may obtain a very excellent sort of education. Can anybody doubt which is the most advantageous? It was said, that there may be many decayed members who have no sons—many that have no children at all, and will not be benefited by it; but there is nothing which says, that the trustees in their discretion must benefit every decayed brother to the same extent: how they shall be benefited is left entirely to their discretion. A very fair test as to whether this would be *ultra vires* may be arrived at in this way. I do not suppose, that any member of this guild would really think, that it was not a very great benefit to them as inhabitants of the city, that the Buchanan charity should be established. Now, suppose Mr. Buchanan had said by his will, Provided always, that no poor decayed brethren of the Guild of Wrights shall receive any benefit from this charity unless that corporation subscribes £100 towards the endowment: can anybody doubt, that there would be no hesitation in saying, that it would be greatly to the advantage of the charity, that that should be done? But Mr. Buchanan could give no authority to the guild so to apply their funds. It must, therefore, be presumed, if you say it ought in that case to have been done, that there was inherent in the guild a power to do it.

My Lords, I shall not add anything more to what has been said by my noble and learned friend, the LORD CHANCELLOR. I regret with him, that this will fall very hardly on those who have raised this litigation, but it is one of the unfortunate instances too common in this House, in which we see parties from that part of the country north of the Tweed, incurring such enormous expenses of litigation for a very small object; and one cannot but deeply regret, that such cases should be so continually brought before us. I quite concur with my noble and learned friend, that this appeal must be dismissed with costs.

Interlocutors affirmed, with costs.

Appellants' Agents, T. Deans, Westminster; A. Morison, Edinburgh.—*Respondents' Agents*, Grahames and Wardlaw, Westminster; Hamilton and Kinnear, W.S., Edinburgh; W. Renison and Son, Glasgow.

MARCH 9, 1865.

ANGUS MACKINTOSH, *Appellant*, *v.* JOHN SMITH and Others, *Respondents*.

Lunatic—Issue—Detention in a Madhouse—Illegal Detention—Evidence—Issue controlled by Record—Declarator of Sanity—*Res Judicata—In an action by M. for illegal and wrongful detention in a madhouse kept by S., an issue "whether M. was illegally and wrongfully detained" was settled.*

HELD (affirming judgment), *That such issue did not admit evidence as to alleged violations of the Statute in the mode of his treatment while in the madhouse.*

HELD FURTHER, *That a decree in an action of declarator of sanity raised by M. against S., and which decree passed in absence, was not admissible evidence to prove illegal detention.*

QUESTION, *How far an issue sent to trial is controlled by the record, so far as regards admissibility of evidence under such issue.*[1]

This was an appeal against interlocutors refusing a new trial.

The action was raised in May 1863, to recover damages from Dr. Smith and Dr. Lowe, keepers of the Saughton Hall Lunatic Asylum, for having wrongfully and illegally detained the appellant (the pursuer) in their private madhouse.[2]

The issue finally approved and sent to a jury was as follows:—"Whether the defenders, or either of them, and which of them, did illegally and wrongfully detain the pursuer in the private madhouse kept by them at Saughton Hall, in the parish of St Cuthbert's and county of Edinburgh, from the 13th June 1852 until the 21st July 1852, or during any part of said period, to the loss, injury, and damage of the pursuer? Damages laid at £5000."

The case was tried before Lord Kinloch and a jury on 5th February 1864; and on the 12th the jury, by a majority of nine to three, found for the defenders. During the proceedings, exceptions were taken by the pursuer's counsel. The first and fourth were directed against the refusal of the Judge to admit in evidence the extract decree in absence pronounced on the 19th December 1861, as well as the summons, proof, and interlocutor in the action of declarator of

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[1] See previous report, 2 Macph. 1261: 36 Sc. Jur. 189, 631. S. C. 4 Macq. Ap. 913: 3 Macph. H. L. 6: 37 Sc. Jur. 318.

