But it is a conveyance which this company made, and I hold that to be their own reading of their own title, for they have made £160 a year out of it from 1832 downwards. They have drawn from the pocket of Mr Tasker £162 a year for all these thirty years, by reading their title as one which enabled them to convey fall No. 1; and now they are in Court pleading that fall No. 1 was outside of their conveyance, and below the utmost limit of their aqueduct, and that they never had any right to it. I have great hesitation in allowing them to plead that with success. I rather think it would be injustice to allow them to plead that with success. Mr Tasker's feu of his mill or sugar-house was before the date of this certainly, and it was a feu from Sir Michael Shaw Stewart; but there are other instances of feus from Sir Michael of the millsteads, separate from the company's feus of the falls, and the company have been in the habit of recognising the feu from Sir Michael separate from their feu of the fall, and consenting to it, and holding it as uniting the millstead and the fall. They were quite entitled to do that here. Mr Tasker held a feu of the sugar-house which is at No. 1. They seem to me to have recognised that as a feu to which they were entitled to attach as an adjunct the fall No. 1 on the plan, and I find that through the greater part of the minutes and the titles and the whole proceedings of the company, they deal with the right to claim the ground afterwards as an adjunct to the fall rather than as an adjunct to the millstead. I find that in a document called a vidimus, which was prepared and presented to the company, there is a distinct reference to the manner in which all these different falls have been feued, and they speak of the ground to be claimed as ground allotted to each fall. That is page 82–3. And then they go on to speak specially of Mr Tasker's, and they call it the fall No. 1, and they say, "Fall No. 1 was applied for by Messrs Tasker, Young, & Co., to supply power to their premises at the Dellingburn." Now, their premises at the Dellingburn were the premises they got in feu from Sir Michael, and they got fall No. 1 as applicable to that. The company deal with the right to claim land as land allocated to the falls, and so dealing with it they in 1863 give him the ground which he claims as an adjunct of the fall previously conveyed. Now, I think it very hard that after they have enjoyed the benefit of this feu-duty, because their deed to Mr Tasker was a feu-contract, after they have enjoyed that for thirty years, and Mr Tasker makes a claim for the land as an adjunct to the fall, and after they have recognised that allocation of land to falls throughout these proceedings, they should now take up new ground and fall back from their agreement, I do think it is a very hard case that they should refuse to give that now to Mr Tasker, unless it clearly beyond doubt belongs to another; and if it clearly beyond doubt belongs to another, then the usual result is that those who have agreed to convey property not belonging to themselves must pay damages if they cannot fulfil their agreement. That is the usual result under such circumstances. I have bestowed the greatest attention in my power on the whole case; and I feel it to be attended with very great difficulty. I think, on the whole, it is not proved that this piece of ground was not fairly within the disposition by Sir Michael Shaw Stewart to the company in 1827, reading that disposition by the light we get from the plan, and by the light we get from the Act of Parliament, and the light we get from the long-continued usage and actings of the parties. I think, in the next place, that if this ground did belong to the company, they are bound to give it to Mr Tasker; and if there is difficulty and doubt as to its belonging to the company, I have only to say in conclusion, that I think the proposal made formerly to grant a conveyance without absolute warrandice was a very fair proposal, and I regret extremely that it has been departed from here. We are now called on to decide this case on the footing that the company refuse all conveyance of any kind, and all compensation of any kind to Mr Tasker. That I think is high ground to take, and very inequitable ground to take, looking at the whole course of proceedings. I would be disposed to find that Mr Tasker is entitled, at all events, to a conveyance of all the right which the company have to this property. If Sir Michael Stewart has really a right to the property, let him come forward and vindicate it. If Mr Tasker gets a title with no absolute warrandice, but merely warrandice from fact and deed, he must then maintain his title against Sir Michael; but I am not prepared to say that the company, who have enjoyed the benefit of their former transaction with him, which proceeded on a different construction of their own title from that which they now maintain, can escape both from the giving of the conveyance and from all the consequences of refusing it to a man who has laid out above £300 since the date of the agreement.

