Friday, June 18.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

EARL OF KINTORE *v.* KINTORE'S TRUSTEES.

Property—Straightening Marches—Act 1669, *c.* 17.

The proprietors of contiguous lands each presented a petition in the Sheriff Court under the Act of 1669, c. 16, for straightening of their marches. The Sheriff-Substitute conjoined the petitions, obtained a report from men of skill, personally inspected the lands, and allowed the parties to lodge objections to the reports. After hearing parties on their objections he fixed the marches. One of the parties appealed on the ground that the Sheriff-Substitute had acted *ultra vires* in laying down what he and the reporters thought a more convenient line instead of simply straightening the marches. Appeal *dismissed*, because the Sheriff had only altered the marches so far as necessary by fixing a line more convenient for both parties, and in so doing had not acted *ultra vires*, and *separatim*, because there was no specific statement of the points on which he was said to have erred.

Observed that the Court might, on such a specific statement being made and substantiated, interfere with the manner in which the Sheriff exercised his discretion in carrying out the Act.

The lands and estate of Haulkerton, in the parish of Laurencekirk, Kincardine, which forms part of the entailed estate of the Earl of Kintore, adjoin the lands of Redford, Ravenshaw, and others in the parish of Garvock, which belong to the Dowager-Countess of Kintore and others, the trustees of the late Earl. The Earl of Kintore presented a petition under the Acts 1661, c. 41, and 1669, c. 17, and the Act 10 Geo. III., c. 51, secs. 32, 33, and 34, and other Acts relating to excambion by entailed proprietors, in which he prayed the Court to find and declare that he, being about to enclose part of the farm of Keilburn, part of Haulkerton, by erecting a fence on the march between them and the said contiguous lands belonging to the trustees of the late Earl, was entitled to insist in an action of straightening the marches, to adjudge as much of the defender's lands to the pursuer, and of the pursuer's lands to the defender, as would enable the fence to be built with advantage, and to remit to men of skill to adjust the value of the land necessary to be excambed, &c. A similar petition was also presented by the trustees of the late Earl, but craving that the march should be straightened not only between them and Keilburn but along the whole march of the two properties.

On 8th October 1884 the Sheriff-Substitute (Dove Wilson) in respect of contingency conjoined the two petitions, and before answer remitted to Mr Walker, land valuator, Aberdeen, and Mr Mitchell, Kinross, to inspect and adjust the value of the lands proposed to be excambed, and settle the marches thereof, and to report upon oath whether the proposed exchange would be just and equal, all in terms of the statute.

On 15th November the Sheriff-Substitute made a personal visit to the lands. On 25th November 1885, the reports having been lodged, he allowed parties to lodge objections to it if so advised. The trustees lodged objections, which are fully referred to in the Sheriff-Substitute's note appended to the interlocutor which he pronounced on 26th February 1886, and which was as follows: —"Finds that it is expedient that the march-line between the lands of the pursuer in the conjoined actions and those of the defenders therein should be straightened and fenced, and approves of the report and of the accompanying plan; remits of new to the reporters to lay down by march-stones and fences, as recommended in their report, the march-line therein settled, and declares that said fence when so erected shall in all time coming be the common march between the pursuer's and the defender's lands: Finds that the portions of land to be taken from the one estate and added to the other are of equal value, and adjudges and ordains such parts of the pursuer's lands as are on the defenders' side of said march-line to belong to the defenders, and such parts of the defenders' lands as are on the pursuer's side to belong to the pursuer: Further, grants warrant to the pursuer and to the defenders to make the necessary exchange of lands by contract of excambion, and finds and declares that the said contract on being recorded in the Books of Court within three months after the date of execution thereof shall be effectual to all intents and purposes, and that the land given to the pursuer in exchange for the land excambed by him shall be held to be a part of the entailed lands and estate of Haulkerton, and shall be subject to all the prohibitory, irritant, and resolutive clauses of the entail of said lands and estate in the same manner as if it had been originally a part of the said lands and estate, and that the land given by the pursuer under said contract of excambion shall after the date hereof be held as out of the said entail, and be liberated from all the prohibitory, irritant, and resolutive clauses thereof, and decerns.