[2] See a previous appeal between the same parties, *ante*, p. 1184.

sanity at the instance of the pursuer. The second and third exceptions taken were against the cross-examination of the pursuer, and the examination of other witnesses as to details of the pursuer's conduct in particular transactions. Thus, it was proposed to ask the pursuer about the details of a visit he made to Richmond in the spring of 1852. His counsel objected to going into such details; but the Judge allowed the questions to be put, and hence the second and third exceptions. The fifth exception was abandoned. The sixth exception was directed against the Judge directing the jury, that the issue sent for trial by the Court did not raise the question whether, supposing the pursuer rightly detained in the asylum, there was an illegality in the mode of his confinement, and did not raise any question of breach of Statute or of regulations made under authority of Statute in regard to the registers of the asylum, or the manner of keeping them.

The regulations as to the management of such houses tendered as evidence by the pursuer were to the effect, that there should be at least one or more cells of sufficient size, according to the number of lunatics, properly warmed and ventilated. And that the keeper of the house should enter in the register directed to be kept by the Statute 9 Geo. IV. c. 34, § 3, all cases in which a patient has been confined in any of the said cells for a period exceeding twelve hours, together with the reasons for such confinement. The Statute also required, that the resident or visiting physician should report to the keeper, and enter particulars in the book to be kept. But the weekly register produced at the trial contained no such particulars, but merely the name and date of the pursuer's admittance.

The First Division unanimously disallowed all the exceptions.

The *appellant* thereupon appealed, and in his *printed case* contended, that the interlocutors should be reversed for the following reasons:—As to the sixth exception—1. Because the questions which, by the direction excepted to, were ruled not to be within the issue sent to trial, were raised by the issue, and ought not to have been withdrawn from the consideration of the jury. 2. Because the judgment of the First Division, disallowing the said exception, and sustaining the charge, proceeded upon grounds different from those upon which the direction of the Judge presiding at the trial was rested. 3. Because the scope of the issue sent for trial by the Court was not controlled or limited by the closed record in the cause. 4. Because the closed record is not within the bill of exceptions, and it was incompetent for the Court, in disposing of the exceptions, to give any effect to the record as controlling or limiting the issue under which the cause was tried. 5. Because, even on the assumption, that the scope of the issue could be limited by the appellant's averments in the pleadings, the condescendence contained statements sufficient to entitle him to have the questions, which by the charge excepted to were withdrawn from the consideration of the jury, tried under the issue.

As to the first and fourth exceptions—1. Because the decree of declarator tendered as evidence on behalf of the appellant, was, until reduced or set aside by the judgment of a court of competent jurisdiction, *res judicata* in any question arising between the appellant and the respondents; at all events, it was admissible in evidence. 2. Because the refusal of the presiding Judge to receive the decree in question as evidence, necessarily affected the result at which the jury by their verdict have arrived.

Lord Advocate (Moncreiff), *Rolt* Q.C., *Anderson* Q.C., and *Sir H. Cairns* Q.C., for the appellant.—The interlocutor disallowing the exceptions was wrong. As to the third exception, the Statutes 55 Geo. III. c. 69, 9 Geo. IV. c. 34, and 4 and 5 Vict. c. 60, made it imperative, that the party confined should be confined and treated in a particular manner, and any deviation from the course pointed out was a cause of action. It is not enough to receive a patient properly; he must also be kept in the way specified by these Statutes. The issue allowed proof of the violation of the Statute as regards the specific regulations which ought to have been followed, for if these were not followed it was impossible for the jury to say the pursuer was not illegally and wrongfully detained. Detention consisted of a series of acts, and comprehended the mode as well as the fact of detention.

It was said, that evidence of violations of the Statute could not be given, because the record did not contain specific averments of such violations. But if the terms of the issue admitted the evidence, nothing stated or omitted to be stated in the record could shut out such evidence, for the issue must be the sole test as to what is or is not admissible evidence under it. That was so stated by LORD BROUGHAM in *Leys, Masson, and Co.* v. *Forbes*, 5 W. S. 402, and by other Lords in *Morgan* v. *Morris*, 3 Macq. Ap. 323, *ante*, p. 806; *Robertson* v. *Fleming*, 4 Macq. Ap. 167, *ante*, p. 1053. It was true there was a contrary *dictum* of LORD CAMPBELL in *Househill Coal Co.* v. *Neilson*, 2 Bell's Ap. 1; but it was irreconcilable with the better authorities. The issue is quite general, whether the pursuer was legally and wrongfully detained, and lets in all those facts, whether alleged in the record or not, which go to prove the illegality of the detention. 2. As to the first and fourth objections: The decree in the action of declarator of sanity ought to have been received in evidence. It was competent to raise such an action when it affects one's legal rights, even though it is an abstract question—Stair, iv. 3, 47; Ersk. iv. 1, 46. It might often be of great importance for a person to establish the fact of his own sanity, if his

deeds and acts be challenged. There must no doubt be a proper defender, and the respondents here were proper defenders. There was no objection to the admissibility of the decree merely because it was a decree in absence, for such a decree has precisely the same effects as a decree *in foro contentioso*.

