The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, Find in point of fact—First, that the respondent Crawford Noble junior is the registered owner of the steam-trawler 'Lightning,' of Aberdeen, and that, being such owner, he, on 18th August 1883, sold to William Watson, the appellant, seven sixty-fourth shares of the said steam-trawler, at the price of One hundred pounds, which was paid to him at the time of the sale by the said appellant; second, that on 25th October 1883 the said appellant and respondent entered into the minute of agreement of that date, and in the record referred to; third, that it was admitted at the bar by the counsel for the said respondent that it was not the purpose of the said agreement, or the meaning or intention of the parties thereto, that the said appellant should cease to be the proprietor, as purchaser, by the aforesaid sale of seven sixty-fourth shares of the said steam-trawler, but only that the said respondent should hold the same in trust for him during the subsistence of the said agreement, and while the said appellant continued in the command and charge of the said trawler as thereby agreed, but subject to the forfeiture thereby provided if legally valid; fourth, that on 20th December 1883 the respondent dismissed the appellant from his employment as captain of said trawler, of which he then ceased to have the command or charge, under the aforesaid agreement, and that the said dismissal was warranted by the appellant's misconduct and drunken habits; fifth, that the appellant thereupon demanded from the respondent a transfer of the shares of the said trawler which he had purchased and paid for, and which the respondent held in trust for him as aforesaid, and that the respondent refused the said demands, on the ground that the said shares had by the said agreement been forfeited to him by the misconduct for which he had been dismissed from the command: Find in law that the said shares are the property of the appellant, who bought and paid for them, and that the same were not forfeited to the respondent by the misconduct for which he was dismissed, and that the respondent having refused to transfer when demanded, and persisted in the refusal, is bound to repay the prices which he received therefor: Therefore sustains the appeal, recal the interlocutor of the Sheriff appealed against, and the interlocutor of the Sheriff-Substitute of 9th June 1885: Repel the defences, and decern against the respondent in terms of the conclusions of the action: Find the appellant entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — M'Kechnie — Glegg. Agent—John Macpherson, W.S.

Counsel for Defender—Younger. Agent—

Friday, November 20.

FIRST DIVISION.

[Sheriff of Perth.

STUART & COMPANY *v.* KENNEDY.

Sale — Price — Consensus in idem placitum — *Mutual Error.*

A quarrymaster sold to a mason a certain number of feet of stone at a certain price. After the stone had been in part delivered and used it appeared that the seller believed that the stone was sold by the *superficial*, the buyer by the *lineal* foot. *Held* that in consequence of this misunderstanding there had been no *consensus in idem placitum* as to the price, and that as the stone could not be restored to the seller, the fair market value of the stone used ought to be taken as the price payable.

Wilson, 21 D. 967, followed.

James Stuart & Company, coal and lime merchants, Denny (afterwards represented in this action by J. F. M'Queen, trustee for their creditors), sued James Kennedy, Killiechassie, Tullypowrie, under the Debts Recovery (Scotland) Act 1867, in the Sheriff Court at Perth, for the sum of £34, 16s. 9d., being the balance of an account for £74 for coping-stone.

The pursuer undertook to supply the defender, a mason and builder, with 750 feet of garden wall coping at the price of 1s. 9d. per foot. The question in the case was, Whether the superficial or the lineal foot was intended?

The pursuer averred it was 1s. 9d. per superficial foot. The defender averred it was 1s. 9d. per lineal foot. 750 feet of the specified dimensions at 1s. 9d. per lineal foot amounted to £65, 12s. 6d., while at 1s. 9d. per superficial foot it amounted to £142, 3s. 9d.

The pursuer had on 30th June 1883 written the following letter to the defender—"Dear Sir—Further to my letter of 23d inst. I shall be glad to supply you with 750 lineal feet garden coping, 26″ broad, 3″ thick at sides, and 3½″ in centre, mill-faced, sawn on sides, and half-checked ½″ on the joints, put on trucks at quarries, at 1s. 9d. per superficial foot, and trusting this low figure will secure the order, I am, yours truly," &c.

The defender denied that he ever received such a letter, and there was no proof that he ever accepted the offer it contained.