"*Note.*—The objections which have been stated by the defenders at the latest stage of these proceedings to the march-line which was laid off by the reporters, with my concurrence, are contradictory of their previous position. In their defences they maintained successfully that the whole boundary between their lands and the pursuer's fell to be rectified, and that operations could not be limited in the way the pursuer proposed to a single farm, but at the inspection they agreed with the other party in asking that the boundary should not be laid out in one straight line from end to end of the two estates, but that it should be laid out so as to make no further alterations than were expedient upon the existing fields through which the existing march ran as an undefined line. After hearing the views of the parties and of the reporters I was satisfied that to act on the proposed principle would give the best boundary, and I thought that so long as the unevenness of the march was rectified, and a good ine for fencing obtained, there was nothing in lhe statutes to prevent its adoption. I have no doubt that it would have been possible to have adopted the other principle, and by disregarding

the existing divisions of the land make a nearer approximation to a straight line from end to end, but there would have been obvious inconveniences. Were another principle now to be adopted everything which has been done in the process since the record was closed would have to be thrown away and commenced of new, and whatever powers a higher Court may possess I do not conceive that I can pronounce any order involving any such result.

"The objections stated by the defenders are all referable either to the principle upon which the boundary line has been laid out, or to things over which I have no control. Had any objections been stated to the effect that a mistake had been made at any particular part of the march-line, and had any suggestion been offered for amending it, or had it been said that any mistake had been made in valuing the parts to be excambed, I would have been ready to consider it. The complaint that the new line of march leaves the defenders' lands without houses is one which the Sheriff cannot remedy. The defenders' lands have no houses at present, and no rectification of marches could take one of the pursuer's steadings and give it to them. The defenders' complaint as to the mill-dams is a complaint against a benefit done to them. For things which can be of no use to them till water can run uphill they have got an equivalent of useful land.

"One of the defenders' objections seems to point to the boundary having been uncertain before the present proceedings commenced. If that had been so the defenders should have raised that point by declarator, and have had it settled before the inspection took place. At the inspection all parties concurred in holding that the existing line of boundary was known and settled."

The trustees appealed, and argued — The Sheriff-Substitute had not proceeded in terms of the Act. His duty was to have laid down a line which was straighter than before, instead of which the line he had directed was really more irregular than the former one. Further, he had acted *ultra vires* in directing the transference of pieces of ground so considerable in size from the one party to the other. In short, he—and the two reporters seemed to have agreed with him—proceeded as if the purpose of the Act was to lay off a new march-line which would on the whole be more convenient to both parties, instead of simply to make the march-line straighter than formerly. Even if that had been the object of the Act, the new line would prove very much more inconvenient to the trustees than the old—*Lord Advocate* v. *Sinclair*, November 26, 1862, 11 Macph. 137.

The pursuer was not called upon.

At advising—

Lord Justice-Clerk—If there had been any specific grievance mentioned on the part of the trustees here it would have been quite competent for us to have remitted to the Sheriff for a detailed statement of the grounds on which he proceeded, or if it had been said that the Sheriff had not taken into account views which the parties urged upon him, I do not say that there is any technical difficulty which would prevent us doing justice between the parties. There is no such case here. The Sheriff-Substitute seems to have taken more trouble than is usual in such cases. He conferred with the parties, and in his note he has stated the grounds on which he proceeded. It is said that the statute only gives the Sheriff power to make marches straight which before were crooked. I certainly dissent from that. There are many cases in which it is in the highest degree important that the convenience of the parties should be considered. The statute is not, of course, intended to be the means of compelling one man to hand over his lands to another, but in the present case I do not think more land has been taken from either party than is necessary to make the march convenient to both. I think the Sheriff-Substitute has acted with discretion and care in the matter.

Lord Young—Neither party can maintain that the statute of 1669 is inapplicable to the case, for they have both presented petitions to take advantage of its provisions, and no proposition has been formulated showing that the Sheriff-Substitute has misapprehended the meaning of the statute or mistaken his duty under it. But if the statute applies, and the Sheriff-Substitute has neither misunderstood the statute nor mistaken his duty, there is an end of the case. If the statute had been made a mere pretext for forcing an excambion on one party, that would have been a misapprehension of the statute, but there is no such case here. The Sheriff-Substitute seems to have considered the matter carefully and thoughtfully

Lord Craighill—I am of the same opinion. I think the Sheriff-Substitute has done the best for both parties, and I am the more fortified in that persuasion by the circumstance that there were two reporters here, one representing each of the parties, and they are both agreed that there is no ground of complaint—that the interests of neither party have been disregarded. Then it is not to be forgotten that the line which the Sheriff-Substitute has laid down holds the field. We do not in the least know what the trustees desire to have put in its place. They have left us entirely in the dark on that matter.

Lord Rutherfurd Clark—I am of the same opinion. If it had been shewn the Sheriff-Substitute had acted in any way illegally, the trustees would have been entitled to redress. But it has not been shewn that the Sheriff-Substitute acted outside the statute. I do not know whether we can interfere with his discretion. I rather think that it is possible that in some circumstances we might. But there is no case stated here to justify our interference.