[LORD CHANCELLOR.—How can you say the subject matter of that decree was *eadem causa*, for that decree might stand, and yet it would not follow, that the pursuer was illegally detained?]

We say, that if the pursuer was sane at the time, nothing could justify his detention. The decree, therefore, went to prove the issue of legal or illegal detention. And while the decree stands, it is entitled to be received as evidence of the fact of sanity.

The Attorney General (Palmer), *Mellish* Q.C, and *Will*, for the respondents, were not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, in this case I think your Lordships will agree with me in coming to the conclusion, that this interlocutor ought to be affirmed. Your Lordships will have observed in the history of this case, that the summons in this cause appears to have been issued on the 20th May 1863. The cause of action is the alleged illegal detention of the appellant, from the 13th June 1852, to the 31st July 1852. The action, therefore, for this personal wrong appears to have been commenced eleven years after the occurrence of the alleged cause of action.

In dealing with the exceptions which are now before your Lordships, I will first express my opinion, that I think your Lordships must be confined to that which is found within the four corners of the bill of exceptions alone. You are well aware, that when an issue has been framed, it may be the subject of an appeal to the Court of Session itself, and it may be finally determined by that Court as to what should be the form of the issue.

Having regard to the proceedings in Scotland, and to the form of the bill of exceptions there, (which is not like the bill of exceptions in England, appended to the *postea*, that is, to the whole record of the action and trial,) I think your Lordships will agree with me, that it is the better course to confine the inquiry to that which is found upon the bill of exceptions alone.

Now, in this particular case the issue which was settled for the trial of the cause was this, whether the defenders or either of them, and which of them, did wrongfully and illegally detain the pursuer in the private madhouse, kept by them at Saughton Hall, in the parish of St. Cuthbert's, and county of Edinburgh, from the 13th of June 1852, until the 21st July 1852, or during any part of the said period. It certainly appears to me rather strange, that an issue which ought to be an issue of fact, (for upon that alone the jury would be called upon to give their verdict,) should have been framed in this manner, "did wrongfully and illegally detain." The question of legality depends upon the defenders having or not having complied with the requisition of the Statutes, which governed this subject in Scotland, namely, the confinement of a person supposed to be a lunatic, and they are fully stated in the bill of exceptions, and also the proceedings that were taken under them, and they appear to have been given in evidence on the part of the defenders.

It seems, that there are three Statutes which principally regulate the proceedings in Scotland, with regard to lunatic persons. Those Statutes are the 55th of George III. c. 69, the 9th George IV. c. 34, and the 4th and 5th Vict. c. 60; and the course of proceeding prescribed by these Statutes, appears to be this, that a petition is presented to the Sheriff of the county, accompanied by certificates of the medical practitioners, and thereupon the Sheriff, if he thinks proper so to do, grants a warrant for the confinement of the alleged lunatic, and also a licence addressed to the keeper of the asylum, in which it is desired that the lunatic should be confined. The whole of these documents were given in evidence on the part of the defenders.

Now these Acts of Parliament provide for resident or visiting physicians regularly to examine the patients. They appoint also an inspector of asylums, and the Sheriff has power to discharge any person who is improperly detained. The licence which is issued by the Sheriff, is a licence to the proprietors of the asylum, to receive and detain the subject of the licence according to law. It is not pretended that there has been any defect, any insufficiency, or any irregularity in any of these proceedings.

The manner in which this question arises before your Lordships is this: At the trial of this issue, the first thing that was proposed to be given in evidence on the part of the pursuer, the present appellant, was a decree obtained by him in an action of declarator, the summons in which appears to have been dated in the year 1861, more than two years antecedently to the date of the summons in the present action. That action of declarator convened the keepers of the asylum and several other persons for the purpose of having it declared, that the pursuer was of sound mind in the months of June and July 1852, during part of which time he was confined in the asylum in the manner that I have already stated.

