For these considerations, if it had not been for the strong opinions which your Lordships have formed, I should have been inclined to differ; as, however, I was not present when the judgment in question was pronounced, although I feel doubt and difficulty, I will not do so.

LORD ARDMILLAN—Seeing that this appeal, if allowed, would deprive the pursuer, if successful in the action of divorce, from recovering his expenses, it will be both safer and wiser to refuse this leave at present, and by doing all in our power to further the trial of the principal question here, to enable Colonel Hibbert to have his appeal at no distant date.

LORD KINLOCH concurred.

Petition refused.

Agents for Pursuer—Burn & Gloag, W.S.

Agents for Co-Defender and Petitioner—H. & A. Inglis, W.S.

Wednesday, February 2.

BELL *v.* SHAND.

Reparation—Assault—Apprehension— Day Trespass Act. Circumstances in which *held* that a lessee of shootings who had apprehended a person whom he suspected of poaching, had used no undue violence, and was not liable in damages.

This was an appeal from interlocutors of the Sheriffs Substitute and Depute of Kincardineshire, in an action of damages at the instance of George Bell junior, Clayfolds, Muchalls, in the parish of Fetteresso, and his father George Bell senior, against Mr Thomas L. R. Shand, residing at Muchalls Castle, in the same parish. It appeared from the allegations of the pursuers that Mr Shand, the defender, was lessee of the shootings of Muchalls, and the senior pursuer was tenant of the farm of Clayfolds upon that estate. It was alleged that on 23d October 1867 George Bell junior, a boy of fifteen years of age, was engaged digging potatoes on the farm when he heard a shot fired by his younger brother James. He went up to James and asked him what he had fired at, the reply was "a rabbit," whereupon he took the gun from his brother, and seeing Mr Shand coming forward he concealed it in a stook. Mr Shand then came up, found the gun, and accused George Bell of poaching. The statement of facts for the pursuer proceeds to state that Bell replied that it was his brother who had fired the gun, and that notwithstanding, "the defender, having paid no attention to what the pursuer the said George Bell junior said to him, seized the said pursuer by the collar of the coat, and dragged him forcibly and against his will from the stook where he had been sitting, and continued dragging him in the direction of Clayfolds, accusing the said pursuer at the same time of having been among the turnips—meaning 'floors turnips'—notwithstanding the said pursuer's repeated remonstrances against the defender's conduct, and his assurance that he (the said pursuer) had neither used the gun nor been among the said turnips. After dragging the pursuer, the said George Bell junior, by the collar of the coat as aforesaid across the said field to the distance of twenty yards or thereby, the defender violently threw the said pursuer to the ground, and grasped him tightly by the throat while upon the ground, holding his gun, and also the one the pursuer's brother had, in the direction of the said pursuer while he was lying upon the ground; but the said pursuer, after struggling for some time, got upon his feet, the defender, however, still retaining his hold of the said pursuer." The father then came up, and Mr Shand, telling him that had he known that the boy was his son he would not have meddled with him, released the boy.

From these violent proceedings of the defenders, Bell alleges that he sustained severe injury, and on 12th December he was examined by Dr Thom, Stonehaven, and Dr Fergusson, Cove, who some months afterwards drew up a certificate in the following terms:—

"*Cove, Nigg, March* 28*th*, 1868.

"We hereby certify, on soul and conscience, that we were called to visit George Bell, a lad of fifteen years of age, son of George Bell, Clayfalls, Muchalls, on the 13th December 1867.

"We found him presenting a very sickly appearance. He was affected with diarrhœa, bleeding from the nostrils, and complained of palpitation at the breast, and of frequently awaking from his sleep with starts. His general health was considerably impaired, and his mind seemed to be also somewhat affected. He was in fact dumpish. Both he and his relatives stated to us that he had been in nearly the same condition ever since an encounter with Mr Shand of Muchalls, sometime previously; and they attributed his illness to a severe fright he had received on that occasion.

