or easily to be got, and it is to me by no means clear, that if he had not been able within a short time to obtain such an investment, he would have remained in Scotland. Looking to what appears to have been the state of his health, and the opinion expressed as to the climate, it seems not at all unlikely, that in that event he would have lived chiefly in a warmer climate, and perhaps occasionally visited his friends in Scotland. He might or might not have invested in land elsewhere. But I do not see sufficient ground for holding, that he had resolved to make Scotland the country of his residence, except in the event of his being able to make such an investment as he desired. In the mean time his mind was unsettled as to where he should finally cast anchor. His location in Scotland was tentative.

If his final offer for Enterkine, in the spring of 1839, had been rejected, I see no reason to conclude, that he would have remained in Scotland; and if he had then gone to a preferable climate and taken up his residence there, I think it could not have been held, that he had in the previous September become a domiciled Scotchman. If he had gone to Scotland with intent to reside permanently there, without regard to any particular mode of investing his fortune, the contingency on which I think so much depends would have been out of the case, and his location in Scotland would not have been attributable to that purpose of investigation previous to decision, to which, I think, it may fairly be attributed. No doubt, the continuance of the residence of a person in any country, however long he has been there, may, in a sense, be said to be contingent on possible future occurrences. But that has no resemblance to the present case, for there the purpose to settle in a particular country, and so acquiring a domicile there, was contingent, and, as I think, in suspense.

Upon these grounds I am disposed to concur in the judgment proposed.

Other defences were pleaded in the action, and were maintained in the Court below, and as the learned Judges in that Court were of opinion, that the Scotch domicile had been established, it was proper, and indeed quite necessary, for them to deal with those other defences, and it would equally have been our duty to have done so if we had taken the same view as they did of the import of the evidence in regard to domicile; but in consequence of our having taken a different view of the import of that evidence, it has now become unnecessary to deal with those other defences.

Interlocutors reversed.

Appellant's Solicitors, J. W. and J. Mackenzie, W.S.; Grahames and Wardlaw, Westminster. —*Respondents' Solicitors*, G. Cotton, S.S.C.; Uptons, Johnson, and Upton, London.

MAY 26, 1868.

ANGUS MACKINTOSH of Holme, *Appellant*, *v.* PATRICK ARKLEY, Sheriff substitute of Edinburgh, *Respondent*.

Process—Preliminary Defence—Time of Pleading—*The Statute* 13 *and* 14 *Vict. c.* 36, § 7, *as to the time of pleading a preliminary defence, is directory only, and the Court may allow it to be pleaded along with pleas to the merits.*

Lunatic—Warrant to Remove to an Asylum—Reduction—Interest of Judge—*The Statute* 55 *Geo.* III. *c.* 69, § 8, *does not require evidence to be given on oath to a Sheriff on granting a warrant to send a lunatic to an asylum. The Statute applies to lunatics not cognosced as well as those cognosced.*

The Sheriff, who grants warrant which is ex facie *regular and within his jurisdiction, has no interest in the document such as renders him liable to be made defender in an action of reduction of such warrant.*[1]

This was an action against the Sheriff substitute of Edinburgh, for reduction of (1) a warrant dated 13th June 1852, to confine the pursuer in Saughtonhall madhouse; (2) a madhouse licence granted by defender to the keepers to receive and detain the pursuer.

The condescendence alleged certain facts as to the granting of the said warrant and licence by the defender as Sheriff substitute, and averred, that the defender acted maliciously, negligently, recklessly, wrongfully, illegally, and without probable cause; but there was no conclusion for damages.

The following were the pleas in law for pursuer :—1. The defender having maliciously, negligently, illegally, wrongfully, and without probable cause, made the order and granted the

[1] See previous report 39 Sc. Jur. 114. S. C. 6 Macph. H. L. 141 : 40 Sc. Jur. 482.