Now, the first thing to be observed is, that the persons so convened, so far as they consisted of the present respondents, had no interest or concern whatever in the subject of that proposed declarator, because, even if the present appellant was a sane person, if they had received him under the authority of a warrant, and by virtue of a licence rightly granted in the manner I have

already described, they were warranted in detaining him. Accordingly it appears, that, inasmuch as the question raised in that action of declarator was an abstract question with which, as I have said, they had nothing to do, and inasmuch as it was not made incidental, or auxiliary, to any other proceeding, the defenders treated it as an immaterial matter, and did not appear. The consequence was, that a decree was taken against them in absence, declaring, that during the whole months of June and July 1852, the pursuer was *compos mentis*, and of sound and disposing mind—in other words, it was, I dare say, a decree following the conclusions of the summons of declarator.

Now, it was proposed to give that decree in evidence upon the trial of this issue. I take it that the first and conclusive objection to that was, that it was a wholly immaterial matter to the trial of the issue in this cause. But if it could be regarded in any sense as material, the next observation would be this: It is, I believe, quite new as a proposition in jurisprudence, that a decree pronounced in absence can be at all given in evidence as amounting to proof of the subject matter, of the second action having been *res judicata*. I entirely agree with the learned Judges in the Court below, that that would be contrary to the first principles of jurisprudence.

There is a Statute to facilitate procedure in the Court of Session in Scotland, the 13 and 14 Vict. c. 36, by the 46th section of which it is enacted, that the rejection of any evidence which turns out upon inquiry to be such as would be immaterial, or such as ought not to have affected the result of the trial, cannot be made the subject of a bill of exceptions. I think, therefore, that your Lordships will not hesitate to say, in conformity with the opinion of the Court below, that the extract of this decree in absence pronounced in that action of declarator was rightly rejected by the learned Judges.

The same observations apply also to the 4th exception, which is immediately connected with the first. The 2d and 3d exceptions were, as I think your Lordships will agree, very properly abandoned by the Lord Advocate in his argument.

The 6th exception then alone remains to be considered, and I think that will be found to be concluded by the observations which I have already taken the liberty of submitting to your Lordships. The exception is to a certain portion of the charge of the learned Judge. The learned Judge, in his charge to the jury, amongst other things, directed them, "that the issue sent for trial by the Court, did not raise the question whether, supposing the pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement, and did not raise any question of breach of Statute, or of Regulations made under authority of Statute in regard to the registers of the asylum or the manner of keeping them."

It appears from the bill of exceptions, that evidence was tendered, on the part of the pursuer, for the purpose of proving, that his treatment during his confinement in the asylum was unnecessarily severe, and that the severity to which he was subjected was not resorted to in the manner required by the Act of Parliament. The complaint, therefore, was, that *plus* the illegal confinement, he had been treated in an improper manner during that confinement.

I think, upon that question, the learned Judge was quite right in his conclusion, namely, that supposing the pursuer to have been rightly detained in the asylum, which the very tendering of the evidence of necessity admitted, the issue did not involve any question as to his mode of treatment during that illegal detention. The issue that was sent down to be tried by the jury was this: whether he had been wrongfully and illegally detained or not? whether he had been treated in an illegal manner during that detention? The answer to be given by the jury would be simply aye or no to the question of wrongful detention; but if the wrongful detention be admitted, then, for the purpose of aggravating the cause of complaint by proving some further improper treatment, the answer would be very material. But here the additional cause of complaint beyond the illegal detention did not arise upon the issue. It was not to be found within the ambit of that particular question which was submitted to the jury to answer in the affirmative or in the negative.

Upon those plain principles, thus shortly stated, I think that your Lordships will agree with me in the conclusion, that all these exceptions were, in point of fact, wholly unfounded, and that the Court did quite right in overruling them, and in refusing a new trial.