The contract actually entered into was a verbal one, and was entered into between the pursuers' traveller and the defender, between whose evidence at the proof there was a direct contradiction; the traveller saying that the superficial foot, the defender that the lineal foot, was the measure agreed on.

After the question arose, the defender, under reservation of his position, had paid £40 on account. That sum being rather more than the stone then delivered would cost, according to his view of the bargain, he maintained in this process that no more was due. On the pursuers' view the total amount delivered would amount to £74, 16s. 9d., so that £34, 16s. 9d. was the sum sued for.

The Sheriff-Substitute (Graham) found for the pursuers, and decerned for the sum sued for.

On appeal the Sheriff (Gloag) on Sept. 26, 1885,

recalled the Sheriff-Substitute's interlocutor, and found that it was not proved that the parties had agreed on the price of the coping-stone; that the defender had paid £40 for the coping-stones supplied; that the fair market value did not exceed the sum so paid, and assoilzied the defender from the conclusions of the action, with expenses.

"*Note.*—The Sheriff-Substitute has decided this case for the pursuers, and has given cogent reasons for his judgment; but after very careful consideration I have come to the conclusion that the grounds of defence are of still greater weight, and that the defender is entitled to absolvitor.

"The pursuers, now represented by their trustee, were tenants of a quarry, and they agreed to supply the defender, a mason and builder, with 750 feet of garden-wall coping of specified dimensions, which the defender on his part was to put up on the estate of Garth. The price named was 1s. 9d. per foot, and the question about which the parties have differed is (as the Sheriff-Substitute states it), whether the superficial or the lineal foot was expressed or intended. The pursuer says that the price agreed on was 1s. 9d. per superficial foot; the defender avers that it was 1s. 9d. per lineal foot. The pursuers' rate, having reference to the dimensions of the coping to be supplied, amounts to more than double of the latter's rate. The price of 750 feet of coping, 26 inches broad, at 1s. 9d. per lineal foot, would be £65, 12s. 6d.; while at 1s. 9d. per superficial foot it would be £142, 3s. 9d.

"Now, in the first place, I have formed the opinion that 1s. 9d. per lineal foot was very near the market value of coping such as was supplied, and that 1s. 9d. per superficial foot was about double of the fair market rate. I think that important point has been fully established by the witnesses for the defender—Moir, M'Currach, and Beveridge—all practical men, thoroughly versant, I believe, with this matter, and well qualified to give evidence about it. It appears, besides, that the defender was actually supplied with stone-coping of the same kind—used by him for the same purpose—from other tradesmen, Calder Brothers, at 1s. 8d. per lineal foot, to which rate an addition of 1½d. or 2d. per foot would fall to be made for the operation of checking. Further, the defender depones that he had agreed to supply this coping to the proprietor of Garth for 1s. 10d. per lineal foot. This evidence is not corroborated, but I do not understand that it has been seriously questioned; and of course if the defender bought his coping from the pursuers at 1s. 9d. per superficial foot, and sold it at 1s. 10d. per lineal foot, he would be a very serious loser by that transaction. Now, the record fairly raises the question, what was the fair market value of this coping; and this weighty evidence for the defender has not been met by any independent evidence whatever. All the pursuers' witnesses besides James Stuart were in their own employment; they had never been concerned in supplying coping of this kind before; and they do not profess to be able to speak to its price in the market. Now, all the defender's practical witnesses say that the rate of 1s. 9d. per superficial foot was quite out of the question, and, on the whole, I cannot doubt that if decree were to go against the defender he would pay more than twice the market rate—more than twice what he paid to Calder Brothers—and about double of what he was to receive from the proprietor of Garth.

"It is no doubt true that all this would be of little consequence if the conditions of the bargain were clearly proved. If that were so, it would not signify whether the bargain was good or bad, equal or unequal; but if there be room for question as to the actual terms of the bargain, then I think the evidence as to what would be a reasonable price is very important, for it is surely very unlikely that the defender would deliberately agree to pay to the pursuers twice the sum for which he could get the same commodity from others, and twice the sum which he was to receive for it on re-sale.