Lord President—Then the judgment of the Court is to adhere to the interlocutor of the Lord Ordinary, but I think it right that our interlocutor should bear, *in gremio*, that the defenders decline to grant any disposition. There is also a verbal alteration which must be made in the finding in law. The Lord Ordinary says—"The pursuer is barred from insisting." Now, I do not know what that means, and I think it would be more correct to say—"Is not entitled to insist."

Adhere.

Agents for Pursuer—Murray, Beith, & Murray, W.S.

Agents for Defenders—Patrick, M'Ewen, & Carment, W.S.

Saturday, Dec. 22.

SECOND DIVISION.

MACINTOSH *v.* ARKLEY.

Sheriff—Reduction of Warrant—Want of Interest. A person brought an action against a Sheriff-Substitute concluding for reduction of a warrant and license under which he was conveyed to, and detained in, a Madhouse. Action dismissed in respect the defender had no interest in it. Observed that the defender had erred in satisfying the production.

The pursuer, Angus Macintosh of Holm, seeks to reduce an order dated 13th June 1852, and signed by the defender, who is one of the Sheriff-Substitutes of Edinburgh, by virtue of which he was taken to Saughton Hall Madhouse, and confined there; as also a license to Drs Smith and Lowe to receive and detain him there. He complains that he never was a furious or fatuous person, or lunatic, and that in the petition presented to the defender he was not described as such, but only as a person who was in a state requiring the restraint of an asylum, which might mean no more than that he had been drinking to excess.

He complains further that the defender had no sufficient legal evidence before him; that the Act 55 Geo. III., cap. 69, sec. 8, required evidence "by medical certificate and otherwise," but that the defender, contrary to the Act, had rested satisfied with the medical certificate alone; that the pursuer was not made a party to the proceedings, or allowed an opportunity of defending himself; that the defender could not act as he did until after he had been cognosced; that the defender had no authority whatever to pronounce the order, and that he acted maliciously and without probable cause.

The defender satisfied the production, and pleaded, *inter alia*, that the action was incompetent against him in respect that he had no interest, and further, that the action was irrelevant. Lord Jerviswoode sustained both these pleas.

His Lordship added the following note to his interlocutor:—

"The process with which the Lord Ordinary has been here called on judicially to deal is of a character which, so far as the Lord Ordinary can discover, is without direct precedent.

"The conclusions of the summons are directed to the reduction and declarator of nullity of certain writs therein described as—'*First*, Interlocutor, order, or warrant, granted and signed by the defender, Patrick Arkley, on or about the 13th June 1852, whereby authority was granted by the said defender for the confinement of the pursuer in Saughton Madhouse. *Second*, Madhouse license granted by the said defender, of same date, whereby Drs Smith and Lowe, keepers of the said Madhouse at Saughtonhall, were authorised to receive into and detain the person of the pursuer in their said Madhouse,' and also of certain renewals of said license.

"The *only* defender called in the action to answer to the conclusions is 'Patrick Arkley, Esquire, advocate, one of the Sheriff-Substitutes in the county of Edinburgh or Mid-Lothian, and residing in Edinburgh,'—and it appears *ex facie* of the summons, that the order or warrant, of which reduction is sought, was granted by the said defender, under a petition which bore to be presented in the name of the mother of the pursuer, and to be based upon a certificate, on soul and conscience, by 'Geo. Glover, surgeon,' and 'Thomas G. Weir, M.D., Edin.'

"Thus, it is apparent from the judicial statement of the pursuer, that the defender was not the originator of, nor sole actor in, the proceedings of which the pursuer complains, but that these commenced under an application to him solely in his official and judicial character at the instance of another.

"Is it possible, then, seeing that this state of facts stands disclosed on the face of the pursuer's own summons and record on his behalf, to permit the progress of the action under it, while the sole defender called to answer to the conclusions of the action is the judge by whom the order complained of was issued?

"The Lord Ordinary is of opinion that it is not so, and that it is his imperative duty at once to throw out the action as incompetently laid against the defender.