LORD CRANWORTH.—My Lords, the question on the record is reduced, in truth, to substantially two questions. I will take the last first, namely, as to the directions which the learned Judge gave to the jury, in which he directed them, that, "the issue sent for trial did not raise the question whether, supposing the pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement, and did not raise any question of breach of Statute, or of regulations made under authority of Statute." It appears to me, that that was a perfectly right direction, and the only direction which the learned Judge could give. The language of the issue is, whether they did wrongfully and illegally detain, by which I understand, whether they did detain without having any lawful warrant to detain. That is all that is raised; and it would be strange, indeed, if the mode in which the party was dealt with, supposing him to be dealt with in any way which would give him a right of action, should enable the jury to say, "You did wrongfully detain him," the meaning of which would be, "You ought not to have detained him." It

might be, that either their misconduct towards the person detained, or their non-observance of the regulations of the Statute, might give rise to valid proceedings against the detaining parties; but neither of those things could by any possible construction be made to lead to the consequence, that he ought not to have been detained; and I think, that, unless he ought not to have been detained, the learned Judge properly directed, that the issue must be found for the defenders.

Then comes the question of admissibility of that decree in absence. Now, really that is a matter which I think, when looked at, admits of no doubt whatever. The question decided by that decree, as far as it could be decided, was, that at a certain time the pursuer was of sound mind. Well, what then? What the defenders had to prove was not, whether he was of sound mind, but whether there were documents before them that warranted and compelled them to take him into confinement, and detain him. Therefore the two points were not at all *ad idem.* But far beyond that, although it is true, that, as between the same parties, a decree or a judgment in England, may be given in evidence as *res judicata,* it is not because there is one link in a chain of evidence which parties are giving in order to arrive at a particular conclusion which may have been established, that, therefore, you can give in evidence a decree or judgment in support of that one link in the chain of evidence. No such doctrine has ever been propounded, or ever can be contended for. I think, therefore, with my noble and learned friend, that on neither of these grounds can these exceptions be supported, and that the interlocutor ought to be affirmed.

LORD CHELMSFORD.—My Lords, since the first opening of this case at the bar, I never have been able to bring my mind to entertain the smallest doubt upon the questions that have been raised; and I shall not think it necessary to trespass upon your Lordships with many observations in addition to those which have been made by my two noble and learned friends.

It is important to bear in mind what are the nature and the character of a bill of exceptions. There can be no doubt, that it is a proceeding which must be construed with the utmost strictness. It is the statement of the ruling of a Judge upon a point of law arising upon a trial. If the opinion of a Judge is not stated accurately, if he is not faithfully represented, he may refuse to sign the bill of exceptions, and his signature to the bill of exceptions is the acknowledgment of its accuracy.

Now what were the exceptions in this case? I will take the sixth exception first. The exception to the ruling of the learned Judge was, that he directed the jury, that the issue sent for trial by the Court, did not raise a certain question which is specifically stated in the exceptions. Now your Lordships will observe, that the exception does not raise any question with regard to the right of looking to the record for the purpose of explaining the issue. It is a question upon the issue alone, what that issue raises for the consideration of the jury.

I am not disposed to enter at all upon the controverted question how far your Lordships have been right on former occasions in saying, that when issues have been framed you cannot resort to the record for the purpose of explaining them. I would just point out to your Lordships what is the mode of framing issues in Scotland. The whole record is looked to, and from that record there is extracted a substantial question or questions which are intended to be raised by the parties. Upon the examination of the record in that manner, issues are framed, and if either of the parties consider, that those issues do not raise either the question substantially, or all the questions which were proposed to be raised, your Lordships are aware, that there may be an appeal to the Court of Session in the first place, and ultimately to your Lordships' House upon the framing of these issues. Then one would think, that the moment those issues so framed have been agreed upon between the parties, they contain the only essential question which is to be submitted to the jury, and that they do not require, nor can they receive, explanations from any other quarter.

Now what was the issue in this case which was extracted from the record, and which was proposed to be tried by the jury? It was this: Whether the defenders, or either of them, and which of them, did wrongfully and illegally detain the pursuer in the private madhouse kept by them at Saughton Hall, in the parish of St. Cuthbert's and county of Edinburgh, from the 13th June 1852 until 21st July 1852?

