taken off by evidence that they were not intended to constitute marriage, but were interchanged for some other purpose, they cannot, I think, according to our law, be interpreted otherwise than as constituting very matrimony.

It is an important element in the case that the defender denied on record that the declaration was in his handwriting, and that sexual intercourse took place. False statements like these warrant a construction of the facts the most unfavourable for the party; for the fair inference is, that the statements were made for the purpose of avoiding that very construction. This is only one item of the proof against the party, but it is an item of the greatest possible importance.

I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT and LORD DEAS concurred.

Agents for Pursuer—Macdonald & Roger, S.S.C.
Agents for Defender—Adam, Kirk & Robertson, W.S.

Tuesday, May 25.

SECOND DIVISION.

POLLOCK *v.* H. E. CRUM EWING.

March Fence—Act 1661, *c.* 41—*Straightening of Marches — Excambion — Relevancy.* Circumstances in which the Court *held* an action for laying down a march fence between lands, brought under Act 1661, relevant, and appointed the line to be observed in making the fence.

This was an action brought by the pursuer under the Act 1661, intituled "Act for Planting and Inclosing Ground," to compel the defender to concur with him in constructing a march fence between the lands of Auchineden, situated in the parish of Killearn and county of Stirling, belonging to the pursuer, and the lands of Strathleven, in the parish of Bonhill and county of Dumbarton, belonging to the defender. The defender maintained that the jurisdiction of the Court of Session was excluded by the Act libelled on. He argued that the action was competent only in the Sheriff Court. This plea was repelled by Lord Ordinary JERVISWOODE.

His Lordship added the following note:—"The Lord Ordinary had the benefit of an ingenious and able argument on the question as to the exclusion of the jurisdiction of this Court, to which the second plea for the defender relates; but after examination of the Statute of the King Charles II. (1661), cap. 41, on which alone the summons is rested, the Lord Ordinary has been unable to see grounds on which to sustain the plea to which he has referred. The obligation thereby laid upon heritors, whose lands are adjacent, is general and absolute, and the jurisdiction conferred with a view to secure the enforcement of the provisions of the statute is most comprehensive, and certainly not altogether exclusive of that of this Court.

"The Lord Ordinary has only, in conclusion, to note that he has read with attention the elaborate and instructive opinions of the Court in the case of *Strang* v. *Stewart*, March 31, 1864, but it does not appear to him that either the judgment or the opinions there delivered are inconsistent with the views on which the Lord Ordinary is here so far proceeding.

"It is not as yet judicially determined that any march fence is to be constructed in the locality to which the conclusions of the summons relate."

The case was afterwards transferred to Lord ORMIDALE, before whom the defender maintained that the provisions of the Act were not applicable to the circumstances of the case, in respect that the march between the properties was a burn, and that it was impossible to erect a fence upon the line which was the boundary of the two properties —viz., the *medium filum* of the stream. A remit was made by Lord ORMIDALE to Mr John Dickson, Saughton Mains, to report upon the matter, who, after examining the proceedings and visiting the ground, reported—"1st, That it is possible to construct a strong iron fence in the centre of the burn, fixed to large stones to be placed there, but this could only be done at such a cost as would be injudicious, and would not be for the interest of either party; and 2d, that the best line of fence that could be adopted is that shown on a plan furnished by the pursuer's agents, and signed by the reporter as relative thereto—considering the nature of the ground, and having in view the interest of both parties."

As the line reported upon by Mr Dickson would encroach considerably on both properties, and would have the effect of an excambion or straightening of marches, the defender maintained that the pursuer should have laid his action on the Act 1669, being the Act applicable to straightening of marches. To this contention Lord ORMIDALE gave effect, and pronounced an interlocutor assoilzieing the defender from the action.

His Lordship added the following note:—"When the case was first debated before the Lord Ordinary, it was thought that an inspection by a practical man, such as Mr Dickson of Saughton Mains, of the line of march in dispute and adjacent grounds, and a report by him, might result not only in clearing up, so far as necessary, the disputed facts, but also in the parties agreeing to a line of fence, and the description of fence to be erected thereon. Accordingly, a remit was made to Mr Dickson, by interlocutor of 19th June 1868, and under that remit he has reported (Report, No. 15 of process) —'1st, That it is possible to construct a strong iron fence in the centre of the burn fixed to large stones to be placed there, but this could only be done at such a cost as would be injudicious, and would not be for the interest of either party;' and '2d, That the best line of fence that could be adopted is that shown on a plan furnished by the pursuer's agent, and signed by the reporter as relative hereto, considering the nature of the ground, and having in view the interest of both parties.'