"We have since separately seen him several times, and have found him affected, more or less, in the same way. From all that we have observed in this case, as well as the history we received both before and after we visited him, we believe that there is the strongest probability that the illness was caused by the fright which it is alleged he received on the occasion of his meeting with Mr Shand.

"JOHN FERGUSON, M.D. M.R.C.S.E., &c.
Cove, Nigg, Kincardineshire.
JAS. TAYLOR THOM, M.D. L.R.C.S.E,
Stonehaven, Kincardineshire."

Upon 3d October 1868, after repeated letters to the defender, the pursuers raised the present action, claiming £200 as *solatium* for the injuries he had sustained by the defender's conduct, and for medical attendance.

The defender stated that, imagining that the boy was poaching on his land, and not knowing who he was, he had arrested him without any unnecessary violence. The boy has sustained no injury and was none the worse.

After a long proof the Sheriff-Substitute (DOVE WILSON) pronounced the following interlocutor, to which was appended a most elaborate note:—"*Stonehaven, 3d May* 1869.—Having heard parties' procurators on the record and proof, finds that it is proved that defender did not assault the younger pursuer, and therefore assoilzies defender from the conclusions of the action: Finds the defender entitled to expenses, of which allows an account to be given in, and, when lodged, remits the same to the Auditor of Court to tax and report, and decerns."

On appeal this interlocutor was affirmed by the Sheriff-Depute (SHAND) on 24th June 1869.

The pursuers appealed.

BURNET and A. J. YOUNG, for them, pleaded that there had been undue violence used towards the pursuer, which had caused him serious injury; and that the defender had not complied with the pro-

visions of the Day Trespass Act, by asking for the name of the pursuer, and requesting him to leave the lands.

MILLAR, Q.C., and M'LENNAN, for the defender, were not called on.

At advising—

LORD PRESIDENT—This is an action of damages for assault, and the simple question is, whether the defender assaulted the pursuer on the day specified, viz., 23d October 1867. I am satisfied on the evidence that there was no assault, and I agree with the Sheriff and Sheriff-Substitute in thinking that we should assoilzie the defender. I may explain in a word that the ground upon which I concur is that I think the defender apprehended the boy under the Day Tresspass Act, and that he was perfectly justified in the circumstances in doing so, although that apprehension was not followed up by any further legal proceedings. Unless, then, that apprehension was accompanied by undue violence, there was no assault, and it is vain to say that there was any undue violence except that the boy, as was very natural, seems to have been very much frightened.

LORD DEAS concurred.

LORD ARDMILLAN—In considering this action of damages for alleged assault I have, after careful perusal of the proof, applied my mind (1) to the question, Has the pursuer instructed, as matter of fact, the assault alleged and the injurious consequences said to have followed from it? and (2) the question, Is the defender liable in damages as for assault in respect of illegal apprehension or laying hold of the younger pursuer, assuming that neither violence nor injury has been proved?

On the first of these questions I have without difficulty arrived at the conclusion that neither the assault alleged nor the injurious consequences alleged have been proved.

That this lad, the pursuer George Bell junior, was, along with his brother, caught on ground where the defender had the exclusive right of shooting; that the younger boy had fired at a rabbit, and the pursuer, the elder brother, was hiding the gun; that the defender collared the pursuer, demanded his name, and pulled him along with him till he handed him over to his father whom he met,—these facts are proved. I do not say that the pursuer was doing anything very bad; but the defender was entitled to demand his name, and to remove him if he was a trespasser.

It is not proved that any blow was given, or that any violence beyond the mere collaring and pulling along was used by the defender. Apart from the question, to which I shall afterwards advert, whether the pursuer was injured by being *frightened*, I am of opinion that the defender did not in any way hurt the pursuer, or do anything that could hurt him.

But was the pursuer injured in consequence of the fright caused by the defender's apprehension of him? If the pursuer was not injured by fright, there is no evidence that he was injured at all by anything that occurred on that 23d October 1867, this action of damages not having been brought till the 3d October 1868.

Now, what was the fright to which the pursuer attributes consequences injurious to his health?