licence complained of, the same, as also the several renewals of the original licence, ought to be reduced and set aside. 2. The order complained of ought to be reduced, in respect—(1.) That the petition upon which it followed was irrelevant. (2.) That sufficient legal evidence was not offered to establish the allegation in that petition, in terms of the Statutes. (3.) That it was not served upon the pursuer, or any one for his interest. (4.) That the pursuer had no opportunity of consulting an agent as to his interests, or of rebutting the allegations of insanity contained in the said petition. (5.) That it was signed by his mother when under essential error as to its nature and effect. (6.) That the defender, who alone is recognized by the two earlier Statutes, even if it had been incumbent upon him to act in the circumstances, could do so only in conjunction with the Procurator fiscal, under the 4th and 5th Vict. cap. 60, § 3, the provisions of which Act he failed to observe. (7.) That as in 1852 no one was in law a furious or fatuous person or lunatic who had not been either cognosced by a jury, or pronounced to be so by the Court of Session, and as the pursuer had not been found to be a furious or fatuous person or lunatic in either of the above modes, the defender, in the circumstances, was not justified, even in the view most favourable to him, in pronouncing an order for the confinement of the pursuer, other than an interim order for a fortnight, according to the provisions of the Act 55 Geo. III. cap. 69, § 10, so that the condition of the pursuer's mind might be ascertained in the manner prescribed by law; and (8.) That the whole proceedings were irregular, incompetent, informal, and contrary to law. 3. The defender's pleas in law, in so far as they were competent against satisfying the production, are now too late, and therefore incompetent, having been virtually departed from. 4. The defender having stated no relevant defence, or set forth any allegations in fact, inferring that the pursuer was a furious or fatuous person or lunatic, and justifying the order in question, the pursuer is entitled to decree *simpliciter*, and without proof. 5. The Statutes under which the order in question was granted being limited by their whole tenor, as applicable solely to furious or fatuous persons or lunatics, and not having clothed the Sheriff with any privilege, the *onus* of averring and proving that the pursuer was a furious or fatuous person or lunatic is laid upon the defender.

The following were the pleas in law for defender:—1. The action, having for its object only the reduction of proceedings in which the defender has no interest, is incompetent as directed against the defender. 2. The pursuer's averments are not relevant or sufficient in law to support the conclusions of the action. 3. The defender in granting the order and licence of June 1852, complained of, having acted judicially and in the discharge of an official duty, devolving on him as one of the Sheriff substitutes of Edinburgh, the present action is not maintainable against him. The pursuer's statements are not relevant or sufficient to sustain an action directed against the defender for his actings in a judicial and official capacity, or to support or infer the conclusions thereof. 4. *Res judicata;* at least the present action is excluded, in respect of the legal proceedings above mentioned, and of the result thereof. 5. The pursuer's averments being unfounded in fact, the defender ought to be assoilzied from the conclusions of the action. 6. So far as regards the licence granted by the late John Thomson Gordon, the action is not maintainable, in respect the defender was not any party thereto, or in any way connected therewith.

The Lord Ordinary, on 4th December 1866, sustained the *1st* and *2d* pleas in law for the defender, and dismissed the action. The Second Division on 22d December 1866, recalled the interlocutor and sustained the *1st* plea for the defender, and dismissed the action. Against both interlocutors the pursuer now appealed.

Sir R. Palmer Q.C., and *J. Brown* Q.C., for the appellant.—The documents complained of were injurious to the appellant as declaring him to be a lunatic. They purport to be granted under the Statutes 55 Geo. III. c. 69; 9 Geo. IV. c. 34; and 4 and 5 Vict. c. 60. The respondent is the only person against whom the action can be brought, and though malice is not alleged, or at least damages are not sought, yet there is sufficient interest to make the respondent defender. There was in the case excess of jurisdiction, inasmuch as there were no sufficient materials before the Sheriff, and the appellant was not a lunatic within the meaning of the Statute, not being cognosced, and he had no notice of the proceedings taken against him—*Ferguson* v. *Malcolm*, 12 D. 732. The defence of incompetency, if relied on by the defender, ought to have been pleaded in the first instance before satisfying production, and was admitted too late—13 and 14 Vict. c. 36, § 7.

Lord Advocate (Gordon), *and Mellish* Q.C., for the respondent, were not called upon.

LORD CHANCELLOR CAIRNS.—My Lords, in this case an action was raised in the Court of Session in Scotland, for the purpose of reducing an order made by the Sheriff of Edinburgh, and a licence granted by the Sheriff of Edinburgh, and the action was raised at the distance of fourteen years from the time when this order was made and this licence was granted. The Court of Session have held, that the action is incompetent, and from that interlocutor of the Court of Session this appeal comes up to your Lordships.