Lord Young—Perhaps your Lordships will permit me to add what I intended to say but omitted, very much in the language which Lord Rutherfurd Clark has just used, that I think we may interfere with the discretion of the Sheriff, but then, as I pointed out in the course of the debate, we should have required a specific statement of the particulars in which the Sheriff is said to have erred, and the alterations which the party complaining proposed to have in substitution for what the Sheriff had done.

Lord Justice-Clerk — I think I sub-

stantially said that; at all events I intended to do so.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Pursuer — Darling — Graham Murray. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Strachan—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Friday, June 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'DONAGH *v.* P. & W. MACLELLAN.

Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 7—*Notice.*

A workman sustained personal injuries on 7th May. He sent his employers notice of injury in time to be delivered in course of post on 19th June. *Held* that this notice was not served within six weeks from the occurrence of the accident within the meaning of the Employers Liability Act.

Reparation—Action—Receipt for Sum of Money in Compensation for Damages.

A workman who was making a claim against his master for reparation for an accident had intimated it through an agent, but afterwards met his master at the works and agreed to settle his claim for a small sum, and signed a receipt for the sum as full compensation. He subsequently raised an action of damages for the accident, stating that he understood that the amount given him was only part compensation. It was not proved, and he denied, that the receipt was read to him before signature, or that he intended to settle the whole case. *Held* that on repayment of the amount for which he granted the receipt he was entitled to be restored against it and to proceed with his action.

Process—Sheriff—Appeal—Plea.

A workman sued his master for damages for injury. The Sheriff found that the pursuer had discharged his claim, and the Court found on appeal that the discharge was no bar to the action. The pursuer then moved for leave to lodge issues for the trial. The Court *allowed* an issue to be lodged for trial by jury in the Court of Session, holding it unnecessary, as the whole case was before them, to remit to the Sheriff to proceed with it.

On 7th May 1885 John M'Donagh was injured in the left foot by the fall of a column in the raising of which for the support of the Forth Bridge he was employed by P. & W. Maclellan, engineers in Glasgow. The injury took place through the fault, as was alleged in this action, of his employers. A notice of injury under the Employers Liability Act 1880 was posted at Edinburgh by his agent on the afternoon of 18th June, addressed to the defenders at their office in Glasgow. It was posted in time to arrive at the Glasgow post-office on the evening of the 18th, but not so that it would be delivered that night in the ordinary course of post. The Act provides (sec. 4) that an action for recovery of compensation under it "shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury;" and further (sec. 7) that the notice "if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post." The period of forty-two days from 7th May, excluding in the reckoning the 7th May itself, expired on 18th May, that day being counted in the reckoning. The 19th, on which the notice would be delivered in ordinary course, was on this principle of computation forty-three days from the day of accident.

This action was subsequently raised. It was laid at common law, and alternatively under the Employers Liability Act, and was founded on averments that the accident arose from fault for which the defenders were responsible.

The defenders pleaded that the action could not be maintained under the Employers Liability Act in respect that the pursuer had failed to give notice in terms thereof. They also pleaded—"The pursuer having, in consideration of the sum of £8 paid him by the defenders, granted a discharge of all claims against them in respect of his injuries, is barred from insisting in his present claim, and the action should be dismissed with expenses. The pursuer not having been injured through any fault of the defenders, or of those for whom they are responsible, the defenders should be assoilzied." In support of the plea that pursuer had discharged his claim they produced this receipt—"Received from P. & W. Maclellan the sum of £8 as full compensation for any claim for damages on account of the accident to me in which my foot was injured whilst in their employment at the Forth Bridge Works, South Queensferry, in May last."

As to the alleged discharge the following facts appeared:—The pursuer had had several interviews with W. T. Maclellan, a partner in defenders' firm, and the question of settling the case had been discussed by them. The pursuer deponed that at one of these interviews he had asked for £50 and a promise of work, while the defenders deponed that while he at first asked £20, £8 was the sum agreed upon, and that they were to pay it out of charity. A day or two after the sum was discussed the parties met at the gate-house of the works, and the defenders laid before pursuer for signature the receipt above quoted. The pursuer signed it (the gatekeeper signing it as a witness) and received the £8, but deponed that he had not understood the true nature of the document, and imagined that it was part compensation. He swore that it was not read to him.

Mr Maclellan's evidence was that it was read over to the pursuer. The gatekeeper swore that he had not heard it read. The defenders also led evidence to show that they promised him work in watching.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that the notice of action under the Employers Liability Act was not, in the meaning of the Act, served within