I may be permitted to say, with very great respect to my noble and learned friend on the woolsack, that I do not think there is any objection to the form of this issue, by reason, as he supposed, of its submitting questions of law to the jury, because in every action for false imprisonment, the question is upon the plea of not guilty. The question which is submitted to the jury ultimately, is, whether the imprisonment was lawful or not. That may be a question partly to be decided by the Judge, and partly by the jury, but you could not have the whole question raised for consideration of the legality of the imprisonment, without framing the issue in this form.

What then is the meaning of this issue, and has the learned Judge submitted the proper construction of it to the jury? It appears to me, that nothing whatever can possibly be involved in this issue but the fact of the detention, and the question, whether that detention was wrongful

and illegal, or, in other words, whether the defenders were justified in detaining the pursuer in the lunatic asylum.

Now, it was submitted several times at the bar, that there is a distinction between detention and treatment. I must confess it appeared to me, that distinction was hardly sufficiently appreciated in the course of the argument. It was suggested, that the question whether the party was of sound mind or not, might determine, and was necessarily and essentially the matter that must determine, whether the detention was wrongful and illegal or not; but I think there is great misapprehension there, because assuming, that the pursuer was of sound mind when he was conveyed to the lunatic asylum, yet, as he was conveyed there under proper medical certificates, and with the proper warrants, it would not be illegal on the part of the defenders to detain him although he was of sound mind, unless they had had a proper authority for his discharge. In fact, they would have had no right to discharge him, unless they had had that authority, which is provided for, I think, in the 9th of Geo. IV.

Again, it was said, supposing that the keepers of the asylum, during the time that the pursuer was an inmate of their asylum, were satisfied, that he had become of sound mind, and did not communicate that fact to the proper authorities in order to obtain his discharge, that would be an unlawful detention. I must confess, that I differ entirely from that proposition, and I doubt very much whether any action at all could have been maintained for the keepers of the asylum not having communicated the fact of his restored sanity, unless that course was taken by them maliciously. Then it might constitute a cause of action, but it would not be the cause of action involved in this case which is raised by the issue, whether the detention was wrongful and illegal.

The question, then, is—confining the issue entirely as it appears to me it ought to be confined, to the question of whether the detention was wrongful or illegal, and it being perfectly clear, that in whatever mode the supposed lunatic was treated during the time that he was in the asylum, that is not involved in the specific words of the issue, the question really is—whether the learned Judge properly stated to the jury, that if the pursuer was rightfully detained in the lunatic asylum, then there was no question as to illegality in the mode of his confinement, and that it did not raise any question of breach of Statute or of regulations made under authority of Statute in regard to the registers of the asylum, or the manner of keeping them.

I think, that you may bring the learned Judge's ruling to a satisfactory test in this way: Assuming, that the pursuer had been improperly put into the strong room, and assuming, that the registers were not duly and properly kept under the provisions of the Act of Parliament, would those circumstances have entitled the pursuer to his discharge? If they would not, and it can hardly be contended that they would, then it is impossible to say, that either the act of confining him in the strong room, or the omission to enter upon the registers certain things which are required by the Act of Parliament, could constitute an illegal detention.

The only circumstances which would go to establish an illegal detention would be these: either, that there were not proper medical certificates, or, that there was no warrant from the Sheriff, or, that he was detained after there had been a proper authority for his discharge, or, that the place into which he was received was not a legally licensed asylum. I know of no other circumstances whatever which could have constituted this detention a wrongful one, and unlawful: and therefore, inasmuch as none of those circumstances existed in this case, I am of opinion, that the ruling of the learned Judge was perfectly correct, that the issue between the parties was confined merely to the detention; and although there might by possibility be a cause of action on the part of the pursuer supposing he was improperly treated in the lunatic asylum, yet, that was a distinct and substantive ground of complaint and cause of action, and is not in the smallest degree involved in the issue between the parties.

I will therefore proceed to the other question which is raised by the other exception, whether the extract of the decree in absence in the action of declarator was admissible evidence against the defenders.

Now your Lordships have already had pointed out to you by my noble and learned friend on the woolsack, the extraordinary character, as I must call it, of this action of declarator. It is a summons in an action in the year 1861 proposing that it be decreed, that the pursuer was of sound mind in the month of July 1852. It is said, that the defenders were called upon to appear, but did not appear. One would naturally say, why should they appear? How could they be possibly interested in an abstract question of this kind, or how could they suppose that they might become interested in an abstract question of this kind, whether the pursuer was of sound mind nine years before the period when this action of declarator was brought?

