This was an action raised in the Sheriff-court of Edinburgh by Samuel Orr, trustee on the sequestrated estate of John Munro & Co., concluding for payment of a sum amounting to £27, 2s. 4d., due by the defender Alexander Melville to the said firm of John Munro & Co. The defender pleaded that various items were overcharged, and stated a counter claim of £18, 2s.

After a proof, the Sheriff (DAVIDSON) found for the pursuer, under deduction of two sums of £1, 2s. and £7, 10s, which was admitted by the pursuer, who was also found entitled to expenses.

The defender appealed.

At advising—

LORD PRESIDENT—This has been a very troublesome little case, and I am afraid there must be some hardship in our manner of deciding it.

The trustee only did his duty in bringing an action to recover sums apparently due to the trust estate, but then the defender is entitled to defend himself, and I think the trustee has not made out his claim.

The important element in the case is the account No 11 of process, which bears date 1871. The termination of the account proper shows a balance of £33, 15s. 6d. against the defender, and all the remaining entries, except the last two, are in pencil, but these last two are in ink, are in the bankrupt's writing, and prove that the account was rendered in its present shape by the bankrupt to the defender. To be sure the account, as now sued for, contains some items of later date, but these altogether make £7, 6s. 10d., and against that there is £7, 10s., which, it is admitted, must go to the defender's credit. That being the evidence of the account itself, the question is, what evidence there is to set against it. The trustee says he has made up an account from the bankrupt's books, bringing out a different result, but it is certain that there is no actual balance standing in those books of this amount, so that, so far, the account sued for must be more or less conjectural, so that I am afraid we must recal the Sheriff's interlocutor, and assoilzie the defender. As regards the question of expenses, I cannot say that the defender's conduct has been quite satisfactory. He has allowed the trustee to bring this action, which, in the absence of further information, he was bound to do, but it was quite easy for the defender to have given him such information, and so have saved all this expense. In these circumstances, while I think we must allow the defender his expenses in this Court, I am not disposed to recal that part of the Sheriff's interlocutor which gives expenses against him in the Court below.

The other Judges concurred.

Counsel for Defender and Appellant—Mair. Agents—M'Caul & Armstrong. S.S.C.

Counsel for Pursuer and Respondent—Brand. Agent—Robert Finlay, S.S.C.

Tuesday, November 26.

SECOND DIVISION.

[Sheriff Thoms, Caithness-shire.

LORD ADVOCATE *v.* SINCLAIR.

Property—Boundaries and Marches—Act anent Inclosing of Ground (1669, *c.* 7)*—Expenses.*

A petition under the Enclosure Acts prayed for a remit to a man of skill, without requiring the Sheriff to visit the marches. No objection in the Court below was taken to the competency, nor to the remit, and both parties concurred in dispensing with a personal inspection of the ground by the Sheriff. *Held*—(1) that the Sheriff must, under the Act 1669, c. 7, personally inspect the ground; (2) that looking to the value of the land, and the expense of the proposed fence, this was not a case to which the Act applied.

