of wire fences and feal dykes with wires along the top. The Lord Ordinary (MACKENZIE) remitted to a man of skill, who reported that the enclosures were chiefly of plantations and ground in the course of being reclaimed, and that the work had been executed in a substantial and durable style.

As there was some doubt whether wire fences were permanent improvements under the Act, Lord Mackenzie reported the case.

The Court were of opinion, that no general rule could be laid down declaring that any particular kind of fence was an enclosure within the meaning of the statute; that each case must depend on its own circumstances; that the mode adopted in this instance was very expedient; and that the enclosure of plantations was specially contemplated by the statute, the juxtaposition of planting and enclosing running through our statutes from the earliest times. Authority was accordingly given to charge the estate.

Agents for Petitioner—Mackenzie & Black, W.S.

Tuesday, March 14.

REID *v.* LAIRD.

Property—Foreshore—Boundary—Prescription. A party acquired a subject of which he had been tenant, described as the just and equal westmost half of a certain piece of shore-ground, as presently possessed by himself, and bounded on the east by a wall. The wall had existed for upwards of forty years as the boundary between the properties, but did not extend below high-water mark. The proprietor of the eastmost half had, in reclaiming ground from the river, encroached towards the west, and the wall did not in point of fact divide the properties equally, but slanted towards the west. In an action of declarator at the instance of the disponee against his author, the proprietor of the eastmost half, to have the boundary below high-water mark ascertained, *held*, that though the pursuer was excluded by the terms of his title from claiming any ground to the east of the wall so far as it extended, he was not barred by his title or by prescription from claiming an equitable division of the ground below high-water mark, which had not been possessed by either party; and the contention of the defender *negatived* that the boundary must be ascertained by prolonging the line of wall seawards.

Held, on a review of various modes of division proposed, as in the cases of *Campbell* v. *Brown*, 18th November 1813, F.C., and *M'Taggart* v. *M'Dowall*, 6th March 1867, that the legal boundary below high-water mark was a perpendicular let fall from the extremity of the original land march upon a straight line representing the average line of the *medium filum* of the river between two points fixed by the Court.

These proceedings, which related to a disputed boundary on the south shore of the Clyde between high and low water mark, near Port Glasgow, were commenced by John Laird, one of three *pro indiviso* proprietors of a piece of shore-ground, raising an action against Mr John Reid, shipbuilder, carrying on business as John Reid & Co., the conterminous proprietor on the west, complaining of certain encroachments alleged to have been made by Reid. A plea was stated in defence that being only one of three *pro indiviso* proprietors the pursuer had no title to sue.

The Lord Ordinary (ORMIDALE) repelled the plea, and substantially decided on the merits in favour of Laird.

Reid reclaimed.

The Court having suggested the propriety of a new action, in which all parties interested should be called, Reid raised an action of declarator, calling as defenders the whole representatives of the three *indiviso* proprietors. The conclusions of the summons were, that the legal boundary between the shore-ground belonging to the pursuer and defender respectively was a certain line A B, or alternatively a certain other line A C, to be explained presently.

In 1811, Lord Belhaven's trustees feued to John Laird and Peter Macfarlane a piece of shore-ground described as "all and whole that piece of vacant shore-ground on the north side of the turnpike-road leading from Port-Glasgow to Greenock, bounded by the lands of David Brown, gardener, on the east; by the lands feued to John Burns, deceased, and now belonging to Alexander Watson and Archibald Falconer, on the west; by the river Clyde at low-water mark, on the north; and by the said turnpike-road on the south parts." In the same year an arrangement was made by which Laird retained the eastmost half of the ground, and the westmost half was conveyed to parties named Carswell and Steel. No actual division took place, and the portion conveyed to Carswell and Steel was merely described as the just and equal westmost half of all and whole that piece of shore-ground described as above. The eastmost half remained in the hands of John Laird, and is now the property of his successors, the defenders. The westmost half passed through several hands, and in 1850 was acquired by John Laird, one of the defenders, who in 1853 conveyed it to the pursuer, who had been previously the tenant of the same. In the disposition to the pursuer the subject is described as the just and equal westmost half of all and whole that piece of vacant shore-ground, described as in the original feu-charter of 1811, but qualified by the words "as the same is presently possessed by John Reid & Co.;" reference also made to the wall between the two properties extending from the turnpike-road to high-water mark as forming the eastern boundary of the property conveyed. The wall here mentioned is still in existence, and had existed for more than forty years before 1853. The pursuer stated that the wall slanted outwards towards the west, and made his "half" considerably smaller than that belonging to the defenders. He did not, however, claim any ground to the east of the wall as it actually existed, but he maintained his right in calculating the proper mode of division to measure from the boundary of the two properties at the turnpike-road. The pursuer proposed two alternative principles of division, the first known as the "*medium filum* principle," the application of which to the present case is stated in his condescendence as follows:—"A plan has been prepared with a view of showing the proper line of division. The red line A C laid down upon that plan shows the line of division fixed upon the principle approved of in the case of *Campbell* v. *Brown*, as reported under date 18th November 1813, F.C. The north boundary of the ground now to be divided is the river Clyde at low-

