that I cannot hesitate for a moment to concur with my noble and learned friend on the woolsack, that the appeal should be dismissed.

LORD KINGSDOWN.—My Lords, I entirely concur with my noble and learned friends.

Mr. Anderson.—My Lords, I am instructed by the respondents to say, that they do not ask for any expenses in this case.

Interlocutors affirmed, and appeal dismissed.

Appellant's Agents, J. Galletly, S.S. C. : Martin and Leslie, Abingdon Street, Westminster.—*Respondents' Agents*, G. and H. Cairns, W.S. : W. Robertson, Duke Street, Westminster.

FEBRUARY 15, 1866.

GEORGE STRANG of Westertown of Briech, *Appellant*, *v.* ROBERT STEWART of Wester Briechdyke, *Respondent*.

Property—March fence—Repairs—Hedge and Ditch—Common interest—Evidence of Agreement, &c.

HELD (affirming judgment), *That where A and B become owners of adjoining fields which originally belonged to the same owner, they may by express agreement constitute the boundary a march fence, and if they have used it as such, an agreement to that effect will be implied, provided the user is inconsistent with any other origin.*

QUESTION, *whether there is any difference between common property and common interest in a march fence?*[1]

The pursuer (appellant) is proprietor of the lands of Wester Briech, in the county of Linlithgow, and the defender is proprietor of the adjoining lands of Briechdyke, and part of Auchenhard, which bound the lands of Wester Briech on the south and west. The lands of Briechdyke are higher than Wester Briech, and between the two lands is a hedge, and along the Briechdyke side of the hedge there is a ditch.

The pursuer presented a petition to the Sheriff of Linlithgow, setting forth, that the thorn hedge and ditch formed together, and had for time immemorial formed, the march fence between the two properties; that the ditch was, moreover, necessary to prevent the water from the higher lands, Briechdyke, from flowing over the lower tenement, Wester Briech, and that the ditch had become choked up, and the hedge had fallen into disrepair. The petition prayed, that the respondent, Mr. Steuart, present defender, should be ordained to join with the petitioner in the necessary operations for cleaning the ditch, as forming an essential part of the march fence, and as necessary for carrying off the water rising on Mr. Steuart's lands, and dressing and protecting the thorn hedge, and generally for putting the ditch and hedge in a fencible condition.

To this petition the defender lodged answers, in which he stated various objections to the competency of the petition, and among others, that it was incompetent in the Sheriff court. These preliminary defences were repelled by the Sheriff substitute, who pronounced a judgment affirming the pursuer's right to have the hedge and ditch considered and treated as the march fence, but adverse to his claim to have the ditch so cleaned as to carry off the water from the lands of Briechdyke. On appeal the Sheriff superseded consideration of the case, intimating in his note his opinion, that the pleadings would require to be remodelled.

The pursuer then brought the present action, the Sheriff court case being afterwards advocated *ob contingentiam*. The summons concluded for declarator, that the thorn hedge and ditch "form together the march fence betwixt the said properties, and is the common or mutual property of the pursuer and the defender: And further, that the pursuer and defender are bound to uphold and maintain the said hedge and ditch at their joint expense, and that the defender is not entitled to encroach upon or fill up the said ditch by his agricultural operations, or otherwise."

The pursuer averred, that the hedge and ditch formed the march fence, and were formed at the same time, and were one and the same operation, the thorn plants forming the hedge having been planted on the earth excavated and thrown out in forming the ditch, and that the hedge could not have grown up or thriven without the ditch; that this march fence, consisting of hedge and ditch, had fallen into great disrepair, but was quite capable of being thoroughly repaired;

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[1] See previous report 2 Macph. 1015; 36 Sc. Jur. 510. S.C. 4 Macph. H. L. 5; 38 Sc. Jur. 223.

and that the ditch had besides for more than forty years served to carry off the water from Briechdyke, and so to prevent it from flowing on Wester Briech.