This was an appeal from the judgments of the Sheriff-Substitute (H. RUSSEL) and Sheriff-Principal. The Crown are proprietors of the lands of Scrabster, which adjoin those of Holbornhead, the property of Mr Sinclair of Forss, the appellant. On December 6, 1870 the Lord Advocate, on behalf of the Commissioners of Woods and Forests, presented a petition in the Sheriff-court of Caithness praying that warrant for service on the respondent be granted, "and thereafter to remit to Mr George Brown, tacksman of Watten, or such other person or persons as your Lordship may appoint, to report upon the proper line of march between the lands of Scrabster and Holbornhead respectively, where not already fenced, and upon an estimate of the just value of the parts to be adjudged respectively from the one heritor to the other, and to decern in favour of the party from whom shall be taken land of more value than the other, for any excess of value which may be found to be taken from such party; and thereafter to find that the most suitable fence to be erected on the whole line is a strong wire fence, or such other fence as may be reported by the said George Brown or the other person or persons to be named by your Lordship, and to ordain the same, or such other fence as your Lordship may find to be most suitable, to be erected at the mutual expense of the parties." It was set forth that this application was made under the Acts 1661 and 1669, by the latter of which (c. 7) "it is statute and ordained that whenever any person intends to enclose by a dyke or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous thereunto, it shall be leisome to him to require the next sheriffs or bailies of regalities, stewarts of stewartries, justices of peace, or other judges ordinary, to visit the marches alongst which the said dyke or ditch is to be drawn, who are hereby authorised, when the said marches are uneven or otherwise incapable of ditch or dyke, to adjudge such parts of the one or other heritor's grounds as occasion the inconveniency betwixt them, from the one heritor in favours of the other, so as may be least to the prejudice of either party, and the dyke or ditch to be made to be in all time thereafter the common march betwixt them, and the parts so adjudged, respective from the one to the other, being estimat to the just avail and compensed *pro tanto*, to decern what remains uncompensed of the price to the party to whom the same is wanting." But the prayer of the petition did not require the Sheriff to visit the marches. Further, along part of the march between Scrabster and Holbornhead there is no fence, and trespasses consequently are frequent, while portions of the boundary are crooked and uneven. Mr Sinclair entered appearance to defend, and on January 12, 1872, the Sheriff-Substitute remitted to Mr Brown to report upon the proper line of march. On February 9 he reported, finding that owing to the nature of the ground an exchange of land would be necessary, and a certain kind of fence was re-

commended. To this objections were taken—"(1) Because the line of march suggested by the reporter was in no sense a straightening of the march, but made quite a number of zigzags; (2) because the report proposed to set the fence in positions where year after year it will be broken down by landslips; (3) because the extent of march proposed to be fenced inferred a cost totally out of proportion to the value of the (crown) land to be fenced; and (lastly) because the report proposed to leave with the objector (respondent), at least at one point, a piece of ground so narrow and so surrounded by the proposed new fence and by an existing old one, as to be useless;" and it was submitted that a different line of march, as suggested by the respondent, would obviate the difficulties, and, that although by his proposal the Crown would get much more land than they would have to give, and must pay for it, it were better that it should be so, than that nearly the full value of a couple of acres should be thrown away in the erection of a fence for them."

On the 19th February the Sheriff-Substitute pronounced an interlocutor approving the report, and repelling the objections stated to it. The Sheriff-Principal, on appeal, adhered, and added in his Note:—

"The 2d, 3d, and 4th objections seem those only requiring notice.

"The 2d objection is one which the experienced reporter, looking to his knowledge of the ground, and seeing he had an interview with the respondent on the spot, when this and his other objections were stated, must be held to have duly considered.

"The 3d objection is vague, and in one view is an answer or defence to the application, which should have been stated long ere now. But it was explained that it had reference to the value of the braes along which the fence is to be constructed, to the exclusion of the valuable arable land on the top. The land deriving the benefit of the new fence the Sheriff considers to be the arable land, and hence this objection fails.

"As regards the last (4th) objection, the road shown on the plan (which the Crown says is public, and the respondent says is of another character), explains why the reporter did not feel warranted in doing anything to interfere with rights not in question in this process.

"It is proper to mention, with reference to the requirements of the Act 1869, that it was stated at the debate that, in respect of the Sheriff-Substitute's knowledge of the locality, his visiting the proposed march had been dispensed with by both parties. The Sheriff happens also to know the ground."

An appeal having been taken to the Court of Session, it was argued for the appellant that the provisions of the statute 1661 did not apply. Further, that it was a requirement of the Act 1669 that the Sheriff should personally visit the ground, and that it was incompetent to straighten the march as proposed, it not being to the advantage of both parties to do so.

Authorities quoted—*E. of Cassilis* v. *Paterson*, Feb. 28, 1809, F.C. 232; *E. of Peterborough*, M. 10,497; *Douglas* v. *Penman*, M. 10,491.

The petitioner argued that the petition was competent; and that in the Court below no objection having been taken, that now stated was only one on the merits. The question was really one of relative expense. Further, the express agreement of both parties to dispense with the Sheriff's visiting the marches was a sufficient answer to that portion of the appellant's argument.

