Friday, May 24.

FIRST DIVISION.

NOTE—CATHERINE M'EWAN FOR POORS' ROLL.

Poor—Poors' Roll A pursuer of an action of filiation and aliment, holding judgments of Sheriff-Substitute and Sheriff in her favour, found entitled, as respondent in an advocation, to the benefit of the Poors' Roll.

This was an application for the benefit of the Poors' Roll. The applicant had been pursuer of an action of filiation and aliment, which the sheriff-substitute and also the sheriff had decided in her favour. In the Sheriff-Court the applicant had been admitted to the benefit of the Poors' Roll. The defender advocated, and the pursuer now desired admission to the Poors' Roll in order to enable her to defend the judgments in her favour which she had obtained.

RHIND, for the advocator, objected to the application. The applicant was earning nothing when on the Poors' Roll in the Sheriff-Court, but she had since then got a situation as a domestic servant, in which she was earning £15 a-year.

MELVILLE was heard for the applicant. He admitted that she was now earning £15 a-year.

The Court repelled the objection, and remitted the application to the reporters. It was observed that the right of a party to get on the Poors' Roll did not depend on the position which he or she occupied in society, and it would never do to admit every servant girl who happened to become the mother of an illegitimate child. But this case was a very special one. The child was born in December 1865, and had been since that time supported entirely by its mother because the paternity was denied. But the sheriff-substitute as well as the sheriff had found the paternity proved; and if they were right, the child should have been alimented to the extent of one-half by the defender. Besides, even if the applicant ultimately succeeds, all she can recover is a sum to defray one-half of the aliment, the other half being payable by herself. Further, the applicant was on the Poors' Roll in the Sheriff-Court, and it was not to be assumed that she was improperly placed upon it; and the result of now refusing her application was to prevent her defending the judgments which she had been enabled to obtain.

Agent for Applicant—J. P. Coldstream, W.S.

Agents for Objector—D. Crauford and J. Y. Guthrie, S.S.C.

Friday, May 24.

SCOTTS *v.* DRUMMOND & HERRIOT.

(*Ante*, p. 14.)

Jury Trial—Right of Way—Motion to apply Verdict—Conclusion of Removal of Obstruction—Interdict—Expenses. Defender in declarator of right of way assoilzied from conclusions of removal of obstructions, and interdict against obstructing. Pursuer found entitled to modified expenses.

The summons in this action had concluded for declarator—(1) That the road from the town of Coldingham on the south, to the public sea-shore at Petticur-Wick or Pettico-Wick on the north, as particularly described (being the road in the first issue), was a public road; (2) That the road from the village of Coldingham Shore to St Abb's Head and Pettico-Wick (being the road in the second issue) was a public road for foot-passengers; (3) That the road from Coldingham Shore to Burnmouth Harbour and Pettico-Wick (being the road in the third issue) was a public road for foot-passengers; or otherwise for declarator that the pursuers and the public had a right of way along the road first described, and also a right of way for foot-passengers along the roads second and third described: And farther, it ought and should be found and declared, by decree foresaid, that the pursuers and all others are entitled, in all time coming, to the free and uninterrupted use, possession, and enjoyment of the said road first above described as a public road for foot-passengers, horses, and carriages, or for one or other of these purposes, and to the free and uninterrupted possession of the said roads second and third above described as public roads for foot-passengers, or at least to the foresaid right of way along the said three roads or lines of road respectively, and of all the rights and privileges therewith connected: And farther, the said defenders ought and should be decerned and ordained, by decree foresaid, to remove all walls, gates, palings, and other obstructions tending to interfere with or prevent the free and lawful use, possession, and enjoyment of the said several public roads, or any of them, or right of way foresaid, or any of the rights and privileges therewith connected; or at least so to place the gates along said public road and footpaths, or any of them, in such a manner as to leave to the pursuers and the public the free and uninterrupted use, possession, and enjoyment of said roads: And farther, the defenders, and all others acting in their names or by their authority, ought and should be decerned and ordained, by decree aforesaid, to desist and cease, and ought and should be interdicted and prohibited, from troubling, molesting, or obstructing the pursuers and all others in the peaceable use, possession, and enjoyment of the foresaid public road or rights of way.

ASHER, for the pursuers, now moved the Court to apply the verdict, and find the pursuers entitled to expenses.

DUNCAN, for the defenders, objected to the motion, so far as it embraced a decerniture against the defenders to remove gates and fences in the line of roads declared to be public by the verdict of the jury. These gates and fences had existed all along throughout the period during which the right of way had been acquired. He also moved the Court to apply the verdict in the defenders' favour under the second issue, assoilzieing them from the conclusions of the action applicable to the road contained in that issue; and asked the expenses applicable to that branch of the case.

GIFFORD, for the pursuers, contended that no separate expense had been incurred applicable to the second issue, the road in which was spoken to by the witnesses called to speak to the road in the first issue. Besides, the pursuers had in the main gained their case, which was to vindicate a right of way to Pettico-Wick as a public place. Expenses might be modified.