A preliminary objection to the decision of the Court, on the score of incompetency, was taken upon this ground: It was said, that if the defender in the action relied upon the defence of

incompetency, he ought to have put in the plea to that effect at the time when he was called on to satisfy production. To support this argument the Statute 13 and 14 Vict. c. 36, § 7, was relied on. But I think that when your Lordships consider that section, you will have no difficulty in holding, that all that that section was intended to do was by way of direction to point out that the proper course for a defender, who had a preliminary objection of that kind to take, would be to take it in the first instance, and to reserve his defence on the merits for a subsequent stage of the case. But I can find nothing in the Statute which debars a defender who has not taken this course (doubtless a most convenient course) from asserting his defence on the score of incompetency, along with his defence on the merits if he be so advised. No doubt it may become a question for the Court to consider, if additional costs are incurred by that course, whether the party who has departed from the directory provisions of the Statute, ought not to bear the costs thereby occasioned.

Passing from that preliminary objection, it appears, that the order and licence which are sought to be reduced were made under the Statute of 55 Geo. III. c. 69, for the purpose of authorizing the confinement in a lunatic asylum of persons whose state of mind required confinement of that description. The first thing, I think, which your Lordships have to consider here is, whether this order and licence were within the jurisdiction of the Sheriff, who made and granted them, and whether *ex facie* they are regular, and come within the meaning of the Statutes.

Three objections have been taken to the order and the licence. First, it is said, that there do not appear to have been before the Sheriff the materials prescribed by the Statute to justify such an order and licence. Now the 55 Geo. III. c. 69, § 8, provides, "that from and after the passing of this Act, no persons shall be received into any house kept for the reception and the care or confinement of furious persons or lunatics in that part of the United Kingdom called Scotland, without an order made by the Sheriff, or Steward depute, or Substitute of the county or stewartry where such house shall be, who shall forthwith satisfy himself as to the propriety of granting such an order, by the certificate or report of medical persons and otherwise, as the circumstances of the case may seem to require." Nothing is said as to taking evidence, or taking evidence upon oath. There is to be the certificate or report of medical persons, and then come the words "and otherwise," that is to say, the Sheriff is to satisfy himself otherwise, as the circumstances of the case may seem to require.

What was done in this case was, that the Sheriff had a certificate of two medical gentlemen, who declared on their soul and conscience, "that, from our own personal observation, and from the report of credible witnesses, we believe the foresaid Angus Mackintosh of Holme to be in such a state of mental derangement as to require confinement in an asylum." Therefore, so far as a report or certificate of medical persons is required by the Statute, a report or certificate was before the Sheriff. But in addition to that he had before him the petition of Mrs. Mackintosh, the mother of the appellant, who stated to him, "that her son, aged 26 years, presently residing at Edinburgh, is in such a state of mental derangement as to require the confinement and restraint of an asylum for his security and recovery, as appears from the medical certificate herewith produced." The Sheriff had, therefore, before him this additional circumstance—the representation made by the mother of the appellant. That was a further circumstance within the meaning of the Statute. And if, in the discretion of the Sheriff, the circumstances of the case required no more than these materials to satisfy him as to the propriety of granting the order, in my opinion he had jurisdiction to make the order.

But then it was said, that the 55 Geo. III. applied, on the face of it, only to persons who are furious or fatuous or lunatics, and that that description comprehends only persons who are cognosced as lunatics. I find no authority whatever for saying, that these words ought to be limited in this way. It appears to me from the whole scope of the Act, that the Act was intended to provide a safer and more regular mode for the confinement of persons who had not been cognosced who were abroad, and in a state of mind that required protection.

Then it was said, lastly, that the Procurator fiscal should have intervened in these proceedings on the part of the Sheriff, and should have co-operated with the Sheriff. And in support of that argument the 4 and 5 Vict. cap. 60, § 3, was referred to. But when your Lordships look at that Statute, you find, that it does not in any way supersede or interfere with the old Statute of the 55 Geo. III., but that it provides for the summary or interim custody of those dangerous lunatics who might be in the hands of the police, and might require to be put in confinement of another description than the restraint or confinement of a properly licensed medical place of reception for lunatics.