"At the debate on Mr Dickson's report, both parties concurred in stating that a fence 'in the centre of the burn' was not to be thought of, and that the consideration of such a fence and line of march might therefore be laid aside. But the pursuer insisted that the other fence and line of march recommended by Mr Dickson should be adopted, and the fence ordained to be erected at the mutual expense of the parties, in terms of the conclusions of the summons. To this the defender objected that the proposed fence, if erected, would encroach considerably—at one place to the extent of no less than 79 yards—into his property, and would thereby have the effect of depriving him of a valuable portion of his estate, which he was neither bound nor could be expected to submit to, the more especially as it was stated by the pursuer himself,

in the third article of his condescendence, that the ground on each side, although hill pasture, 'yields a considerable rental.' Yielding apparently to the cogency of this objection, the pursuer ultimately contented himself with moving the Lord Ordinary to find that the line of march suggested by Mr Dickson was the right one; but, before pronouncing any decree against the defender for the erection of a fence along that or any other line, to sist this process, in order to allow the pursuer to bring another, laid on the Act 1669, c. 17, applicable to the straightening of marches, and to cases where ground must be taken from and exchanged between the coterminous heritors, and the ascertainment of the values of such ground, behoved to be made and paid for. The defender, however, insisted for absolvitor, leaving it to the pursuer to bring another action on the Act 1696, c. 27, or on such other grounds as he pleased.

"It appeared to the Lord Ordinary that, as matters have now turned out on Mr Dickson's report, and the respective contentions of the parties, decree for a march fence could not be given in the present action, and that he would not be warranted in adopting the course suggested by the pursuer, but opposed by the defender. There seemed, therefore, to be no alternative but to pronounce decree of absolvitor. This, however, will not exclude any other action, laid upon different *media*, the pursuer may be advised to institute. The Lord Ordinary may, in conclusion, remark, that he is not quite satisfied that the statutes in question are applicable at all to such a case as the present."

Against this interlocutor the pursuer reclaimed.

MACKENZIE and A. MONCRIEFF for him.

SOLICITOR-GENERAL and KINNEAR in answer.

At the end of last session, on the application of the pursuer, the Second Division remitted again to Mr Dickson, to report, *inter alia*, "whether a fence can be constructed along the margin of the burn, on which the pursuer's property is situated, with convenient watering-places for cattle?" and "whether such a fence can be constructed partly on the margin of the burn on the pursuer's side, and partly on the side of the defender's, with a crossing or crossings of the burn, also fenced, without involving any material change in the position?"

Upon these two questions Mr Dickson reported as follows;—

"In obedience to the terms of the foregoing interlocutor, Reporter having again inspected the line of march between the two estates, with the view of more correctly examining the margins and width of the burn, begs to state:

"1. That the march stream is a small burn flowing through a hilly district, in which there is a considerable quantity of water after heavy rains, and very little in dry weather, varying in width between the banks from 5 to 15 feet, and on an average may be taken as 10 feet wide.

"At his former inspection, in October 1868, there was a considerable quantity of water in it, but at his visit on the 18th instant there was so little water that he could step across it dry shod, and at one place, where the water was confined in a rocky bed, it was only two feet wide and seven inches in depth at the centre, so that, except for about 200 yards, where the banks are steep and rocky, it does not form a fence for either cattle or sheep.

"The Reporter may also mention that the course of the burn, from the letters C to D, has obviously been straightened, and the line altered at some former date, as the old winds of the burn are still visible on both sides.

"2. A wire fence can be constructed at an average distance of four feet from the margin or edge of the burn, wholly on the side on which the pursuer's property is situated, and if required, convenient watering-places can be got by merely making a small cut under the wires to the burn.

"3. That a similar fence can be equally well constructed, partly on the margin or edge of the burn on the pursuer's side, and partly on that of the defender's, with water gates across the burn, without involving any material change in the possessions.