"The Sheriff was not, and could not be, in the sense of the law, a party to the proceedings of which the pursuer here complains. He is the legitimate arbiter and judge of the rights of those whose interests are involved in any legal process before him, and is so, simply because he is *not* a party to such process. These proceedings were at the instance of another, and, as the Lord Ordinary thinks, that party, and those who acted under them, or some of them, are those against whom alone this action, if competent at all as laid, could have been directed.

As a test of this view, the question may be considered in relation to the supposition, that the defender, instead of meeting the action as he has done by a defence, had allowed decree to pass, in what way could the defender have suffered or have been affected by such a course? Certainly, in no respect whatever, so far as the conclusions of this action would reach. The reduction sought, if obtained, might and could only have affected the interests of those on whose application and certificate the order and license was granted. But these parties are not here in any character whatever, and there is no proposal to bring them here.

"In this state of the case, the Lord Ordinary is of opinion that it is his duty to refuse altogether to enter, at the call of the pursuer, on the merits of the question raised in the conclusions of the summons, or to discuss points mooted at the debate, which may be important and difficult, until he shall have a party or parties before him who have a direct, pleadable, and legal interest to defend the procedure challenged.

"Had the summons contained conclusions for damages against the present defender, as was the case in the noted instances of Haggart *v.* Hope, 1st June 1821, 1 S. 46—House of Lords—Shaw's Appeals, vol. 2, p. 125, and of Hamilton *v.* Anderson, June 11, 1856, 18 D., p. 1003—House of Lords' Reports—Macqueen, 3, p. 363, the Lord Ordinary would have felt that he was called upon to deal with the case of the pursuer in an aspect and on a footing materially different from that in which alone he finds himself entitled to regard the proceedings.

"But, taking the case as presented, no course seems to be open but to sustain those pleas in defence with which alone the present interlocutor deals."

The pursuer reclaimed.

CAMPBELL SMITH (with him LORD ADVOCATE), for him, argued—The plea of want of interest ought to have been stated against satisfying the production, and is now too late. Moreover it proceeds upon a false assumption of want of interest and is bad in itself.

SOLICITOR-GENERAL and SHAND, for the defender, were not called upon.

At advising,

The LORD JUSTICE-CLERK thought the first plea for the defender sound, although the defender ought not to have satisfied the production—he had gone far wrong in doing so. But it was never too late to state a plea of incompetency, and he was of opinion that this action, as laid against the defender, was quite incompetent. The defender had no interest in it whatever. He would go further, and say that neither had the pursuer any interest in it. No decree of reduction they could pronounce in it could be of any use to him, or have the effect of cutting down the warrant as against those (if there were any such) who had a right to plead it. He thought the Lord Ordinary should not have sustained the plea of want of relevancy, because that plea was to some extent upon the merits of questions to contest which there was here no proper pursuer or defender.

Lord COWAN concurred, and stated that he did not think the order in question required to be reduced. *Ex parte* warrants of that nature came to

an end of themselves. The pursuer could not again be confined under that order and license.

Lord BENHOLME and Lord NEAVES also concurred —the latter agreeing with Lord Cowan in opinion as to the warrant not requiring or admitting of reduction, and remarking that the whole litigation was absurd, both as to the directing it against the defender, and as to his satisfying the production by producing a document which he had no right to have in his possession, and in which he had no interest whatsoever.

The Court accordingly recalled the interlocutor of the Lord Ordinary, and of new sustained the first plea in law for the defender as to want of interest.

Agent for Pursuer—James Somerville, S.S.C.
Agents for Defender—Macrae & Flett, W.S.

JURY TRIALS—CHRISTMAS SITTINGS.

Monday, December 24.

(Before Lord Barcaple.)

THOMSON *v.* ADAM.

Jury Trial—Wrongful Apprehension. Verdict for pursuer—damages, £100.

This was an action of damages at the instance of David Thomson, fisherman, Pulteneytown, Wick, against Thomas Adam, joint agent at Wick for the Aberdeen Town and County Bank. The issue laid before the jury was in the following terms :—

" Whether, on or about the 18th day of October 1864, and at or near the Wick Branch of the Aberdeen Town and County Bank in the town of Wick, the defender maliciously, and without probable cause, apprehended the pursuer, or caused him to be apprehended, and conveyed to the police office in Wick aforesaid—to the loss, injury, and damage of the pursuer ?"

