sound one. Accordingly, on the assumption that the son of the pursuer and her daughter, as represented by her husband, the defender, are equally liable to support the pursuer, the only question which we have to decide is the amount which they are to contribute. I am not disposed to go beyond the sum which we thought sufficient in *Thom* v. *Mackenzie*, *supra*. That case was a very fair precedent for Mr Murray to found upon, and therefore I think we shall do justice between the parties if we decern against the defender for the one-half of £40, the other half being provided by Dr Foulis.

LORD MURE concurred.

LORD SHAND—The case of *Reid* v. *Moir*, *supra*, was decided in 1866, and we are now in 1887, and your Lordship has pointed out that the judgment was a unanimous one. But if the matter which was there decided could have been opened up I should not have regretted it, for I have always entertained considerable doubts as to the soundness of that judgment. Although, in the general case, a husband when he marries incurs liability for his wife's debts, I think that in a case like the present there is sense in saying that that general principle does not apply.

Otherwise, I agree that £40 is a sufficient sum to award to the pursuer.

LORD ADAM concurred.

The Court pronounced this interlocutor :—

"Decern against the defender for payment of aliment to the pursuer at the rate of £20 per annum, as his contribution towards the support of the pursuer, and that half-yearly, beginning the first term's payment at Martinmas 1886: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer and Reclaimer—A. J. Young—Salvesen. Agents—Sturrock & Graham, W.S.

Counsel for the Defender and Respondent—Graham Murray — Watt. Agent — Thomas Dalgleish, S.S C

Wednesday, July 20.

FIRST DIVISION.

MACLAGAN (COLLECTOR OF THE MINISTERS' WIDOWS' FUND) *v.* BROWN.

Church—Ministers' Widows' Fund—19 *Geo. III. c.* 20—54 *Geo. III. c.* 169.

The trustees of a church erected by private subscription offered the charge to an ordained minister of the Church of Scotland who was not a parish minister. He accepted the appointment, which was approved by the Presbytery. The trustees, in a petition to the Presbytery, set forth that they were about to apply to the Teind Court for the erection of the church and district into a church and parish *quoad sacra*, and submitted a draft constitution for approval, which provided that the said minister "shall be recognised and received by the presbytery of the bounds as the first minister of the new church and parish as soon as possible after decree of erection has been pronounced by the Court of Teinds." The Presbytery approved of the proposed application, and the constitution was approved by the General Assembly. Thereafter the Teind Court granted a decree of disjunction and erection, and the minister was inducted. *Held*, in a question between the minister and the collector of the Ministers' Widows' Fund, that the former was entitled and bound to become a contributor to the Ministers' Widows' Fund.

Grant v. *Macintyre*, July 14, 1849, 11 D. 1370, *distinguished.*

The Church of St Margaret's, Dumbiedykes, Edinburgh, was built in 1881 by private subscription in order to accommodate the inhabitants of the vicinity in connection with the Church of Scotland. On the 17th of October 1881 the trustees resolved to appoint the Rev. William Morris Brown minister of the church, and they intimated their resolution to him in a letter in the following terms :—"*Edinburgh*, 17*th October* 1881.—To the Rev. W. M. Brown.—My dear Sir,—At a meeting of the trustees held this forenoon it was agreed to offer you the charge as minister of Dumbiedykes Church. We guarantee you a yearly stipend of £150 for the first three years, the grant from the Home Mission in addition. Rev. Mr M'Nair, as convener, intends calling a meeting of the committee appointed by Presbytery for Friday first, at 22 Queen Street. I would be pleased to have your reply before then.—Yours sincerely, W. M. FORD." The Rev. William Morris Brown was at this date a duly ordained minister of the Church of Scotland, but was not a parish minister. At the meeting which followed the trustees elected Mr Brown; the Presbytery, upon the report of the committee appointed by them, approved Mr Brown's appointment, and he thereafter entered upon his duties as minister of St Margaret's.

In March 1885 the trustees of the church presented a petition to the Presbytery of Edinburgh, setting forth that they were now to apply to the Court of Teinds for the erection of the church, with a suitable district attached, into a church and parish *quoad sacra*, in terms of the Act 7 and 8 Vict. cap. 44; that in order to make the said application it was necessary that they should procure a constitution, and they therewith submitted the draft of a constitution to the said Presbytery for sanction and approval, and also prayed the Presbytery to recommend the boundaries proposed for the new *quoad sacra* parish. Article 15 of the said constitution proposed—"That the Rev. William Morris Brown, M.A., shall be recognised and received by the Presbytery of the bounds as the first minister of the new church and parish as soon as possible after decree of disjunction has been pronounced by the Court of Teinds."

The Presbytery approved of the proposed disjunction and erection, and consented to application being made to the Court of Teinds. The deed of constitution was, on the recommendation of the Presbytery, approved by the delegation appointed by the General Assembly for that purpose on 1st April 1885.

On 6th January 1886 a petition was presented to the Court of Teinds, and on 12th July 1886,

after the usual procedure, decree of disjunction and erection was pronounced in terms of the prayer of the petition. Thereafter Mr Brown signified his acceptance of the appointment, and he was admitted minister of the *quoad sacra* church and parish of St Margaret's, Dumbiedykes.