"4. The description of fence that the Reporter considers to be most suitable to be erected on the margins or edges of the burn is a wire fence of six wires (the top wire of No. 4 and the remainder of No. 6), with iron standards set 9 feet apart, 4 feet 3 inches in height (above the surface of the ground), 1½ inches broad, and a quarter of an inch in thickness, with double prongs 18 inches apart and 15 inches long, fixed into the ground where it is suitable, and wherever there is rock, to be fixed in holes with lead; and iron straining posts two inches square (fixed into lays stones of not less than two hundredweight each), and properly stayed, to be put not more than 100 yards apart, and also at every turn where the fence diverges from a straight line (with two water gates over the burn at letters E and E, provided the fence is to be erected partly on both sides of the burn), and estimated to cost 1s. 8d. per lineal yard, or in all £180.

"And the Reporter is further of opinion that such a fence, if constructed either wholly on the one side of the burn, or partly on the one side and partly on the other, will be beneficial and serviceable to both parties, and he has shown on the plan, by blue line, the fence wholly on the pursuer's side of the burn, and by a black line the portion that he considers should be on the defender's side of the burn, having in view the formation of the ground most suitable for the fence.

"And assuming the fence to be constructed as proposed, viz., four feet from the margin or edge of the burn, the extent of land to be excambed on *both* sides would be under three roods, and worth about 5s. of yearly rent."

At advising—

LORD JUSTICE-CLERK—The pursuer and defender in this case are proprietors of lands lying adjacent to each other. The march between their properties is a stream, the character of which we have described in the second report of Mr Dickson "as a small burn flowing through a hilly district, in which there is a considerable quantity of water after heavy rain, and very little in dry weather." It is on an average ten feet wide. At one of his visits, he tells us, there was so little water that he could step over the burn dry-shod. It is plain that such a burn cannot form a march-fence of itself.

This burn is the march between two parishes, and between two counties, a fact which was very prominently brought forward in the argument; but which appears to me to be wholly immaterial and irrelevant in this particular question. The statute is applicable to the case of the march-fence of lands belonging to different proprietors; and if the bounding stream forms a march to which the provisions of the act would apply where it does not divide parishes or counties, the fact of its forming a parish or county boundary cannot take it out of these provisions.

Besides the evidence we have as to the nature of the burn in the description already noticed, we have it ascertained that a fence may be constructed in the centre of the burn, though the cost of construction would be too considerable to be remunerative or judicious.

Mr Dickson suggests, in his first report, a fence as the best which, leaving the line of the burn, should cross at one point, but should proceed pretty much in a straight line—the effect being to add to the permanent occupation of each proprietor a considerable portion of ground belonging to the other. The effect of this would be, that the permanent exclusive occupation of these portions of land would be changed, while, as the statute neither directly nor indirectly authorises a transfer of property, the property would remain in the party who could not possess it—a position wholly anomalous and unknown to the law. This is a sort of arrangement very common in such cases, but in the absence of agreement an application of the provisions of the Act 1669 is necessary to the legal effect of such arrangment. The Act 1669 is not founded on in the case, and this Court cannot enforce its provisions, which must be carried out before another tribunal.

Mr Dickson has, in his second report, reported that a mutual fence can be constructed in two other ways, and in either beneficially for the interests of the coterminous proprietors. One is a fence passing along the margin of the burn for about a half of the boundary; crossing the burn, and then following the margin on the other side, along to the end of the march—a comparatively inconsiderable portion of ground being affected. The third is one which should go along and near to the margin of the burn, but all of it within the property of the pursuer, proper provision being made for watering-places.

These proposed fences were not under the consideration of the Lord Ordinary: His Lordship, considering the only alternatives presented to him as involving either a very wasteful expenditure or a virtual transfer of property, dismissed the case; and if these had been the only alternatives, I should have concurred entirely in his views. But the case now before us has assumed a different aspect, and we have to deal with it with reference to the different conditions of the question now raised.

The first question is, whether to such a fence as the march-burn here the Act 1661 applies?

