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

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

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

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

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

MORRIS *v.* GUILDRY OF DUNFERMLINE.

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

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

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

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

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

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

in-law. His children, if he had any, continued Mr Reid's grandchildren, which implied their father being Mr Reid's son-in-law, just as much as their mother being Mr Reid's daughter. If a legacy had been left to the sons-in-law of Andrew Reid the pursuer would have been entitled to partake in it."

The defenders reclaimed, and argued that the pursuer not having applied for admission during his wife's lifetime, he was not entitled to obtain admission as a son-in-law after her death, and that they should have been allowed a proof of their averment that, from the period of the foundation of the guildry, it had been the usage to admit as sons-in law only those persons who made application during the lifetime of their wives. The Lord Ordinary had refused to allow this proof as incompetent.

The Court, after argument, on 4th July 1865, allowed to the parties a proof of their averments bearing on the question of usage, and the case having been again argued, the Court to-day altered the Lord Ordinary's interlocutor, and assoilzied the defenders.

The LORD PRESIDENT said—The question raised is whether a person, in order to obtain the privilege claimed by the pursuer, must be not only a son-in law of a member, but also the husband of a member's daughter. The following are the rules as to the entry of members founded on by the pursuer:—"1. Any individual having, neither by birth nor marriage, any claim or title to be admitted a member of the fraternity and incorporation shall be admitted a member on payment of £30 sterling. 2. Sons and sons-in-law of guild brethren, excepting as hereinafter mentioned, shall be admitted members of the fraternity and incorporation as follows, viz.:—If not exceeding twenty-one years of age, by payment of the sum of £1, 1s.; and if exceeding that age, according to the scale or table of fees hereunto annexed, which is hereby declared to form part of these rules, in the same manner as if it were herein engrossed. 3. Where an individual has been admitted a member of the fraternity, in virtue of a right acquired through marriage with the daughter of a guildbrother, his children by a previous marriage shall not be admitted members of the fraternity and incorporation other wise than is specified in the first article thereof." The claim of the pursuer is founded on the expression "sons and sons-in-law" in rule second. A question has been raised whether these rules were or were not intended to extinguish and ignore the previous unwritten law of the guildry. If they were, it is said the words must be read in their popular sense, and not as qualified by previous usage. On the other hand, it was contended that these rules only put into words what was the previous law of the fraternity. And it is said that previous to 1852 the usage was to admit sons-in-law, but only during the lifetime of their wives. I think that, in regard to the condition of things before 1852, when there were no rules, the usage is the thing to be looked to. It is said, on the one hand, that there is no instance of any son-in-law being admitted after his wife's death. On the other hand, it is said there is no instance of anyone being rejected, and therefore there is no usage on the subject. There is a case in 1791 of a Mr Henderson, who was admitted after his wife's death; but that was an exceptional case. He had applied during his wife's life, and the consideration of his application had been delayed through the fault of the Dean of Guild, and he was therefore admitted. That is the plain meaning of what was done, whatever be its value. Except that case, there is no case of admission, and none of an application tabled and refused. But there are cases proved where the parties would have been entitled to admission if after their wives' deaths they had been admissible; and these were not parties who did not care about entering, but who contemplated entering, and were deterred by those whom they consulted as to the usage. There are also one or two instances of persons being urged to enter before their wives' deaths, lest they might lose their privilege under the unwritten law of the corporation. The preponderance of evidence is in favour of the defenders, and the fact of no instance occurring is corroborative of it. I therefore think it established that the usage was to reject persons in the position of the pursuer. There is a minute of 1780 founded on by both parties. It is in these terms:—"Which day there was an overture laid before the guildry, in order for to have a standing law made annent the admission of the sons-of-law of gild brethren who had neglected to enter during the life of their wife, who had been the daughter of a gild brother; which being considered by the meeting, they appoint the Dean of Guild and his council to draw up a proper overture, to be laid before the guildry at their next meeting; and also that this overture shall comprehend the grandchildren of gild brothers whos father had neglected to enter; and that this overture shall be put in the book in order that the same may be turned into an act at next anniversary meeting, if so they shall approve thereof." This minute shows that it was in contemplation to alter the standing law as it stood at the time—namely, the usage. It was contended for the pursuer that this was a proposal to prevent admission after a wife's death, and that nothing having been done upon it, the law must have been as he contends. I think it could not be a proposal of that kind. Sons-in-law after the wife's death were kept out already according to the usage, and it must have been a proposal to let them in. This being so, do the regulations of 1852 abrogate the unwritten law? Is the term "son-in-law" used in a different sense in them from its sense previously. If it was intended to make any difference it would have been clearly stated, and I am not satisfied that the rules were intended to alter the law, or to do anything but remove doubts.

Lord CURRIEHILL concurred. He thought that if an alteration of the laws was made in 1852 there might be a question as to the power of the brethren to make it. He thought that the true theory of the society's law was to provide for the daughters of members as well as sons. The sons had a right to enter as such. The law gave the daughters the same privilege, by admitting their husbands on the same terms.

Lord DEAS said the Lord Ordinary proceeded on the footing (1st) that it was quite competent to make these rules; and (2d) that it was incompetent to inquire into previous usage in such a case as this. He greatly doubted the first point, and also the legality of making by these rules what the members themselves called "a new constitution." He had no doubt of the competency of looking to usage. Before 1852 there was nothing but usage, and he concurred as to the result of the proof upon it. Being satisfied of this, he was clear that the term "sons-in-law" could not be held to be used in the rules in any other sense than that in which it had been used from time immemorial.

Lord ARDMILLAN also concurred. He founded mainly on the overture in 1780, which, he said, it was impossible to read as an overture to prevent the admission of persons in the position of the pursuer. Nothing followed on it; therefore the practice remained. But in 1791 a person claimed admission whose wife was dead. It was as clear as day from what was done in that case, that the practice was not to admit, because he was admitted on the special ground that the matter had been delayed by the Dean of Guild. This exception proved the rule.

SECOND DIVISION.

PRINCIPAL AND PROFESSORS OF UNITED COLLEGE OF ST ANDREWS *v.* BLYTH AND OTHERS.

Property — Title — Possession — Proof. Held (aff. Lord Kinloch) that pursuers, claiming that certain subjects were included in their title, had failed to prove possession of the subjects, so as to show that their title comprehended them—