water. The principle recognised in the reported case is to take a line representing the average direction of the centre of the river or firth, the shore of which falls to be divided, and upon it to drop perpendiculars from the march stones of the various properties. In fixing the red line upon the plan now produced the point of junction of the two properties at the turnpike-road was taken as the common boundary from which a perpendicular on the *medium filum* fell to be dropped. The average course of the river was taken by drawing an equalising line, including about 2½ miles of the river (one mile and a quarter up the river and the same length down), and embracing the projections and bays on either side of the ground to be divided, and the red line on the plan represents a line dropped perpendicularly on the said equalising line from the boundary of the two properties at the turnpike-road. This line falls somewhat within the defenders' enclosed property, obtained by encroachment as aforesaid, but it is only with the part of the line from A to C, that is to the seaward of the sea-wall, that the pursuer now seeks to have the proper division declared and carried out; and in the event of the principle approved of by the Court, as reported, being adopted here, he claims the shore-ground to the west of the line A C. The pursuer now offers to accept the division effected by the said red line should the defenders agree to this."

The second mode of division proposed by the pursuer is explained as follows:—"Cond. 8. The interlocutor in the case of *Campbell* v. *Brown*, dated 1st July 1813, was not the last interlocutor pronounced in the cause, as it appears from the process that a later interlocutor was pronounced on the 9th of June 1819, approving of a somewhat different principle of division, which had been suggested in an additional report by Mr Kyle, a man of skill employed in the case. This principle was to draw a straight line between the two extremities of the ground belonging to each of the adjoining proprietors where they touched the original high-water mark. The point of contact of the two lines formed an angle, and a line bisecting this angle, and produced seawards, was taken as the line of division. The object both of this mode of division and that mentioned in the preceding article was to regulate the division of shore-ground, not by the direction of the fences landward, but according to the extent of the respective fronts adjoining high-water mark. The blue line drawn on the plan represents a line drawn upon the latter principle; the extremities of the properties at high-water mark being taken as at the road. The result is to give the pursuer rather more of the shore-ground than he would get by the red line, and he maintains his right to have the division made according to the blue line. In this case, also, the pursuer only claims the shore ground north of the sea-wall."

The defenders founded on the clause in the pursuer's title by which the subjects were conveyed as then possessed by him, and to the reference to the wall as the eastern boundary. He maintained that not only must the wall be accepted as the boundary as far as it went, but that for the purpose of dividing the ground further out into the river the line of the wall must be prolonged. An alternative principle of division was also proposed by the defenders, which led to nearly the same result. This principle, suggested by Mr Sang, C.E., consisted of allocating the frontage at low-water mark between the pursuer and defenders and the proprietors of ground to the east of them in proportion to their respective frontage at high-water mark.

SHAND and MONCREIFF for the pursuer.

MILLAR, Q.C., and BURNET for the defenders.