Certain doubts having arisen as to the right and duty of Mr Brown to become a contributor to the Ministers' Widows' Fund, this Special Case was adjusted, to which J. T. Maclagan, the collector of the said fund, was the first party, and the Rev. William Morris Brown was the second party.

The question upon which the judgment of the Court was craved was—"Is the party of the second part bound and entitled to become a contributor to the Ministers' Widows' Fund?"

In the case of *Grant* v. *Macintyre*, July 14, 1849, 11 D. 1370, the Court found, in conformity with the opinion of the majority of the whole Court, "that ministers ordained or admitted to the charge of any church and district, after the same shall have been erected into a church and parish *quoad sacra* under authority of the Statute 7 and 8 Vict. cap. 44, are bound and entitled to become contributors to the Ministers' Widows' Fund, but find that parties holding the charge of any church and district so erected, but who have been appointed to the same before the date of such erection, are not bound or entitled to become contributors to the said fund."

In view of that decision it was contended by the first party that Mr Brown had been appointed minister of St Margaret's before the church was erected into a church and parish *quoad sacra*, and that consequently he was neither entitled nor bound to become a contributor to the fund.

The second party maintained that he was not appointed until after the date of said erection, and that he was bound and entitled to become a contributor to the said fund.

It was argued for the first party—(1) That the appointment of Mr Brown in 1881 was quite sufficient, as admitting him to be minister of the church; (2) that even if that were not sufficient, by the constitution finally settled in 1885, before the petition to the Teind Court was presented, he was duly admitted as minister of the church. Accordingly the case was ruled by *Grant* v. *Macintyre*, July 14, 1849, 11 D. 1370; *Irvine* v. *Trustees of Widows' Fund*, May 24, 1838, 16 S. 1024, 1389, *rev. Gordon* v. *Trustees of Ministers' Widows' Fund*, February 18, 1836, 14 S. 509, and November 16, 1836, 15 S. 15; *Cheyne* v. *Cook*, June 20, 1863, 1 Macph. 963.

It was argued for the second party that Mr Brown was, prior to the erection, simply in the position of a missionary. His secular rights were wholly regulated by the contract with the trustees—a contract of employment. His office in no respect answered to the legal conception of a benefice. Besides, the constitution was only provisional on the erection, and therefore it was only in a sense that his appointment was prior to the erection. His position thus differed *toto cœlo* from that of the Parliamentary ministers, and the case of *Grant* v. *Macintyre*, *supra cit.*, did not apply.

At advising—

Lord President—The second party in this case is minister of the *quoad sacra* church and parish of St Margaret's, Dumbiedykes, and is *prima facie* entitled and bound to become a contributor to the Widows' Fund, because all ministers admitted to benefices of that description have been held by the judgment of this Court to be so bound. But it is maintained by the collector of the Widows' Fund that Mr Brown is not so entitled because he was minister of a church which, with the surrounding district, had been erected into a church and parish *quoad sacra*, and that he had been appointed before that erection. This plea is rested on the case of *Grant* v. *Macintyre*, 11 D. 1370.

The circumstances of the case are simple. The church at Dumbiedykes was erected by private subscription, and although recognised by the Presbytery as in communion with the Church of Scotland, had only the *status* of a chapel of ease erected by voluntary subscription. Then the trustees or subscribers applied to Mr Brown and offered him the appointment as minister, and the terms of their appointment are distinctly set forth in the letter which they wrote to him. They offer him the charge, and they guarantee him a yearly stipend of £150 for the first three years, the grant from the Home Mission in addition. They added that the Rev. Mr M'Nair, as convener, intended calling a meeting of the committee appointed by the Presbytery. Mr Brown answered favourably; the meeting was held; and it was agreed that Mr Brown should be elected.

Now, I pause to consider what was the nature of the arrangement between the subscribers and Mr Brown. The church belonged to the subscribers, and Mr Brown was selected to officiate as minister; and as he happened to be an ordained minister, he did not require to be ordained again for that purpose. The relation was that of parties to a mutual contract—to a contract of employment? That was the whole arrangement. No doubt it was carried through with the approval of the Presbytery; and that was quite right, for the church was intended to be in communion with the Church of Scotland. When the subscribers applied to the Court of Teinds to have the district in the neighbourhood of the church erected into a *quoad sacra* parish, they availed themselves of the provisions of the Act 7 and 8 Vict. cap. 44, sec. 8, and in doing so desired the Court to erect a certain district indicated by certain specified boundaries as a parish *quoad sacra*, and they offered the church of that parish, and they proposed that Mr Brown should be the minister of that church and parish. His position was to be essentially different from the position of minister of a chapel of ease. He was to have a permanent endowment under the 8th section of the Act 7 and 8 Vict. cap. 44. He was to have a stipend and manse. Provision was made for the upkeeping of the church and for the transference thereof from the subscribers to the Church of Scotland. All the provisions necessary to the maintenance of the ecclesiastical buildings were permanently secured. A deed of constitution had been approved by the General Assembly; and thereafter the subscribers presented the petition to the Court of Teinds, in which it was, *inter alia*, set forth that Mr Brown should be recognised and received by the Presbytery of the

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,