision applies in terms to cases tried at sittings to be held immediately before the commencement of the Session. In such a case we necessarily begin by counting the days of vacation. Accordingly, if the notice to the Keeper of the Inner House Rolls is a condition of the right to move—and I agree that it is—the motion cannot now be sustained. In this respect it is impossible to distinguish that provision from the other provisions in the same sections of this Act of Sederunt, and if we were to hold that it was merely directory we should be obliged to hold that all the provisions of the Act of Sederunt were merely directory and might be dispensed with at our discretion.

LORD KINNEAR concurred.

The Court refused the motion.

Counsel for the Defenders—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuer—Jameson, Q.C.—Constable. Agent—Andrew Gordon, Solicitor.

Thursday, October 26.

FIRST DIVISION.

BANKIER DISTILLERY COMPANY *v.* YOUNG'S COLLIERIES, LIMITED.

Process—Transference of Action—Interdict.

Where a party had been found not entitled to pollute a stream by pumping water from his coal mine into it, a motion by the complainer to have an action of interdict against him transferred against his singular successor in the coal mine *refused*, on the ground that the action was rested upon wrongful acts committed not by that singular successor but by his author.

This was a sequel to the case of *The Bankier Distillery Company* v. *Young & Company*, July 20, 1892, 19 R. 1083, *aff.* July 27, 1893, 20 R. (H.L.) 76. In that case the Court found that the defenders were not entitled to discharge into the Doups Burn water pumped from their coal-workings to the injury of the pursuers, and continued the