At advising—

LORD COWAN—The Crown has thought fit, founding upon the statutes which are referred to in the application, to present this petition to the Sheriff of Caithness for straighting of marches. I think it is material to observe, first of all, what the terms of these statutes are. The first is that of 1661, which says that "where inclosures fall to be upon the borders of any person's inheritance," the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance, and recommends to all Lords, Sheriffs, and so forth, to see this Act put in execution. The second Act, which was passed in 1669, provides that whenever any person intends "to inclose by a dyke or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous thereunto," it shall be leisome to him to require the next Sheriffs or other officers "to *visit* the marches" alongst which the said dyke or ditch is to be drawn, who are hereby authorised, when the said marches are uneven or otherwise incapable of ditch or dyke, to adjudge such parts of the one or other heritor's grounds as occasion the inconveniency between them, from the one heritor in favour of the other. I have great difficulty in thinking that this is a case which falls within these statutes at all. I do not wish to lay down positively that this is not a case falling, in some of its aspects, within the statutes. At the same time, I think this is a case of a very remarkable nature—it has more the appearance of an attempt to have an artificial boundary run along the whole of the march between these two properties, when there is a natural boundary sketched by the hills, clearly marked out, than that of a proper straighting of marches. If it had been stated that at particular parts there was danger of trespass on account of the want of inclosures, it might have been competent to have asked a dyke or ditch to be made; but that has not been said to be the case except in one small part of this property towards the south of the boundary. But apart from that, although I think it is a consideration that one cannot keep out of view in judging how we are to dispose of this application, I think the prayer is inconsistent with the statute. I do not think that under an application of this kind—at least I can find no authority for it—it should be an application to the Sheriff to remit to a particular party to go and report upon the boundaries and upon the values of the several portions of ground which should be exchanged with a view to the adjustment of a suitable march. Such a process has for its object rather a forced excambion as between these two parties of particular portions of their estates, and this is not the object or purpose of either of the statutes. The proper application under the statute is that the Sheriff or Judge-Ordinary shall visit the ground, and in presence of the parties consider what particular parts ought to be given to the one and to the other, and what dyke or ditch it was necessary to have in order to prevent trespassing from one side to the other of the march. Now, here the application is not to visit, and, in point of fact the Sheriff never did visit these premises; because the Sheriff-Substitute says he was acquainted with the district in a sort of general way, just as we are all acquainted, I suppose, with districts which we have traversed or occasionally seen; and the Sheriff-Principal says he has the

same kind of general knowledge. In these circumstances, the parties have dispensed with that which I apprehend to be at the basis of every application of this kind. It is well known that prior to the statutes, under which this application is made, the way in which boundaries were marked out and trespasses prevented was by a perambulation of the march by the Sheriff, with a jury accompanying him, who adjudicated upon the line of march that ought to be fixed as the true boundary; and I am not aware that there ever was a judicial straighting of marches otherwise carried through, where the parties were not consenting, than by the Sheriff visiting the ground under a legal perambulation. That has now been superseded by the statutory procedure; but, unless expressly dispensed with by the parties, the statute plainly requires that there should be a visitation of the ground on the part of the Sheriff, as the first step in a process of this kind—and for this good reason, that when he goes to the ground, and has the parties there, he can judge for himself, and determine whether or not there is any need for an extended march wall of the expense that is proposed here to be incurred, or whether at some particular parts of the march there may not be a sufficient natural fence to dispense with that altogether. In the opinions that were delivered in the case of *Stewart* v. *Strang*, these principles were clearly laid down. The original jurisdiction was recognised to be in the Sheriff, whose judgment, after inspection as to the boundaries, will be held conclusive, unless it be shown that justice will not be done by adopting the line which the Sheriff has thought necessary. Here a different course has been followed. I will not say that Mr Sinclair is devoid of fault in not taking the proper defence, because he seems to have gone along with the Crown to some extent in approving of the manner in which the case has been treated; but ultimately it comes to this, that a most expensive wall or march dyke is recommended by the Reporter, which is to cost about £70 or £80. And then, when you look at the line of dyke which the Reporter has said to be the proper boundary, you find what Mr Sinclair justly contends for—that he has put the dyke in such a position as really to leave between it and the old wall which encloses Mr Sinclair's property a mere triangular piece of ground that would be of no use at all. I think the proposed line is also open to the objection which has been alleged, viz., that its effect will be to cut off unnecessarily a good deal of ground on the north side of Mr Sinclair's estate.