"The question then remains—What is the direct proof as to the actual agreement between the parties? Now, their communications commenced with a letter of 21st June, in which the defender asks the pursuer for a quotation for 750 lineal feet of coping. The pursuer replied on 23d June asking further information, which seems to have been furnished, and then there comes the letter of 30th June, of which a copy has been produced, and on which the pursuers' case and the Sheriff-Substitute's judgment mainly depends. In that letter the pursuers explicitly state their price at 1s. 9d. per superficial foot. Now, the defender says that he never received that letter, and at the debate his agent argued the case as if the pursuers had not only never sent that letter to the defender, but had never intended to send it, and had simply concocted it for the fraudulent purpose of founding a claim on it afterwards. Now, I do not agree with that argument in the least. The letter is booked in the pursuers' letter-book in the ordinary way, and I have not the smallest doubt that they wrote it meaning to send it to the defender. Indeed, I see no reasons for charging the pursuers with any dishonesty at all. They had no practical acquaintance with this kind of coping, and I do not doubt that their demand of 1s. 9d. per superficial foot was made in perfect *bona fides*, and was in their opinion reasonable. Whether the letter reached the defender, or had been omitted to be posted, or had been misaddressed, or had somehow miscarried, is not perfectly clear, although I agree with the Sheriff-Substitute in thinking that the fair conclusion from the evidence is that it was delivered. The defender's denial that he received it raises a difficulty certainly. It is possible that he may have overlooked it; but however that may be, the important point is that there is no proof at all that the defender accepted the offer in that letter. One might have expected a written acceptance. But I hold that, on the evidence, the letter of 30th June, whether received by the defender or not, forms no part of the contract between the parties. That contract was entirely verbal, and was made at a meeting at Logierait between Small, the pursuers' traveller, and the defender. It does not very clearly appear why Small was sent to conclude the bargain, but it is of consequence to notice that Small in his evidence does not say that the pursuers said anything to him about the letter, and it is of still more importance to notice that he does not say that the letter was mentioned at all at the interview between him and the defender when the bargain was made. He depones that

the rate agreed to was 1s. 9d. per superficial foot; but the defender, on the other hand, depones that it was 1s. 9d. per lineal foot. There is no more, as regards this part of the case, than the directly conflicting evidence of these two witnesses, and I see no sufficient reason for preferring the one to the other. It may be said, on the one hand, that it is very unlikely that Small should agree to supply the coping at 1s. 9d. per lineal foot when the pursuers had just written stating the price at that sum per superficial foot. On the other hand, it is, in the circumstances which have been already referred to, highly improbable that the defender should have agreed to give the larger price. Now, considering that this bargain was completed verbally, and to all appearance somewhat informally, I think it possible to believe both these witnesses, Small and the defender, and I think the fair conclusion from their evidence is that they misunderstood one another—Small intending to refer to the superficial foot, the defender understanding and having in his mind the lineal foot. I by no means say that this view of the case is without difficulty; but my difference from the Sheriff-Substitute seems to be this, that I do not give such over-ruling weight to the letter of 30th June as he does, and I give more weight to considerations as to what would be a fair, reasonable, and probable bargain in the circumstances, as brought out by the practical witnesses adduced by the defender.

"Now, seeing that the bargain has been partially fulfilled, the legal result of holding that as regards price there has been no *consensus in idem placitum* is to hold that the goods supplied must be paid for according to the ordinary market rate (*Wilson*, 14th June 1859, 21 D. 957). Now, the whole quantity contracted for has not been supplied, but £40 has been paid to account. I think that 1s. 9d. per lineal foot is slightly under the ordinary market rate, judging from the evidence of the practical witnesses, and on the whole I think that the £40 paid to account comes sufficiently near the market rate. No question has been raised about the balance of the 750 feet of coping-stones not delivered; and as to that balance I do no more than indicate the view that the bargain as to them should be held to be off. I am not in a position, however, to express a final opinion to that effect.