Now, I must say, that I am not disposed to go the length of my noble and learned friend upon the woolsack, that because this was a decree in absence, therefore it would not be evidence against the defender under proper circumstances. Because, supposing the very same question arose between the parties in another suit, and it was directly in issue between them, then it appears to me, that notwithstanding it was a decree in absence, and notwithstanding the extraordinary character of this proceeding, yet still, according to the authorities, it would have been

evidence against the defenders. But this is not a case of that description; this is a case in which the sanity of the pursuer was not a matter directly in issue in the present suit. And there is a distinction which has not been sufficiently adverted to at the bar, between the judgment of courts of concurrent and of exclusive jurisdiction. The judgments of the courts of concurrent jurisdiction are evidence only where the very same matter comes directly in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence where the matter arises incidentally, or is the matter directly in issue. Now your Lordships will observe, that this is the case of the judgment of a court of concurrent jurisdiction, not of exclusive jurisdiction, and the matter, to say the most of it, clearly is not the matter directly in issue in the suit. It is a matter which arises only incidentally if it arises at all, because the question which was in issue in the suit was, whether the defenders wrongfully and unjustly detained the pursuer in the asylum? It might be a matter which incidentally arose in that suit, whether the pursuer was of sound mind at the time or not; but then, that being a matter merely incidentally arising, and this being a suit in a court of concurrent jurisdiction, according to all the authorities, that decree cannot be admissible in evidence. But I must say, that I think, so far as the defenders are concerned, the matter did not even incidentally arise in this suit. I do not mean to say, that it was not a part, and probably a very important part, of the pursuer's case, but so far as respects the defenders, it did not even incidentally arise so as to affect the defence. Because, supposing that the pursuer was of sound mind at the time he was taken to the asylum of the defenders, if there were the proper medical certificates, and if there was the proper warrant of the Sheriff to the defenders to receive the pursuer into their asylum, and if he was of sound mind, and if it was proved that he was of sound mind, as against them, their detention of him would not be wrongful and illegal, but would be perfectly lawful, and only that which was their bounden duty. Under these circumstances, how can it be said, that such a decree as this becomes evidence in the case, when without adverting again to the circumstance of its being a decree in absence, which I think would be no objection to it, it can only be at the utmost a matter incidentally arising; and, according to my view of it, so far as the defence is concerned, it is a matter which does not even incidentally arise in the course of this suit.

For these reasons I have never been able to entertain the slightest doubt upon the questions which have been submitted to your Lordships, and I concur in the opinion of my noble and learned friends.

LORD CHANCELLOR.—My Lords, I may say in explanation of what fell from me, that I did not intend to express any surprise at finding the words "wrongfully and illegally" in the issue. But what I did intend to express was, that seeing there was no complaint, that the defenders had offered as to anything prescribed by the Statute, in respect either of the certificate, or the warrant, or the licence, the pursuer not having made any such charge, it was strange that the issue should have been directed in this form.

With regard to the decree in absence, my observation was this, that a decree pronounced in absence cannot be given in evidence as proof of the subject matter of the second action being *res judicata*, although undoubtedly, if it had been material to the issue, it might have been proved in evidence. But we all concur in the opinion, that the question raised in that action of declarator was a question wholly immaterial to the question raised by this suit.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellant, Simpson and Wakeford, Westminster; Jas. Somerville, S.S.C., Edinburgh.—*For Respondent*, Bircham, Dalrymple, and Co., Westminster; Jollie, Strong, and Henry, W.S., Edinburgh.

MARCH 21, 1865.

THE TRINITY HOUSE OF LEITH, and the INCORPORATION OF MERCHANTS OF LEITH, *Appellants*, *v.* Rev. H. DUFF, *Respondent.*

Church—Ancient Chapelry—Stipend—Augmentations—Statutory Compromise—*An ancient chapelry came, at the Reformation, into the possession of some corporations, who thereafter jointly appointed the minister, drew the pew rents, paid the stipend of the minister, and from time to time made augmentations. Disputes having latterly arisen as to the liability to repair the church, and as to the amount of stipend exigible, a Statute was passed to provide for the repair and for the administration of the property and revenues of the church.*