Upon the whole, and without going into this case further than is necessary to see how the case should be disposed of, my opinion is this, that this was a wrong application from the first, but that Mr Sinclair was wrong in not having objected to it; and then, in the second place, looking at the pieces of ground that are proposed to be exchanged, the expense of this wall is so great that we are entitled, under the authority of the decisions to which reference was made, to consider whether it is a march that ought to receive judicial sanction. Giving effect to the principles which I think led the Court in other cases of this kind, I am of opinion that we should dismiss this application altogether; and with reference to expenses, your Lordships will say what ought to be done. The parties will probably come to see the good sense and reason of uniting together, and leaving it to somebody or other to regulate in a more sensible way the march between these two properties.

Lord Benholme—My views of this case are very much the same as those of Lord Cowan. I think the main fallacy has been that the Sheriff has not gone to the spot and made his own observations in order to ascertain, in the first place, whether this is a case which ought to be entertained under the statute; and secondly, what is the most advantageous and economical line of boundary if it is to be fixed. Looking to the plan which we have before us, we cannot form a very perfect idea of the actual position of the properties. And still less, I should say, can the Sheriff know anything about it who was not on the spot at all. I quite agree with what Lord Cowan has proposed—that this application ought to be dismissed; and I would fain hope the parties might come to some adjustment of the matter in a more economical manner than is here proposed.

Lord Neaves—I concur in the opinions which have been delivered. This is a matter of considerable delicacy, because there is no doubt that those Acts are very useful Acts on the one hand, and they are also capable of being made extremely oppressive on the other. To compel a man with a small property to join in such expensive fences, may often be perfect ruin to him; and, on the other hand, a man with a small property may be a source of great annoyance and molestation by nimiously seeking enclosures and marches, and causing boundaries to be made in this way, when there is no real reason for them. Now, I do not mean to say that there may not be cases where it is possible to employ others to assist the Sheriff in what he does; but I think we should keep to the words of the statute in the first place, which authorises the party who wants to enclose and who wants to get ground made accessible and uniform for the purpose of his enclosing, to do what the statute requires, and that is that it entitles him to require the Sheriff to visit. His business is to require the Sheriff to visit the ground, to see it, and afterwards to take advice of any kind; but he ought to visit the ground, and it is only in that way that we can get a judgment which will entitle us to give it the weight which is due, and which ought always to be paid to it, if possible, where it comes from the inferior Courts. We cannot look at the ground ourselves, we can only get vague descriptions of it, but the Sheriff's report of his visitation of it ought to be the accord of what was right and wrong, and it will then carry a due and reasonable weight and authority. But here we are perfectly helpless in that respect, and all we have to guide us is the report of a Mr Brown, who was nominated, I think, by the pursuer, and his name put into the petition. I don't think that is a proper way of doing, or that a man should just do what appears proper to him in such a matter. In this very case, also, there appears to me to be grounds for holding that this is a boundary where it is wholly nimious to require a march dyke to be erected. There are places where there are natural boundaries which render that unnecessary; and although the mere extent of a boundary will not supersede the necessity for an enclosure where there may be danger of trespassing, this is not a case in which there is any reasonable ground for expecting that to any injurious extent, I will not say how far an enclosure to prevent that may not be right at some points here, but I think the parties can arrange that themselves without putting in operation these old sta es, which appear to me to have been de-

signed for a totally different matter, and intended to be carried out in a different way from that which has been adopted here. The Sheriff is said to have known these properties, that he had been there. What does that signify, if he did not apply his mind to the real question at issue between the parties. Does any man scrutinise the boundaries of a place like this until it becomes a matter of special inquiry? It is quite out of the question. A man may pass by a place every day in the year without having the slightest appreciation of the real question at issue when it comes to be a dispute of this kind. On all these grounds, I think we should refuse the application.

