bounds as the first minister of the new church and parish.

Now, it appears to me that when the Presbytery proceeded after the decree of erection to induct Mr Brown, they were proceeding with perfect regularity and propriety. He was for the first time admitted to such a benefice. All that is very clear, were it not for the case of *Grant* v. *Macintyre;* and it is contended that the case of Parliamentary ministers is on all fours with the case of Mr Brown. But when Mr Macintyre was admitted to Kinloch-Spelvie, he was admitted once for all as to that office or benefice. The erection of the church and district into a parish *quoad sacra* might affect his position as holder of that benefice, but it did not lead to any new admission. His *status* was undoubtedly altered, but his remuneration, stipend, and manse remained the same; and his office remained the same. On the other hand Mr Brown was never appointed to any benefice until he was appointed to the *quoad sacra* parish and church of St Margaret's. Mr Brown had no connection with the church prior to that appointment other than being employed for a limited time to conduct the services of the church. There was no kind of endowment to which he was entitled apart from the agreement that he was to get £150 a-year. Now, by statute, every minister of the Church of Scotland when admitted to a benefice is bound to contribute to the Widows' Fund. It cannot be said that Mr Brown was admitted to a benefice when he was appointed to this chapel of ease. I therefore think that there is a clear distinction between this case and the case of *Grant* v. *Macintyre*, and that the question submitted to us should be answered in the affirmative.

Lord Mure and Lord Adam concurred.

Lord Shand was absent at the hearing.

The Court answered the question in the affirmative.

Counsel for the First Party—Graham Murray—Dickson. Agents—Inglis & Allan, W.S.

Counsel for the Second Party—Pearson—Wallace. Agents—Mackenzie & Black, W.S.

Saturday, July 16.

OUTER HOUSE.

[Lord Kinnear, Ordinary.

EARL OF AIRLIE *v.* FARQUHARSON.

Property—March Fence—Deer Forest—Benefit not Equivalent to Cost—Act 1661, *cap.* 41.

The proprietor of lands occupied as a deer forest raised an action against the proprietor of the lands adjoining, which were let as grazing farms, for declarator that the defender should concur with him in erecting a march fence between their respective properties, and pay one-half of the expense, in terms of the Act 1661, cap 41. The fence proposed by the pursuer, though sufficient to enclose sheep, was admittedly insufficient to prevent deer from crossing the boundary. The line of the fence was at a great altitude, being for seven-eights of its length over 3000 feet above the sea level, and the cost of maintenance would thus have been great. The defender maintained that he had never felt any inconvenience from the want of a fence; that it was entirely in the interests of the pursuer's deer forest that the fence was asked, and that the cost of erection and maintenance would be out of all proportion to any benefit gained. The Lord Ordinary (Kinnear), after a report by a land agent and valuator, found that it had not been proved that a march fence was necessary or would be beneficial to the defender's estate, and *dismissed* the action.

This action was raised by the Earl of Airlie, proprietor of the estate of Caenlochan in the county of Forfar, against James Ross Farquharson, Esquire, of Invercauld, proprietor of the lands of Corryvaiuch in the county of Perth, and the lands of Corryvouse in the county of Aberdeen to have it declared that the pursuer was entitled, to require the concurrence of the defender in constructing a march fence between the said lands belonging to the pursuer, and those belonging to the defender, and to insist on the defender's making payment to the pursuer of one-half of the expense thereof, in terms of the Act 1661, cap. 41. And further, that the pursuer should be authorised to make the fence in terms of a specification and estimate produced, and that the defender should make payment to the pursuer of one-half of the expense.

The pursuer in his condescendence proposed that the fence to be erected along the march should consist of a stone dyke 2 feet 6 inches high, with two wires along the top on iron standards at a cost of 11¾d. per yard. The length of the march was 8000 yards, so that the total cost amounted to £391, 13s. 4d.

The lands of the pursuer to the east of the march were occupied as a deer forest; the lands of the defender to the west of the march were let as grazing farms.

The defender lodged defences.

A remit was made before answer to Mr James Bett, land-agent and valuator, to inquire and report whether a fence was necessary and would be beneficial to the parties, and whether the fence proposed by the pursuer was suitable.

From Mr Bett's first report it appeared that the whole line was at a high elevation, ranging from 2729 to 3483 feet above sea level, nearly seven-eights of its length being over the 3000 feet level. Formerly there had been a wire fence with wooden posts along the march for about a mile. This fence had been erected about the year 1868 by the pursuer's predecessor for the purpose of keeping sheep out of the forest, and not to prevent the passage of deer from the lands of the pursuer. In the reporter's opinion the proposed fence would be beneficial to the parties, as it would, on the one hand, prevent the sheep from the defender's lands from coming into and disturbing the forest, and on the other hand, would enable the sheep to graze undisturbed up to and all along the farm boundary; whereas without a fence both sheep and deer would be disturbed by the shepherds hunting the sheep away from the boundary. The reporter suggested that at either end of the march, where stones were to be had in sufficient quantity,

the fence should consist of a stone dyke 2 feet 6 inches high, with wrought-iron standards on the top, to stand 1 foot 2 inches above the cope of the dyke, and bored for two wires. On the remainder of the march line an iron and wire fence ought in the reporter's opinion to be erected.