At advising—

LORD PRESIDENT (after a narrative of the facts)—The scheme upon which the pursuer proceeds is this. He admits that, so far as ground has been gained by the defenders from the sea, and possessed for upwards of forty years, he cannot challenge the encroachment however manifest, but he insists that this shall not prejudice his right to the ground yet undivided between high and low water mark. He contends that he is entitled to take the original high-water mark, and draw a line from the extremity on one or another of the principles he proposes. The defenders say that the wall which bounds the embanked ground and divides it from that of the pursuer ought to be produced to low-water mark, and form the boundary. Alternatively, they suggest Mr Sang's boundary line. In regard to the first contention of the defenders, although there has been some attempt on both sides to prove possession of the unreclaimed ground adverse to the contention of the opposite party, I do not think it possible to decide the question on the footing of possession, for the possession of both parties has in reality been very much confined to the ground reclaimed. It becomes necessary to have regard to the history of the properties as disclosed in the titles. (*His Lordship then proceeded to trace the history of the properties from* 1811.) Mr Reid is excluded by his titles from claiming anything east of wall, but the wall does not extend below high-water mark. As what was conveyed to him was the "just and equal westmost half," the true construction is, that though the later parts of the disposition may control the general words as regards the reclaimed ground, they can have no effect in depriving him of his right to a just and equal half of the ground not reclaimed, and of which there had been no adverse possession. It is said that the pursuer is barred by prescription for challenging the wall. This is not quite the true position of the defenders. Their best answer to the pursuer's claim is to be found in the terms of his disposition. But the question is, whether will prescription entitle them to carry out the principle of division indicated by the wall? I think there is no authority for their contention. The maxim is, *Tantum præscriptum quantum possessum.* Where there is a clear distinction between ground possessed and ground not possessed by either party prescription will not give either more than what he has actually possessed. No doubt if this wall had been built by agreement between the two parties it would have furnished a strong argument that it had been intended to point out the line of boundary. But there was no agreement, and the question comes to be whether prescription is to be carried to all its consequences. That would lead to very startling results. A line of boundary between two mountain estates might, for instance, be described as running along a ridge. In the course of time one of the parties has possessed beyond the ridge and up to the next ridge for some part of the line. If the defenders' argument were good, it would be in the power of the proprietor who had made the encroachment to say to his neighbour, "You must carry out my boundary line according to the principle indicated by the part I have

possessed." That might entitle him to many times the quantity of ground he had actually possessed. *Tantum præscriptum quantum possessum* meets any such claims. The defenders, though they have succeeded by forty years' possession, or by force of the disposition to the pursuer, in getting a larger share of the reclaimed ground, are not entitled to get a corresponding share of ground never possessed by any one, and which has never been divided. On what principle is the division to take place? The defender is not entitled to have the wall produced seaward, and further he is not entitled to take the north end of the east wall as the starting point of the boundary seawards. On the contrary, he is bound to take the extremity of the original boundary between the properties.

The defender has another scheme—Mr Sang's plan. He proposes to take a certain length of water-side ground between certain limits, and, dealing with the whole proprietors, to divide the whole shore-ground in equitable proportions. One is tempted to ask, why take the ground between these limits more than any other portion of the globe? The only answer we get is, "Because they are fixed boundaries." There are many other fixed boundaries. It is a curious idea that a division should be made not only between the parties before the Court, but between other parties. I can see no intelligible principle in this plan.

It remains to consider what are the schemes proposed by the pursuer. We have been accustomed to believe that the proper mode of division is to ascertain the average *medium filum* of the river, representing it by a straight line, and dropping perpendiculars upon it from the boundaries of the properties. We are told that though that principle was adopted at one stage of the proceedings in *Campbell* v. *Brown*, it was abandoned, and a different principle adopted. This scheme appears to have been suggested by Mr Kyle, and is very fairly explained in condescendence 8—(*Reads as above*). By what mathematical process this will lead to an equitable result I do not know. Though it is not easy to express in words, it is quite easy to experiment upon the plan by figuring two contiguous properties along a river or the sea, and varying the lie of the ground. It will be seen that the production of a just or unjust result is a matter of the purest accident. I cannot adopt this plan.