"Other points were adverted to in the argument, but they are quite subordinate to the main question, whether the letter of 30th June is to be held as the basis of the agreement, to the exclusion of all considerations as to equity or probability. These points may, however, be very shortly referred to—(1) The price list (No. 17) is not of much importance in this case. It was said on the part of the pursuers to show that they always sold by the superficial foot. It does not show that exactly. But it does not refer to coping stones at all, and I think that the defender succeeds in showing that the prices stated in the list for pavement favour the view that 1s. 9d. per lineal foot rather than 1s. 9d. per superficial foot was a fair price for the coping. (2) Neither were the invoices of the portions of coping delivered pieces of evidence of much consequence. For although the words 'rate per superficial foot' heads one of the columns, still they are but ordinary forms, and no rate is in point of fact filled in in the appropriate column. I have examined the invoice-book and find that the rate of 1s. 9d. is filled in in pencil. But that did not come to the knowledge of the defender; at the same time, no reflection is involved against the pursuers, because all their invoices in the invoice-book are treated in the same way. The invoice-book may tend to show, what I think is probably the case, that the pursuers understood that the price was 1s. 9d. per superficial foot, but it shows nothing about the understanding of the defender. (3) The payment of £40 to account was rather in excess of the amount due for the coping delivered—if the price were to be stated at 1s. 9d. per superficial foot. But it was made after the defender had distinctly tabled his objections and stated his view of the bargain. There is no proof that he waived his objection, and the payment must be taken along with the explanation which he makes about it, namely, that it was made in the belief that the rest of the coping was to be supplied at his price.

"For these reasons I have reached, with considerable hesitation, a conclusion in this case different from that of the Sheriff-Substitute."

The pursuers appealed to the Court of Session, and based their case upon the letter of 30th June, which they maintained formed the substance of the contract between the parties.

The respondents denied ever having received the letter in question, and maintained that the terms contended for by the pursuers were so unreasonable and ruinous that it was impossible to suppose that he could ever have entered into them.

At advising—

Lord President—[*After stating the question in the case, and observing that he concurred entirely in the opinion of the Sheriff*]—There are, however, some portions of the evidence in this case which create a good deal of difficulty in my mind, and particularly the letter of 30th June 1883. In it the pursuer sets forth that he will be glad to supply the specified quantity of garden coping of the dimensions required "at 1s. 9d. per superficial foot, put on trucks at quarries." Now, the defender says he never received any such letter, and it certainly does not appear from the correspondence that he ever accepted the offer which it contained, and accordingly the difficulty arising from such a letter ever having been written is removed.

If that be so, then, as the bargain has been partially fulfilled, the Sheriff is right in holding that as regards price, there having been no *consensus in idem placitum*, the result in law is that the goods supplied must be paid for according to the ordinary market rate.

That was the rule laid down in *Wilson*, 21 D. 957, and it is the principle which must be applied in the present case.

In that case the transaction between the parties related to a sale and purchase of bullocks. There was a misunderstanding about the price, and as the goods could not in the circumstances be redelivered the Court found that the purchaser was bound to pay the market value of the cattle.

In the present case if one party thought that the price fixed was 1s. 9d. per superficial foot, and the other that it was 1s. 9d. per lineal foot, each party thus believing a different thing to be the contract, it is clear that there could be no *consensus in idem placitum*. If the question had arisen *rebus integris* there would have been no contract; the stone would have belonged to the vendor, and the price to the vendee. But if

something has followed on the faith of the agreement, then another rule must be applied. Here £40 has been paid to account, and it is a balance of £34 that is now sued for. More than half of the agreement has therefore been performed, and accordingly *res non sunt integræ*. In these circumstances, as a mistake has undoubtedly arisen when the contract was made as to the price which was to be paid for the stones, we must just resort to the principle laid down in the case of *Wilson*, and hold that the defender must pay the market price of the coping-stone, while the quantity which has been delivered will limit the amount of his responsibility.

Lords Mure and Shand concurred.

Lord Adam, who was absent on Circuit when the case was argued, delivered no opinion.

The Court affirmed the interlocutor of the Sheriff appealed against except as regarded the finding for expenses, and found no expenses due.

Counsel for Pursuer (Appellant)—J. A. Reid. Agent—William Duncan, S.S.C.