The defender lodged objections to this report, in which he stated that he had never found any inconvenience from the want of a fence, and denied that it would be of any benefit to him; that the fear of disturbance to the deer was the reason of the demand, which was entirely in the interests of the pursuer's deer forest; and that the cost of erection and of maintaining the proposed fence would be out of all proportion to any benefit gained, and if the fence was erected at so high an altitude it would be broken down by the winter storms in little more than a year.

A second remit was made to Mr Bett to report—"Whether in his opinion the necessity for a fence arises from the occupation of the pursuer's land as a deer forest, or whether any fence, or, if any, whether a fence of the same character and extent, would be necessary if both estates were stocked with sheep."

Mr Bett then made a supplementary report, the draft of which was submitted to the defender who lodged representations with the reporter. The reporter stated that there was no room for doubt that the pursuer's object was to prevent his neighbour's sheep from trespassing on his deer forest; but that, assuming both estates were stocked with sheep a fence would still be necessary for the full beneficial occupancy of each, as otherwise the stock could not graze unmolested up to and along the boundary, and so utilise the whole grazing. The proposed fence would not prevent the crossing of deer at any point. The reporter also added that repairs would be occasionally required, but that if the fence he specified were carefully laid out and properly executed these ought to be reduced to a minimum.

The Lord Ordinary (KINNEAR) on 16th July 1887 found that it had not been proved that a march fence was necessary or would be beneficial to the defender's estate, and therefore dismissed the action.

"*Opinion*—The purpose for which the pursuer requires the march fence in question to be erected is admittedly to protect the deer in his forest from disturbance by the sheep and the shepherds of the defender. It appears to me to be very doubtful whether this is a purpose within the intention or scope of the statute. But however that may be, I am not satisfied that the defender will derive any such advantage from the proposed fence as to justify his being compelled to contribute to the cost of constructing and maintaining it.

"The common advantage to conterminous properties from the erection of a march fence is in general that each estate will be thereby protected against trespass from the other. But it is not said that the defender suffers any disadvantage in consequence of deer from the pursuer's forest coming upon his lands, or that if he did the disadvantage would be remedied by the erection of the proposed fence, because it is admitted that although it would be sufficient to keep out sheep, it would not be sufficient to keep in deer. It is not suggested that conterminous proprietors could be compelled under the statute to erect a sufficient deer fence; and if not, it seems very doubtful whether they can be compelled to erect a fence which is not of that character, but the sole purpose of which is to protect a deer forest from the encroachments of sheep.

"It is said that the fence will be beneficial to the defender because it will enable his sheep to graze undisturbed up to and along the boundary line. I have no doubt this is an advantage, and at all events I should accept the reporter's opinion as conclusive upon such a point. But the question is, whether it is an advantage commensurate with the expense which the pursuer proposes to lay upon the defender for the purpose of procuring for his own estate a different kind of advantage in which the defender will have no share.

"The reporter says that the line of march 'is at a high elevation, ranging from 2729 to 3483 feet above the sea,' and that for 'nearly seven-eights of its length,' it is 'over the 3000 feet level.' There can be no question that the maintenance of a fence of the kind proposed at so great an elevation must be costly, because it will be exposed every winter to storms which cannot but be destructive, and the introduction to Mr Bett's first report shows that it will not be very readily accessible for the purpose of timely repair. The defender accordingly requested the reporter to state the probable cost of repair year by year, and his opinion as to the benefit to either proprietor in comparison with the cost. I think the representation containing this request laid it upon the pursuer to satisfy the reporter, if he could, and through him to satisfy the Court, that the benefit to the defender's estate would be commensurate with the cost, and I must infer from the manner in which the reporter deals with this part of the question that he has been unable to do so. The reporter says that the cost may be reduced to a minimum by care in the original construction, and there can be no doubt that a properly constructed fence will not require to be repaired so frequently as a badly constructed one. But he states his opinion, as might indeed have been expected, that the fence will be exposed to conditions which a fence lower down would escape, and that occasional repairs will be called for, and he does not say that there will be any increase of value in the defender's grazings equivalent to the cost of making and repairing the fence.

"On the whole, therefore, I think that the pursuer has failed to show that the construction of the fence will be sufficiently beneficial to the defender to justify the action."

Counsel for the Pursuer—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defender—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.