We are told this very plainly by his medical witnesses and advisers. Dr Ferguson, who "recommended the legal proceedings," explains that the "fright" of the pursuer consisted in finding himself in the hands of the defender Mr Shand, who, as the elder pursuer had told the Doctor, "had deliberately shot at one man," besides being reported to have "shot at others." Doctor Thom says that he attributed the appearances—not, I think, any marked appearances—of disease to "fright," and explains that the fright was caused by the boy believing that "the defender had fired at a man some time previously." This fright, and this reason for it, is the only thing specified as causing injury to the pursuer or as affecting the pursuer's health.

Now, so far as the proof goes,—and we cannot look beyond it,—this charge against the defender of previously shooting at a man is no more than an imagination. It is not proved. It is not alleged on record. It is not now suggested as a fact. Nay more; twice in the course of the proof the defender was proceeding to put questions with the view of contradicting any such charge, and explaining anything that might even have caused misapprehension, when the pursuer objected to the course of examination and stopped it.

If there had been a fright and injurious consequences therefrom caused by this false and absurd imagination, the defender would not have been responsible unless he had been himself otherwise to blame. He is not to answer for a delusion on the part of the pursuer.

But unless we think the evidence of the medical witnesses for the pursuer reliable, we cannot even come to the conclusion that the pursuer was actually affected by the serious illness alleged, and still less can we conclude that he was injured by fright caused by the defender on the occasion libelled.

I do not wish to express myself strongly in regard to these two witnesses—Dr Ferguson and Dr Thom—who, at all events, cannot be viewed as quite impartial. The assault is said to have been on 23d October 1867, the medical examination was on 13th December 1867, the medical certificate on 28th March 1868, and the action of damages on 3d October 1868.

The pursuer's statement on record is that the pursuer has, since the 23d October 1867 and down to the date of the action, been suffering seriously from the injuries he received; and for these injuries he demands £200 of damages. The medical evidence by which it has been attempted to support this averment rests almost entirely on the statements of the pursuer and his family.

It appears, however, from the proof, that in point of fact, during the time between the alleged assault and the raising of this action this pursuer has been engaged in ploughing, carting, thrashing, tramping hay on a cart, tramping straw in a barn, forking grain, shooting, dancing merrily, and playing the cornopean in the Volunteer band.

In the face of the real evidence thus afforded by the proved conduct and proceedings of the pursuer, it would require the most conclusive and reliable medical testimony to lead me to believe that the pursuer was at that time suffering from the consequences of an assault and a fright seriously affecting his health. We have no such medical testimony for the pursuer. We have no evidence of any kind which can safely sustain the claim of damages on the first and more serious ground of action.

But (2) it is maintained that, apart from vio-

lence, or fright, or consequent injury, the defender is liable in damages as for assault in respect of his laying hold of the pursuer and pulling him out of the field. It is said that this was illegal and culpable, and amounted to an assault.

In dealing with this part of the case, so put separately, in which the conduct of the defender must be viewed as free from all unnecessary violence, I think the lapse of nearly a year before the action was brought is a fact not without some importance.

I do not advert to the question, whether the junior pursuer, as son of the tenant of the farm, was entitled to kill rabbits. He was not known to be the son of the tenant; he had hid the gun in a stook; he refused to give his name; and the defender was entitled to deal with him temperately and without violence, as an intruder and a trespasser.

Whether considered with reference to the provisions of the Day Trespass Act, 2 and 3 Will. IV., cap. 68, sec. 3, or at common law, I am of opinion that, in the circumstances, the defender was not guilty of any wrong in merely apprehending the pursuer and removing him from the ground without violence—without more force than was necessary for his removal.

On the whole matter I am satisfied that the judgment of the Sheriff is right.

LORD KINLOCH concurred.

Agents for Pursuers—Milroy & Hampton, S.S.C.
Agents for Defender — Morton, Whitehead & Greig, W.S.

Wednesday, February 2.

HILLSTROM *v.* GIBSON & CLARK.