Though the principle of the *medium filum* was not ultimately adopted, it was adopted at an earlier stage, and it was reported as a judgment of authority in 1813. In an important recent case, *M'Taggart* v. *M'Dowall*, 6th March 1867 (*ante* vol. iii, 277), it was not only assumed as a sound principle with legal authority, but made the basis of another analogous principle. The Court were asked to adopt the precise principle of *Campbell* v. *Brown*. They were not prepared to do that, since it was on the open sea—on the bay of Luce. They thought that the average line of the single coast was the proper line. The proper way in which the principle of the *medium filum* was accommodated to that case is stated by Lord Kinloch. The Second Division adopted that rule, and thus the case of *M'Taggart* is a strong confirmation and adoption of the principle of the recorded case of *Campbell* v. *Brown*. No doubt there may be some difficulty in adopting that principle to the particular circumstances of each case, and it is possible to adopt the principle in appearance, and work out very inequitable results. The difficulties occurred very strongly to Dr Keith Johnston. At first we did not fix the length of line, but we did in the second remit. It is important to remark that the length of the line was fixed by the Court themselves. It is not a matter of skill, but of justice and legal principle. If we adopt the principle of the *medium filum*, it will be the duty of the Court to determine whether the length of line proposed is fair and reasonable. Dr Keith Johnstone is not satisfied with the *medium filum* principle. It does not give him a precise formula by which he could divide the whole coast of Scotland. I do not share that ambition. All that the Court can do is to lay down a rule which shall be reasonably fair in the circumstances. In short, I can see nothing which affords any reasonable prospect of a just result, except the plan originally suggested in *Campbell* v. *Brown*. I am for giving judgment in favour of a line drawn on the principle of A C, of that precise line, if parties are agreed that it fairly represents the application of the principle. If not, we must have a remit.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—The practical question to be solved in this case is how the division line is to be drawn between the pieces of shore ground belonging respectively to the pursuer and defenders. If the outside boundaries of these grounds had been fixed down to low water-mark this might have been an easy process, involving, probably, nothing more than an equal division of the interjected area. But these outside boundaries, and at all events that on the east, between Messrs Laird & Co. and Anderson's trustees, cannot be held defined in such a way as to be binding on all parties concerned. The division must therefore be made, if possible, by the application of a general rule, which will be applicable indiscriminately in the case of all the conterminous proprietors.

I conceive that this general rule is to be found in the principle laid down in the reported case of *Campbell* v. *Brown* in 1813, and again (for the principle is the same) applied in the case of *Mactaggart* v. *Macdowall* in 1867. It has been said that the session papers in *Campbell* v. *Brown* show that by interlocutors not reported the Court went back on this principle, and that the case terminated without any final judgment. But I think the principle of the reported judgment is still very authoritative; and we have every reason to believe has been practically acted on since that date. It was, I think, directly sanctioned in *Mactaggart* v. *Macdowall*, the only difference in the mode of its application arising from the circumstance that in this latter case it was applicable to the open sea, whilst in *Campbell* v. *Brown* it was applicable to a river or firth.

The ground of the rule adopted in the reported case of *Campbell* v. *Brown* was that set forth in the original interlocutor of the Sheriff in that case, which found, first, negatively, that a mere prolongation of the land boundaries would not rightly represent the march upon the shore; and then found, affirmatively, that the line of march was to be ascertained by taking the extent of land frontage possessed by each along high-water mark, and giving to each a proportionate part of the shore at low-water mark, as the same was truly afforded by the actual course of the shore. This I conceive to be the meaning of the Sheriff when finding "that the extension of such enclosures towards

the bed of the river, within the high-water mark, ought to be regulated not by the direction of the conterminous fence between proprietors, but by the extent of their respective fronts adjoining to the high-water mark, and so that each shall carry out his enclosures in a direction equally corresponding to the course of the shore." The Court, in working out this principle, appointed a line to be drawn representing the *medium filum* of the river Clyde, and a perpendicular to be dropped on that line from the point indicating the land boundary between the properties where it touched high-water mark. In this way effect was given to the land frontage of the respective properties at high-water mark; and the shore was divided by a line falling perpendicularly from the point terminating the land boundary on the assumed average line of the bed of the river. The rule was of course equally applicable to all the properties lying on the river in that locality; and the shore fell to be parcelled out by a series of perpendiculars drawn each from the point of meeting of the conterminous properties at high-water mark. It perhaps cannot be said that the rule is one absolutely and inflexibly to be applied in all circumstances whatsoever. But, in the actual circumstances, I think the rule was fitly and judiciously assumed. So far as I can read the after unreported proceedings in *Campbell* v. *Brown*, I conceive the Court to have been in error in to any extent departing from this principle. It has been, to say the least, through accidental wisdom that the proceedings have not been reported ; and I do not doubt that the reported rule has practically settled many a controversy.