Counsel for Defender (Respondent) — Scott. Agents—Begg & Bruce Low, S.S.C.

Friday, November 6.

SECOND DIVISION.

[Lord Trayner, Ordinary.

WAUGH *v.* WYLIE.

Property—Boundary—Loch—Presumption arising from Natural Configuration of Ground—Possession.

Where the lands of two proprietors met at a loch, their respective rights in which and the boundaries of their estates were not disclosed by their titles, and a dispute arose as to whether one of them had any right in the loch—*held* that the natural configuration of the ground led to a presumption that the loch formed the boundary, that the *onus* of proof was therefore on the proprietor alleging right to exclude the other from the loch, and that he had not discharged that *onus* either by proof of a definite boundary including the loch in his estate or by proof of exclusive possession.

James Waugh, farmer, South Arnloss, Stirlingshire, was heritable proprietor of the lands of Barns, which come down to the east and south edges of a sheet of water called "The Little Black Loch." The property of Barnsmuir (which did not belong to either pursuer or defender) lies to the south and west of the sheet of water, and the property of Lochhouse, belonging to Alexander Wylie, W.S., Edinburgh, lies on its north side. This action was brought by Waugh against the proprietor of Lochhouse to have it declared that "the march or boundary between the pursuer's said lands of Barns and the defender's said lands of Lochhouse to the north of the loch called 'The Little Black Loch' is the march or boundary laid down and defined on the Ordnance Survey sheet herewith produced by the red line from the point marked X to the point marked Y, and formed or marked upon the ground by the five march-stones, which are marked on the said Ordnance Survey sheet by the letters A, B, C, D, E: And . . . that the said Little Black Loch shown on the said Ordnance Survey sheet is not comprehended within the marches or boundaries of the defender's said lands of Lochhouse, and that the defenders have no right, title, or interest to or in the said Little Black Loch: And further to have the defenders, and those deriving right from them, interdicted, prohibited, and discharged from troubling or molesting the pursuer in the peaceable possession and enjoyment of his said lands according to the march above referred to, or from invading or encroaching thereon in any manner of way in all time coming."

The pursuer averred—"(Cond. 3) From time immemorial, or at least for forty years and upwards prior to March 1883, the march shown upon the said Ordnance Survey sheet, and formed by the said five march-stones, has always been recognised and acknowledged as the march between the said lands of Barns and the said lands of Lochhouse, and the pursuer and his authors and their tenants, and others deriving right from them, have possessed the said lands of Barns for the said period conform to the said march. There is not, and never within the memory of man has been, any regular fence along the northern boundary of the said Little Black Loch other than the said five march-stones."

The defender denied these averments, and answered as follows—"Explained that the defenders, their authors, and their tenants, have from time immemorial, or at least for forty years and upwards, possessed their lands of Lochhouse as riparian proprietors on the said loch without any fence, obstruction, or hindrance whatever between their lands and the said loch. They have cultivated and grazed to the waters of the said loch, and have used the waters of the said loch for watering cattle, steeping lint, fishing, and other purposes at their pleasure without interruption or interference during the said period. There are valuable minerals under the loch, and the defenders, their tenants, and their authors have also partly wrought the minerals under the loch within their part of the *solum*. The stones mentioned by the pursuer are not march-stones between Lochhouse and Barns; and the effect of the new line of march now for the first time set up by the pursuer would be, as the defenders understand the pursuer's claim, to exclude the defender's lands of Lochhouse from all access to the said loch from which they are called, and which is a part and pertinent of the lands of Lochhouse as regards the shore and *solum* thereof *ex adverso* of the said lands."

The pursuer produced the following titles—(1) A charter of alienation granted by the Earl of Linlithgow and Callander, dated 21st February 1709, in favour of John Bowie, in which the lands conveyed were described as the lands of Holehouse and pertinents, and were further described as "meithed and marched conform to a decreet of division betwixt us and our other feuars of Holehouse." The lands were conveyed with the "haill fishing upon the Black Loch and Little Loch belonging to us." (2) A disposition by Charles Tinker and Cornelius Bryce, the successors of John Bowie, dated 26th May 1819, in favour of Thomas Johnston, of the lands of