Charter-Party—Lightening of Vessel—Custom of the Port — Deletion — Delivery of Cargo—End of Voyage. It was provided in the charter-party of a vessel that she should "proceed to a safe port, or so near thereunto as she may safely get and lay afloat at all times of tide, and deliver the same, and so end the voyage." The master was directed to take the vessel to Glasgow; but on her arrival at the Tail of the Bank, off Greenock, it was found that she drew a foot and a-half more water than she could get in Glasgow harbour at low tide. It was proved that in such circumstances it was customary to unload vessels in part, and for the vessels then to be taken to Glasgow. In this case, however, the words "according to the custom of the port" were deleted from the charter-party. *Held* (*diss.* Lord Deas), the master was not entitled to insist on delivery of the cargo at the Tail of the Bank, but was bound to allow the consignees to lighten the vessel of part of her cargo, and then to proceed to Glasgow—this being reasonable and customary.

By charter-party entered into at Alexandria between the pursuer, as master of the ship "Frey," and certain parties as charterers thereof, the "Frey" was chartered to carry a cargo of beans and wheat from Alexandria to a safe port to be specified to the master, "or so near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage." The words "according to the custom of the port" originally stood between "same" and "and," but had been deleted. The defenders were consignees of the cargo, and indorsees of the bill of lading. On the arrival of the ship at Falmouth the master received orders to take her to Glasgow. But on her arrival at the Tail of the Bank, off Greenock, it was found that the ship drew about a foot and a-half more water than was to be had in Glasgow harbour at low tide. In these circumstances the master refused to endanger the safety of the vessel by taking her to Glasgow except on payment of £45 above freight, and required the defenders to take delivery of the cargo at the Tail of the Bank. This they refused to do. Eventually the ship was lightened of sufficient cargo to allow her to be taken to Glasgow; and the pursuer brought this action to have the defenders decerned to pay him £129, 12s. 6d., being 15 days' demurrage at £6 per day, as stipulated in the charter-party, and the dues incurred in taking the vessel from the Tail of the Bank to Glasgow and back. The Sheriff-Substitute (DICKSON), and, on appeal, the Sheriff (GLASSFORD BELL), found for the pursuer.

The defenders appealed.

MILLAR, Q.C. and R. V. CAMPBELL for them.

SHAND and ORPHOOT in answer.

At advising—

LORD PRESIDENT—The vessel arrived at the Tail of the Bank on the 25th of November; and the question then arose,—Was the master bound to carry the vessel further, or might he remain at the Tail of the Bank and deliver the cargo there, although there was no quay suitable for the purpose there? The answer to this question depends upon the construction to be put upon the charter-party. The charter-party is of the ordinary kind; but there is one peculiarity in it arising from the deletion of the words "according to the custom of the port." It is admitted if the vessel had gone to Glasgow with a full cargo on board that she could not have lain in safety at low water. Her draught of water was 17 feet 9 inches at the Tail of the Bank; but at Glasgow, the water being fresh, she would have drawn 18 feet 1 inch. And as at Glasgow she could only have got about 16 feet of water at low tide, it is certain that, laden as she was, she could not with safety have come up to Glasgow. Now it is shown that the general custom in such cases is to lighten the vessel sufficiently to allow of her coming up to Glasgow. The words "according to the custom of the port," however, were deleted from the charter-party. If they had not been deleted the pursuer would have been bound to have allowed his vessel to be lightened and then to have gone on to Glasgow. But, as it is, we must hold that the master was not bound by any custom of the port of Glasgow.

He therefore refused to go up to Glasgow, or to have the vessel lightened at the Tail of the Bank. He said, if his vessel was lightened of part of the cargo there, it was giving him two ports of discharge. Now at the Tail of the Bank, where the ship was lying, there is no quay or accommodation for unloading. Large vessels lie at anchor there, and the cargoes of some vessels are unloaded there in the way the master of the "Frey" wished. But these cargoes are shipped into smaller vessels, which go by the Union Canal to Grangemouth. Now the Tail of the Bank is not a natural place for a ship to discharge her cargo. With a sudden gale arising there would be great risk of disaster to the ship and cargo. There is therefore nothing in the way of custom or propriety to be said in