Damages laid at £500.

The jury unanimously returned a verdict for pursuer, assessing the damages at £100.

Counsel for Pursuer—Mr J. H. A. Macdonald and Mr Alexander Nicolson. Agent—W. C. Murray, W.S.

Counsel for Defender—The Solicitor-General and Mr Maclennan. Agent—Æneas Macbean, W.S.

Wednesday and Thursday, Dec. 26, 27.

RATTRAY *v.* TAYPORT SLIP COMPANY AND ANOTHER.

Jury Trial—Servitude of Bleaching—Reparation. Verdict for Pursuer.

These were conjoined actions of suspension and interdict and declarator at the instance of Miss Susanna Rattray, residing in Tayport, against the Tayport Patent Slip Company, and Robert Derrick, contractor, Leuchars. The issues laid before the jury were :—

" 1. Whether for forty years prior to the year 1864, or from time immemorial, the pursuer and her predecessors and authors, as proprietors of the house and ground at the west of Ferryport-on-Craig, and also as proprietors of a house in the east of Ferryport-on-Craig, have possessed and enjoyed a servitude of bleaching and drying clothes, and a servitude of pasturing cattle, or either and which of these servitudes, over the ground through which the rights of way claimed by the pursuer pass, lying between the high-water mark of the river Tay on the north, and the garden walls of the properties or feus which formerly belonged to or were possessed by John Doig, afterwards Robert Pryde and spouse, Mrs Euphemia Duncan or Greig, Mrs May Duncan or Mitchell, David Duncan, Euphemia Welsh, and George Clark, or some of them, on the south, and which ground is delineated on the plan No. 100 of process, and marked with the letters K K K K K K ; and whether the defenders, in or about the year 1864, and subsequent thereto, have wrongfully interfered with the pursuer's right to the said ground—to the loss, injury, and damage of the pursuer ?

" 2. Whether in or about the months of June, July, August, September, October, and November 1864, the defenders, the Tayport Slip Company (Limited), and the defender, Robert Derrick, or either and which of them, blasted, or caused to be blasted, rock and other materials near the pursuer's property in Ferryport-on-Craig, culpably, recklessly, and in a dangerous manner—to the loss, injury, and damage of the pursuer ?"

Damages laid at £500.

The jury returned a unanimous verdict for the pursuer on the first issue, in so far as relates to the servitude of bleaching and drying clothes on the green in question, assessing the damages at £15 if the interference be continued, but only 5s. if servitude be restored. They also found for the pursuer on the second issue as against the contractor only, and fixed the damages at £20.

Counsel for Pursuer—Mr Young and Mr Gifford. Agent—L. M. Macara, W.S.

Counsel for Defender Derrick—The Dean of Faculty.

Counsel for Tayport Slip Company—The Lord Advocate and Mr N. C. Campbell.

Agents for Defenders—J. M. & J. Balfour, W.S.

Wednesday—Friday, Dec. 26—28.

(Before Lord President.)

TAYLOR *v.* ROSE.

Jury Trial—Reparation—Slander. Verdict for Defender.

In this case John Taylor, tenant of the Railway Refreshment Rooms, Forres, was pursuer ; and Alexander Rose, confectioner, grocer, and spirit dealer, Forres, was defender. The issues sent to trial are as follows :—

" 1. Whether, on or about the 16th day of October 1865, the defender did, at a meeting of the kirk-session of the Free Church of Forres, and within the session-house of the Free Church there, and in presence and hearing of the Rev. Adam Robertson, minister of the Free Church, Forres ; John Berwick, teacher there ; John M'Kessack, farmer, Balnaberry, near Forres ; Joseph Forbes, manager of the Forres Mills, Forres ; Donald M'Donald, confectioner there ; Alex. Cowie, cabinetmaker there ; and James Fraser, residing there, or any of them, falsely, maliciously, and calumniously say that he had seen the pursuer drunk, or in a state of intoxication, on two occasions, the first of said occasions being in the month of August 1865, and the second on or about 4th September 1865 ;