It would be certainly anomalous if an Act having application to Scotland should not embrace the case of so common a boundary. It is, on the other hand, obvious that where a considerable stream divides the adjacent properties, assuming the character of a river, it would be out of the question to deal with the construction of a march-fence in the middle of the stream as if the boundary were a mere burn. It would be impracticable to construct such a fence as the Act contemplated in the middle of such a stream; and a fence along one side of it could with no sort of propriety be described as a fence parting the inheritance. But where the erection of a fence is possible in the middle of the burn, and the burn is small, a fence along the margin, though it does not follow the very line of march which is the *medium filum aquæ*, seems reasonably to satisfy the statutory requirement. If the statute were not to apply in such a case, then, if the march is one of a water-run, however small, its application would be impossible. Indeed, in the case of a mere rill or rivulet of water, the case might very well be figured of a fence otherwise than along its margin being impracticable, for the very construction of a fence—certainly of such a fence as was in use to be constructed at the time of the Act—would displace the march, by occupying the whole or a material part of the *solum* on which it flowed.

The question occurred for decision in two cases not long after the passing of the Act. One that of the *Earl of Crawfurd*, in 1669; the other that of *Seaton*, ten years after. It was objected, in the case of the *Earl of Crawfurd*, "that the march is not a dry march, but a burn, and that the Act cannot be understood but of dry marches." The Lords repelled the plea, and in applying the provision of the Statute 1661, 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." This decision has never been, so far as I know, impeached; it is referred to as a good decision in our institutional writers, and it has indubitably governed the practice in such cases since its date.

In the case of *Seaton* this question was renewed. The march had been found by the Court to be "a strip of water running from the Lady's Well," and the fence was along the strip, and nearly altogether on the property of the proprietor who sued for payment of half the expense of its construction. I say nearly altogether, because, although the entire dyke is stated in the report in Morison as being on Garilton, I find in Fountainhall (Broun's Sup. 3, 228), that a portion of the dyke was demolished as having been constructed beyond the march.

The Court decided in that case that the fence along the strip, entirely on the land of the proprietor, was a march fence in the sense of the Act 1661, and they did so in accordance with the previous decision. I think that a fence constructed in this case along the margin of the march burn, and on the pursuer's land, will be a march fence within the Act.

The Court, in the case of *Seaton*, held that a requisition previous to the construction of the fence did not deprive the heritor constructing the dyke of his right, though they modified the amount to what might be shown to be *in lucrum* of the other proprietor; and this part of the decision, I agree with the Solicitor-General, is bad; indeed, in the subsequent case of *Ord* v. *Wright* it was expressly so found, as Lord Elchies explains in his Notes, but there is no trace of any impeachment of the decision in so far as it adopted the rule of the case of *Crawfurd*.

I am of opinion, therefore, both upon authority and principle, that the pursuer is entitled under his summons to construct a fence within his property along the margin of the stream, and that we should recall the interlocutor of the Lord Ordinary, and find accordingly. If the defender desires to have the option, which was given in *Crawfurd's* case, inserted in the interlocutor, I see no objection to doing so; but if not, I think we should find, in reference to the effect that a fence should be constructed in terms of Mr Dickson's second report, along the margin of the burn, but wholly within the property of the pursuer, and that the defender is bound to defray one half of the cost of construction.

The other Judges concurred.

Agents for Pursuer—Hamilton & Kinnèar, W.S

Agents for Defender—J. & A. Peddie, W.S.

Wednesday, May 26.

FIRST DIVISION.

HUNTER *v.* MILBURN.

Arbitration—Building Contract—Competency of Ordinary Action. A building contract contained a clause of reference. Disputes having arisen, the builder proposed to go before the referee, but the house-owner declined, whereupon the builder brought an action for the balance of the contract price. Action *held* competent, but consideration superseded to enable the parties to go to the referee.

The pursuer contracted for the mason-work of a house about to be erected for the defender, the contract containing a clause whereby it was provided "that in all matters of dispute relating to the carrying out of the several works to the full intent and meaning of the plans and specifications already required, or which shall from time to time be required and prepared by the said John Henderson, shall be referred to the said John Henderson, and that his decision shall be final and binding on all the aforesaid parties." Henderson was the defender's architect.

The pursuer now sued the defender for the balance of the contract price.