The defender averred, that his lands of Briechdyke came up to the roots of the thorn hedge, and included the ditch; and that the hedge had become nearly extinct; that many of the thorn plants were dead and the others decayed by age, and that the hedge could not be put in a fencible state except by entire renovation, and not for a considerable period; and that in any case the ditch was unnecessary and he was entitled to fill it up. The defender was willing to concur with the pursuer in the erection of a march dyke, or a substantial wire fence.

The Lord Ordinary allowed a proof, and a proof was led on commission by both parties.

The hedge and ditch in question were formed in or about the year 1800, when Wester Briech and Briechdyke both belonged to a Mr. Wilkie, and at that time he then had Wester Briech in his own hands, and Briechdyke was let to a tenant named Potts, on a nineteen years' lease, expiring in 1813. The construction of the hedge and ditch was a single operation, the earth excavated in making the ditch being thrown on one side, and the hedge planted on the excavated earth.

In 1802, after the hedge and ditch were made, Wester Briech was sold to the Rev. Mr. Kennedy, and subsequently became the property of the pursuer Mr. Strang. Mr. Wilkie retained the lands of Briechdyke till his death in 1824, when they were sold, and ultimately became the property of the defender, Mr. Stuart. In the conveyance of the two subjects and in the title deeds of the parties, the one property is described as bounded (in part) by the other, but no mention is made of the hedge or ditch.

The pursuer led evidence to the effect, that the hedge and ditch had been regarded as mutual property; that although the ditch was never scoured, the hedge had been sometimes repaired at the mutual expense of the two proprietors or of their tenants, and that the hedge, though in a state of great disrepair, was capable of being repaired and made good and sufficient. He also led evidence that the fence consisting of hedge and ditch was a well known and very common sort of fence, constructed in the way already mentioned, and that the ditch was necessary or at least proper to secure the growth and good condition of the hedge, by protecting the earth about the roots of the hedge from being washed away by the water from the higher ground.

The defender, on the other hand, led evidence to shew, that he had possessed up to the hedge; that the hedge had gone to complete decay; that the occasional repairs of it had generally been by the insertion of wooden stobs in the gaps of the fence, and that it could not be so repaired as to be in a fencible condition till after a considerable time. Further, that the open ditch was unnecessary and injurious; that a drain should be laid down in it, and covered over; that the hedge and ditch fence was out of date, and that the hedge should be removed and a march dyke or wire fence should be substituted.

The Court of Session held, that the ditch was not the property of the pursuer, and that the parties had not dealt with either the hedge alone or the hedge and ditch as to constitute them a legal march fence.

Bovill Q.C., and *Coleridge* Q.C., for the appellant; *Rolt* Q.C., and *A. Brown*, for the respondent.

The arguments turned entirely on the inferences to be drawn from the evidence in the cause.

LORD CHANCELLOR CRANWORTH.—My Lords, this case may be disposed of in a very few words. We have nothing to do with the proceedings before the Sheriff. The case comes before us upon an interlocutor of the Court of Session reversing an interloctor of the Lord Ordinary; and the only question which we have to decide is, whether that interlocutor ought or ought not to stand. The interlocutor is made in an action of declarator, whereby the pursuer George Strang seeks a declarator, "that a thorn hedge and a ditch running close and parallel thereto, and in length coextensive therewith, which divide certain of the pursuer's lands from certain of the defender's lands, form together the march fence betwixt the said properties, and is the common or mutual property of the pursuer and the defender." That was what the pursuer was bound to establish.

According to the law of Scotland, by some early Statutes, the Sheriff has, if there be no adequate boundary between two adjoining properties, the power of compelling the parties to make such a fit boundary—a ditch, or a wall, or whatever may be suitable for the occasion, and to keep it in repair. Such a fence is called a march fence. It is part of the law of Scotland, however, as it would be of every civilized country, that although that is the way in which, strictly speaking, a march fence ought to be made, it may happen that a person having a property consisting of several fields duly separated from each other by existing fences, may sell a part to one person and the other part to another, and those parties may agree to take that, which formerly was a mere boundary between the two fields of the same proprietor, to be thenceforward a march fence which shall divide the two properties from each other. That they may do by express agreement. Whether there is any decision to that effect I am not aware. I believe there is, but if not, I should at once hold that it necessarily follows, and that it may be inferred, that they have made such an agreement, if they have always acted in a way consistent with the supposition

that they have made such an agreement, and inconsistent with the supposition that they have not.