It appears, therefore, to me, that all the objections made, both as to the want of jurisdiction and as to the irregularity of the order and licence, entirely fail, and that we must take the order and licence to be regular, *ex facie*, and to have been within the jurisdiction of the Sheriff. If that is the case, then, I apprehend that the moment the matter was within the Sheriff's jurisdiction, and he, acting with regularity, made this order and granted this licence, the order and the licence became public property, they passed out of the hands of the Sheriff, and became the warrant for any person who might have to act upon them. And from that moment the Sheriff

ceased to have any interest in either of the documents. And, in any proceeding instituted for the purpose of reducing those documents, the Sheriff was clearly a person who had no interest, and therefore, as to him the action would be incompetent.

But then it is said, that there were upon the record here averments of malice and want of probable cause on the part of the Sheriff, in making the order and granting the licence. But when we turn to the conclusions of the summons we find, that the summons contains no petitory conclusions against the Sheriff, that it is not a proceeding against the Sheriff of the nature of a proceeding for damages for the wrongous making of the order; and without saying whether, upon these averments, there would or would not be a case for damages against the Sheriff, I think it is quite sufficient to say, that, in my opinion, if there be any right to proceed against the Sheriff at all, it must be a right to proceed against him for damages, and not a right to proceed against him for reduction of this order and licence.

I think, therefore, that the decision of the Court below was entirely right, and I move your Lordships, that the appeal, being as it seems to me without foundation, be dismissed with costs.

LORD CRANWORTH.—My Lords, I so entirely concur in what has fallen from my noble and learned friend, that I shall not trouble your Lordships by adding a single observation.

LORD CHELMSFORD.—I entirely concur in all that has been said by my noble and learned friend.

LORD WESTBURY.—My Lords, it must be recollected, that the judgment of the Court below proceeded entirely on the question of competency. The relevancy of the averment, therefore, is not at all to be considered. Now the question of competency is material on this ground: A civil action for the reduction of an instrument in Scotland must be brought against the party having an interest in that instrument. The instrument is the judgment of a Judge, pronounced under statutory jurisdiction. The Judge would have an interest in that instrument, if his conduct in pronouncing it were challenged, and it were sought to make him liable to damages for having so acted judicially. But if that be not done, if that be wholly excluded by the form of the action, then the Judge has no personal interest whatever in the order which he has made in the exercise of his judicial authority; and an action could no more lie against him than it would lie against a person who is appointed by law to have the custody or to keep the record of such decree or judicial order. That is the simple ground on which the Court of Session proceeded; and I think it is a ground which approves itself to one's understanding. It is idle to say that hereafter the pursuer may bring an action for damages against the Judge. It is necessary for him to give to his present action a condition of competency. And that can only be done by alleging the liability of the Judge and seeking to enforce that liability.

Upon these grounds, I am clearly of opinion, that the decision of the Court below was perfectly correct, and that this appeal, which is a wholly mistaken proceeding, ought to be dismissed with costs. It is to be regretted that it is competent by the law of Scotland to raise a question of this kind, after the lapse of so long a period as fourteen years after the order was pronounced and carried into execution.

LORD COLONSAY.—My Lords, I have nothing to add to what has been said. I entirely concur in the judgment proposed, and in the grounds which have been stated for it.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Solicitors, James Somerville, S.S.C.; Simson and Wakeford, Westminster.—*Respondent's Solicitors*, Macrae and Flett, W.S.; J. J. Darley, Gray's Inn.

MAY 28, 1868.

PETER MACLAREN, Collector for Heritors of Renfrew, *Appellant*, *v.* THE TRUSTEES OF THE CLYDE NAVIGATION, *Respondents*.

Valuation of Lands Act—Church, Rebuilding—Exemption from Assessment—*The C. trustees before the Valuation Act* 17 *and* 18 *Vict. c.* 91, *were not liable to assessment, being only lessees. By that Act lessees for more than* 21 *years were directed to be entered in the roll as proprietors. An assessment for rebuilding a parish church, which falls on heritors, having been imposed on the C. trustees as proprietors, because they were long lessees:—*

HELD (affirming judgment), *That they continued exempt notwithstanding the Act.*[1]

[1] See previous report 4 Macph. 58; 38 Sc. Jur. 28. S. C. 6 Macph. H. L. 81; 40 Sc. Jur. 484.