The Sheriff-substitute (CAMPBELL) pronounced this interlocutor:—"Finds that the present action is brought to recover payment of a certain sum of money as 'the balance due on the agreed on and ascertained price of estimate, and other mason work, executed by the pursuer' for the defender: Finds that the pursuer has failed to set forth on record any relative averments instructing that the alleged price has either been agreed on or ascertained: But finds, on the contrary, that it appears from the pursuer's revised condescendence that the work in question was done under a contract or agreement, containing a clause of reference of all disputes between the parties to a Mr John Henderson, but that the pursuer has not submitted his claim for the said balance, or under the said contract or agreement, to the said arbiter, although he pleads that the clause of reference, and any award which may be pronounced by the arbiter under the same, are binding and conclusive between the parties: Therefore finds that the present action as laid cannot be maintained by the pursuer, and dismisses the same and decerns: Finds the defender entitled to expenses," &c.

The Sheriff (DAVIDSON) adhered.

The pursuer appealed.

CLARK and BALFOUR for appellant.

SHAND and ORPHOOT for respondent.

At advising—

LORD PRESIDENT—I believe none of us have any doubt that the Sheriff-substitute and Sheriff have gone wrong in dismissing the action. The building contract here contains a clause of reference, and there is no reason for doubting that that is binding on the parties. It occurs in an English contract, but it is not said that there is any peculiarity in that law to prevent it from being as binding as if it had occurred in a Scotch deed. I think the pursuer proceeded correctly in terms of the contract when he called on the defender, if he objected to the work, to go before the arbiter and have the dispute determined. It is not denied that the pursuer took that course, and that the defender refused to go before the arbiter. In these circumstances, I think the pursuer was entitled to bring this action; and, having brought it, it must be observed that the defender does not plead that the action is excluded by the clause of reference, and yet the Sheriff-substitute and Sheriff have dismissed the action as if the defender had pleaded, and was entitled to plead, that it was excluded. It is plain that these interlocutors cannot stand. The next question is, How is the case to be disposed of? Nothing was said by the defender to create any doubt in my mind as to this reference being a binding reference of all disputes between the parties relating to the carrying out of the work; and, that being so, Henderson, the referee, is the proper person to settle the dispute on its merits. I do not think the subsistence of the reference, and the necessity of it going on its merits to Henderson, affects the validity of this action in this Court, and the practical course which I suggest is, that, after recalling this interlocutor, we should supersede consideration of the action for some time for the purpose of allowing the parties to bring the disputes before the referee.

LORD DEAS—This is an action by a builder for payment of the balance due on a building contract, on the allegation that his work has been properly performed. The defender maintains that in various respects the house is not properly constructed. The builder says there is a clause of reference as to that. The answer to that is a declinature of the reference, and a plea that the clause of reference has no application. The first question is, What was the builder to do? It is said that he should have gone to the referee. I don't think so. His proper course was this action. The other party not only declined the reference, but pleaded that it was inapplicable. The builder was quite right in the course he has taken. The defender is not entitled, by declining to go into the reference, to defeat the pursuer's *jus quæsitum* to have the disputes set right by the referee. The result is, that we must give an opportunity to the pursuer to go before the referee and state the dispute which has arisen; and, if the defender refuses to go, the referee will dispose of the matter without him, and then we will consider whether or not to give effect to that award. I think the clause of reference is clearly expressed so as to cover the disputes which have arisen.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Appellant—G. & H. Cairns, W.S.

Agent for Respondent—H. Buchan, S.S.C.

Wednesday, May 26.

WALKER *v.* MARSHALL.

Landlord and Tenant—Incoming Tenant—Value of Fallow. Where a landlord who had been in personal occupation of a farm let it to a tenant, *held* that the landlord was in the same position as an ordinary out-going tenant, entitled to claim from the in-coming tenant the value of fallow, manure, and seed, of which the in-coming tenant reaps the benefit.

The respondent is proprietor of the lands of Machan, in the parish of Dalserf and county of Lanark. For some years he had these lands in his natural possession, cultivating them himself as tenant. In 1866 he had prepared 12 acres for seed for a crop of wheat for 1867, 11 acres and 1 rood being summer fallow, and the remainder being in