But, further, it appears to me that the rule received express confirmation in the case of *Mactaggart* v. *Macdowall*. In that case the conterminous properties were not on the side of a river or firth, but on the Bay of Luce, which was simply the open sea. There was in that case, therefore, no room for taking the *medium filium*, as in the case of a river. It appeared to me, as Lord Ordinary in the case, that the sound method of applying the analogy of the reported case of *Campbell* v. *Brown* was to assume a line representing the average line of the shore, and to let fall on this line the perpendicular dropped from the end of the land boundary. The Court approved of this rule, and appointed it to be carried into effect. In so doing, I think they just adopted the principle of the reported case of *Campbell* v. *Brown*, with the difference created by the circumstance that they were not now dealing with the bed of a river, but with the shore of the open sea.

I am of opinion that the rule laid down in the reported case of *Campbell* v. *Brown*, and thus sanctioned in the after case of *Mactaggart* v. *Macdowall*, should be made the rule of division in the present case. The case is so far different from the former cases that, in the present case there may be said to be involved nothing but shore grounds, without any adjacent land above high water-mark. But, practically, this creates no difference, for the point of separation of the properties at high water-mark is not subject of dispute, so far as it is matter of fact; and it was only as fixing this point that the ascertainment of the land boundaries was of importance in the former cases. The locality now in question is the identical locality which the Court dealt with in the case of *Campbell* v. *Brown ;* and the reported rule of that case ought, I think, to be applied.

The only difficulty which I have had has arisen from the circumstance that Mr Reid only acquired the property now in question in 1853, by which time Messrs Laird had, by possession, defined the line of boundary down as far as the north-west end of their sea-wall; and the line so defined was, in the disposition by Mr Laird to Mr Reid, assumed to be, so far as it went, " the eastern boundary of the ground hereby disponed." The doubt which hence arose was, whether, in the present division, the perpendicular which is to mark off the shore should not be dropped from the north-west corner of the sea-wall, on the footing that at the time of this purchase the sea-wall marked off the frontage along high water-mark belonging to Messrs Laird? I would have thought this necessarily to follow, were there no peculiarity in the terms of the disposition; but the one property had been disponed merely as contiguous to the other. But, by the terms of the disposition, Mr Reid acquires " all and whole the just and equal westward half " of the shore-ground as originally disponed by Lord Belhaven in 1811. In the present process, which is substantially a process of division of this shore ground, hitherto undivided, I have come, on full consideration, to be of opinion that the perpendicular which forms the line of boundary must be dropped from the point on the public road which indicates the point of separation between the properties, as constituted into separate properties in that same year 1811, between Laird and Macfarlane, Lord Belhaven's disponees. The line of boundary indicated by that perpendicular will be the line of march between the properties, subject only to this qualification, admitted by Mr Reid, that down to the sea-wall the line defined by the possession of Messrs Laird will be to that extent the march. The line of boundary which I thus think ought to divide the disputed shore ground will, as I understand, according to the evidence before us, tally with the line A C, alternatively concluded for in Mr Reid's summons of declarator. But this may, if necessary, be made the subject of further consideration.

Agent for Pursuer—William Mason, S.S.C.
Agents for Defenders—Adam & Sang, S.S.C.

Tuesday, March 14.

SPECIAL CASE FOR

J. D. KIRKWOOD (INSPECTOR OF POOR OF PARISH OF GOVAN)

AND

HUGH MANSON (INSPECTOR OF POOR OF PARISH OF DAILLY).

Poor—Settlement—Husband and Wife—Second Marriage. Held (*diss.* Lord Deas), That a derivative settlement acquired by marriage belongs to a woman only while she retains the status of wife or widow of the man from whom it is derived, and is destroyed, not suspended, by a second marriage ; and that on the dissolution of that second marriage, though her maiden settlement may revive, that derived from her first husband does not.

Question, Whether a residential settlement belonging to a woman in her own right, and not derivatively, is extinguished or only suspended by marriage?

The following Special Case was presented to the First Division of the Court of Session by the