Now in this case the boundary in question was a boundary originally between two fields belonging to Mr. Wilkie, and was made between the time when he became possessed of the property and the year 1802. It was a ditch to the south side, and a mound with a hedge to the north side. He in the year 1802 sold that which was on the north side to a gentleman of the name of Kennedy, who is now represented by the pursuer. Subsequently, in the year 1823, he sold that which was on the south side to two gentlemen who are now represented by the defender.

Ever since that time this hedge and ditch have existed, but the ditch has been suffered to be substantially entirely choked up, and the hedge has gone very much into decay, so that it appears that it was not a good fence, and that the pursuer's cattle were in the habit of straying into the defender's land, and, I dare say, for aught I know, the defender's into the pursuer's. What is perfectly certain upon the evidence is this, that from the time I have alluded to of the making of this hedge, or from the sale at least in 1802, all the pursuer's cattle, or the cattle of those whom he represents, had been in the habit of feeding up to the north side of the hedge, and that the defender and those who preceded him had been in the habit of feeding their cattle up to the south side of the hedge. The ditch has been entirely disregarded; of late it has been useless, because the land has been drained in another way. It is either entirely or almost entirely choked up, so that the defender's cattle have depastured up to the south side of the hedge.

What the pursuers had to establish was, that this, which was not originally a march fence, had by agreement been converted into a march fence, and that was to be proved by shewing, that the parties had acted as if this hedge and ditch were a march fence. But there is a total absence of evidence upon the subject. There is some shabby sort of evidence, that the hedge had been so treated. There is very small evidence of that, but I will take it if you please to be the most conclusive evidence. Little repairs had from time to time been made, or rather little temporary additions to the hedge, to prevent, for the time, the cattle getting through. Take if you please that that amounted to an admission on the part of those who made those repairs, that this was a march fence between them. I think, that if that had been a disputed point, it might have been difficult, upon this very meagre evidence, to have come to a conclusion.

But the parties seem to be at one upon this, that the hedge formed the sole boundary, or at all events part of the boundary, of their properties. That being so, the question is, whether that portion of the summons which was an essential portion of it, that the hedge and ditch together formed a march fence, has been established in evidence. It clearly was not a march fence when it was constituted, and there has been no single act done from beginning to end tending to shew that this ditch formed part of the boundary.

I shall not trouble your Lordships by going further into the case. I simply say, that I think the interlocutor of the Inner House was perfectly right, and therefore I shall move your Lordships that it be affirmed.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend on the woolsack, that the interlocutor appealed from ought to be affirmed. When the facts of the case are clearly understood, there seems to be very little difficulty in arriving at a right conclusion.

The boundary fence, which is the subject of this unhappy litigation, was made at a time when the pursuer's and defender's land was in the ownership of the same person. It consisted of a ditch and of a mound upon which there was planted a thorn hedge. Of course, the notion of this being originally a march fence, which seems to be ordinarily understood to be a fence in which two adjoining proprietors have a common property or interest, is entirely out of the question. But although the fence in its inception may not have been a march fence, it may have been made one by subsequent agreement.

Was the fence, then, or any part of it, consisting of hedge and ditch, constituted a march fence either at the time of the division of the property or at any time afterwards. By the conveyance in 1802 which separated the pursuer's part of the lands from the remainder which was retained by the original owner, the boundary, so far as the present question is concerned, is thus described, "bounded partly by a road leading through the lands of Briech, and partly by the farm of Auchenhard and western Briechdyke farm, presently possessed by Henry Potts upon the south." It appears to me that nothing whatever can be founded upon this description in favour of the appellant. The presumption certainly would be, that the granter, in conveying to the pursuer's author the lands with this description of the southern boundary, did not mean to convey anything on the southern side of the hedge which separated the lands from each other. There is no evidence of anything having been done to the fence during the time that the original owner retained his part of the lands, to afford an interpretation by usage of the general description in the conveyance to the pursuer's author.