LORD JUSTICE-CLERK—I am entirely of the same opinion. I quite agree that the Sheriff, in following out the statute, if it applied, ought to have gone himself to the ground, and to have acted upon his own judicial persuasions; but I am inclined to think that, apart from that altogether, this application ought never to have been presented, and ought not now to be entertained. I have no notion that the provisions of the statute could apply to a rocky strip of ground along the sea shore, such as this, or that the expense that is proposed for the erection of this fence is at all legitimate. I find that the prayer of the petition is to this effect —after praying that the respective portions of ground which are found to belong to either party should be adjudged respectively from one heritor to the other, it then proceeds in this way,—"and thereafter to find that the most suitable fence to be erected on the whole line is a strong wire fence, or such other fence as may be reported by the said George Brown, or the other person or persons to be named by your Lordship." Now, this strong wire fence is to be erected for the purpose of clearing the boundary between patches of ground, the value of which amounts altogether to two guineas a-year, and the expense of it, according to the estimates, is to be between £70 and £80. I think that is absolutely out of the question, and therefore I think we ought to dismiss this application. As to what we are to do with the expenses, I would suggest for the consideration of the gentlemen at the bar, before we decide that, that they should consider whether they cannot agree upon a line of march and a natural fence. If they can, there is no reason why we should not interpone our authority to anything they think reasonable; but if that suggestion is unavailing in the present circumstances, we must just dispose of the claim.

Mr MILLAR said he thought there was no prospect of any such agreement, and therefore he asked for the expenses of the appeal, and also for the expenses in the Inferior Court from the beginning of the objections on the part of Mr Sinclair.

After discussion—

The LORD JUSTICE-CLERK said—I think the appellant here should get the costs of the appeal in which he has been successful, and that the rest of the expense should be borne by either party.

The Court pronounced the following interlocutor:—

"Sustain the appeal, alter the judgment, and dismiss the application, and decern: Find the appellant entitled to expenses in this Court, and remit to the Auditor to tax and report."

Counsel for Petitioner—Solicitor-General (Clark) Q.C., and T. Ivory. Agent—Donald Beith, W.S.

Counsel for Respondent and Appellant—Millar, Q.C., and Marshall. Agent—G. L. Sinclair, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Mure, Ordinary.

MURRAY *v.* ALLAN & OTHERS.

Process—Summary Procedure Act 1864—*Day Trespass Act* (2 *and* 3 *William IV*, c. 68)—*Warrant—Apprehension—Action of Damages.*

It is provided in the 35th section of the Summary Procedure Act 1864, that "every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of Court, procurator fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards."

It is also provided in the 11th section of the Day Trespass Act (2 and 3 William IV, c. 68) that "the justice before whom the charge shall be made, may, if he have reason to suspect, from information upon oath, that the party is likely to abscond, issue a warrant for apprehending such party, in the first instance, without any previous summons."

A complaint was brought before the Justices of the Peace for the county of A. under the "Summary Procedure Act" 1864. The offence charged was under the "Day Trespass Act," and an oath of verity by a credible witness to the statement in the complaint was produced to the Justice of the Peace. The complaint contained no direct information that the party charged was likely to abscond, but set forth that he had refused to tell his name and place of abode. On this the Justice issued a warrant to apprehend him. He was accordingly apprehended, and five months afterwards he raised an action of damages for wrongful apprehension. *Held* that the apprehension was something done "in a case instituted under the Summary Procedure Act 1864," and that the action of damages raised on account of that apprehension, not having been brought within two months after the cause of action had arisen, must be dismissed under section 35 of the Summary Procedure Act 1864.

This was an action of damages raised by William Murray, fish merchant, Fraserburgh, against John Allan, solicitor, Banff, and Mearns and Knight, police constables there, for wrongful and illegal apprehension. The circumstances were as follows —George King, the gamekeeper at Craigston, averred that he had found the pursuer and another man named Gordon Smith trespassing upon the lands of Craigston in pursuit of game. In consequence of this information, the following complaint against the pursuer and Gordon Smith was presented to the Justices of the Peace for the county of Aberdeen, under the Summary Procedure Act 1864.