In 1823 the part of the lands which had been retained by the original owner was conveyed to the defender's author, and passing through different hands became the property of the defender in 1848. Whatever was retained by the original owner at the time of the conveyance to the pursuer's author, passed of course under the general description of the boundaries in the conveyance

of 1823. Although down to this time the fence may have been a mere boundary, it is not disputed, that the respective owners of the lands might have afterwards agreed together to make the hedge and ditch a march fence between them, and there can, I think, be no doubt, that the fact of their having done so might be proved by evidence of joint repairs of this so constituted common property. But upon looking through the evidence for the pursuer, I do not find, that there is one of the witnesses who speaks to the ditch ever having been scoured and cleaned at joint expense of the owners of the pursuer's and defender's lands. The evidence as to the joint repairing of the hedge is of the most meagre description, and I might have thought it insufficient to establish it as a march fence, if it had not been for the admission of the defender to which I will presently advert.

This being the state of things, and the hedge being out of repair, and the ditch apparently nearly choked up, the pursuer presented a petition to the Sheriff of Linlithgowshire under the Act of 1661, cap. 41, stating that his lands were divided from the defender's by a thorn hedge and ditch running parallel with and close to the hedge, which hedge and ditch form together, and have constituted from time immemorial, or at all events for greatly more than seven years, the march fence between the said properties, and praying, that the Sheriff would ordain such operations as might be necessary for properly scouring and cleaning out the ditch, and for properly cutting, cleaning, and protecting the thorn hedge, and generally for putting the said ditch and hedge into a proper serviceable and fencible condition and state of repair.

The pursuer, in his condescendence before the Sheriff, asserted, that the thorn hedge and ditch were the march fence and the common or mutual property of himself and the defender. In his answer to this condescendence, the defender admitted and explained, that the march fence between the petitioner's lands and those of the respondent is and consists of a thorn hedge, which is the admission to which I have just adverted, but denied specially that the same consists also of a ditch running parallel and close to the same as here alleged.

According to my understanding of the Statute of 1661, the Sheriff has no power to determine any dispute as to the character and description of march fences, but can only order the repair of an admitted march fence. There seemed, therefore, to be no other way of determining this substantial difference between the parties, except by a declarator of the Court of Session. Accordingly, the pursuer raised his summons of declarator, praying that it might "be found and declared, that a thorn hedge and a ditch running close and parallel thereto and in length coextensive therewith, which divide the pursuer's lands from the defender's lands, form together the march fence betwixt the said properties, and is the common or mutual property of the pursuer and the defender," and that it should further be found and declared, that the pursuer and defender are bound to uphold and maintain the said hedge and ditch at their joint expense. In the 5th condescendence the pursuer alleges, that the march fence consisting of both hedge and ditch is the common or mutual property of the pursuer and the defender, who are bound to uphold and maintain the said march fence at their joint expense.

I should have thought that the summons as well as the condescendence meant to assert the joint liability to repair the fence as the consequence of its being common property. But this was denied by the counsel for the appellant, and your Lordships were referred to the pleas in law for the pursuer to shew, that he asserted a liability to repair independently of the question of the fence being common property. By the 6 Geo. IV. cap. 120, § 11, the pleas stated upon the record are to be held as the sole grounds of action or of the defence in point of law to which the arguments of the parties are to be confined, and each plea raises a separate and distinct issue.

It has been contended, that although the three first pleas in law of the pursuer allege a common property in the fence, the 4th merely asserts, that the defender jointly with the pursuer is bound to uphold and maintain the said hedge and ditch at their mutual expense. It appears to me, that the reasonable construction of the 4th plea is, that it asserts generally a liability to repair the hedge and ditch mentioned in the other pleas—that is, a hedge and ditch being common or mutual property. But even if the 4th plea in law is to stand independently of the others, it will be found that the issue raised by it will make no difference in the result of the case.

I agree with all the Judges of the Second Division of the Court of Session, that the pursuer has entirely failed to establish, that the march fence which alone he has claimed, first before the Sheriff and afterwards in his summons of declarator, in his condescendence, and in his pleas in law, namely, a march consisting of hedge and ditch is common property. I see no ground for the distinction taken by one of the learned Judges between a common property, and a common interest in the march fence claimed, nor any more evidence to establish the one right than the other. If it is not a statutable march fence, which it clearly is not, nor a march fence constituted by agreement or by adoption, of which there is no evidence, I cannot understand how there can be a common interest in it, which will impose a joint liability to repair enforceable under the Statute of 1661.

The ground of property and common interest in the march fence, consisting of hedge and ditch, being removed, there is great doubt, whether the question of general liability to repair at the mutual expense of the parties can be raised at all. But if it can, there is not the slightest evi-

dence to shew, that the defender is bound jointly with the pursuer to maintain the hedge and ditch in the terms of the pursuer's 4th plea in law. The pursuer has not adduced a single witness to shew, that the ditch has ever been cleaned at the mutual expense of himself and the defender. Therefore his summons of declarator has altogether failed of proof, and the interlocutor which he has appealed from must be affirmed.

I apprehend, that the effect of this affirmance will be, that the process brought into the Second Division *ob contingentiam* of the action of declarator being remitted to the Sheriff, he will adjudicate upon the question of repairs with reference to the hedge, the question of cleaning and repairing the ditch being entirely removed from his jurisdiction.

LORD KINGSDOWN.—My Lords, I entirely agree with my noble and learned friends. I apprehend, that the decision of the Inner House which we are now affirming is in effect this: It decides, first, that the hedge and ditch are not common property, and in the second place, it decides that the hedge and ditch do not form a march boundary.

Whatever else may be in dispute between the parties, it is admitted, I think, by both parties to this proceeding, that the hedge forms, I do not say a march fence, but at all events the boundary line to divide the one property from the other. That being so, the Sheriff will have to dispose of the question whether this fence shall be repaired, or a new fence shall be made, or what is the justice between the parties under the powers conferred upon him by the Statute of 1661.

Mr. Brown.—I trust your Lordships will allow the expenses of this appeal.

LORD CHELMSFORD.—This is almost a matter of course.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agents, J. L. Hill, W.S.; Oliverson, Lavie, and Peachey, London.—*Respondent's Agents*, T. Sprot, W.S.; W. Robertson, Duke Street, Westminster.

FEBRUARY 27, 1866.

JAMES BECKETT of Solsgirth, *Appellant*, *v.* JAMES HUTCHESON, Writer, Glasgow, *Respondent.*

Road—Statute labour Trustees—Liability for non-repair—Remedy—Action against Trustees—*A local Act made all the proprietors of lands of a certain rent trustees for making and repairing roads in the county of D. By § 15 the trustees of each district were to have the direction and cognisance of the roads within their district, with power to appoint the order in which roads should be repaired, and to appropriate moneys thereto, and, in case of difference of opinion, any trustee aggrieved might appeal to Quarter Sessions, which shall finally and conclusively determine the matter. A road being out of repair in one of the districts:*

HELD (affirming judgment), *That an adjoining owner, not a trustee, was not entitled to raise an action against the district trustees to compel them to repair, as no such duty was directly imposed on them, and the only remedy given by the Statute was an appeal to Quarter Sessions, for the duty of the district trustees was not to do the repairs, but to meet and consider how they could be best done.*[1]

This action was raised against the clerk to the trustees for regulating the Statute labour and for making and repairing the highways, roads, and bridges within the county of Dumbarton, under the Act passed for that purpose in 1829, as representing these trustees, and against the clerk to the trustees for these roads within the eighth district of that county. The object of the action was to have the Langmuir road, situated within the eighth district, and forming the access to the pursuer's property of Solsgirth, put in sufficient repair.

The pursuer set forth the powers of assessment and of borrowing conferred on the trustees, and averred, that the assessments they had imposed had been much within their powers, and that they had not exercised their borrowing powers at all. The pursuer's averments as to the condition of the road in the 9th, 10th, and 11th articles of his condescendence were, in substance,

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[1] See previous report 2 Macph. 482; 36 Sc. Jur. 230. S. C. 4 Macph. H. L. 6.; 38 Sc. Jur. 229.