LORD PRESIDENT—It is necessary in this case to see what we are to do with all these conclusions. It appears to me that all the pursuers are entitled to is decree of declarator under the first declaratory

conclusion of the summons as to the first and third branches thereof. As regards the other conclusions—the conclusions for removal and interdict—there is no foundation for them whatever.

The condescendence sets out that there are three roads, with reference to each of which it is distinctly averred, in the 5th, 6th, and 9th articles, that from time immemorial, or at least for forty years and upwards prior to the date of instituting this action, such public right of way has existed. It is therefore the fact, according to the pursuers themselves, that there has been no obstruction to these roads prior to this action. And, to make this still clearer, the reason for this action is also stated. In the 13th article it is said that the defenders have recently attempted to interfere with the pursuers and others of the public in the use and enjoyment of said roads, whereby the present action has become necessary. Now, this interference has been explained to be a suspension and interdict in the Bill Chamber. But that is not an obstruction removeable by any conclusion of the summons. There is therefore no foundation for the conclusion for removal of obstructions. Nor is there any more foundation for the conclusion for interdict; for interdict, whether in the form of a summons or of a suspension and interdict, is only competent in the case of active or threatened interference with rights. While therefore the pursuers obtain decree under their first conclusion, as regards the first and third heads, the defenders should be assoilzied as to the second head; and *quoad ultra* the action should be dismissed.

As to expenses, the pursuers have substantially gained their case. They have got a cart-road to Pettico-Wick, and also a footpath. They have lost on the second issue; and if they had subjected the defenders to any distinct expenses applicable to their defences under that branch of the case, which could have been the subject of a distinct account, the defenders might have succeeded in their contention; but there is plainly nothing of that kind here. The justice of the case requires that the pursuers should get their expenses, subject to modification.

The other judges concurred.

Agent for Pursuers—T. White, S.S.C.

Agents for Defenders—Jardine, Stodart, & Fraser, W.S.

Friday, May 24.

TAYLOR & CO. *v.* MACFARLANE & CO.

(*Ante*, vol. iii., p. 151.)

Jury Trial—Bill of Exceptions—Record—Issue—Construction. 1. Refusal by presiding Judge to allow pursuers to put in (1) articles of condescendence, and (2) whole record, at trial, sustained. Observations on the legitimate use of the record at trial. 2. Exception by defenders to refusal of Judge to construe a term in the issue disallowed.

The pursuers in this action were William Taylor & Co., merchants, Leith, and the defenders were M. Macfarlane & Co., distillers, Glasgow. The case was tried in January last on the following issue:—

"Whether in or about September 1862 the defenders, on the order of the pursuers, agreed to supply to them a quantity of whisky, coloured with burnt sugar or other innocent material, similar to a sample of Mackenzie & Co.'s whisky then shown to the defenders? Whether the defenders delivered to the pursuers a quantity of coloured whisky, amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price? And whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burnt sugar, or other innocent material similar to said sample, to the loss, injury, and damage of the pursuers?"

Damages were laid at £6000.

The pursuers' statements were to the effect that they ordered from the defenders a quantity of spirits, coloured according to a sample which had been coloured by Messrs Mackenzie & Co. with burnt sugar; that the whisky supplied by the defenders on this order was sent to the West Coast of Africa, but was then found to be so bad that the natives, after trial of it, refused to purchase. The pursuers afterwards found that the whisky had been coloured with logwood, which was noxious and injurious. Experiments suggested by the defenders were made to purify the whisky, but without success, and the pursuers now sought damages for loss of trade and otherwise.

The defenders denied that burnt sugar was the usual or only substance used for colouring whisky, and maintained that the whisky sent by them was conform to sample. They denied that the preparation of logwood used by them was deleterious. They contended that the pursuers were barred from claiming damages by their failure to return the whisky.

At the trial, various exceptions were taken by the defenders' counsel to the ruling of the presiding judge (KINLOCH). The first two exceptions related to certain questions put to witnesses in the course of examination. These exceptions, however, were not insisted on. (3) The defenders also proposed to put in the ninth article of the condescendence to prove what the pursuers stated therein as to the character of the substance of which they now complained as not being innocent. The pursuers objected to the admissibility of this evidence, and the objection was sustained by the judge. (4) The defenders then proposed to put in the whole record, for the purpose of its being used in construing the words "innocent material" occurring in the issue. This was also objected to by the pursuers, and the objection sustained by the judge. To these two rulings the defenders excepted. (5) Counsel for the defenders also excepted to the charge, in so far as the judge had directed the jury that the term "innocent" in the issue was not a legal term requiring construction from the judge, and that it was for the jury to say, upon the evidence, whether the thing was innocent or not, in the fair and reasonable sense of the word, as employed in ordinary language. (6) They also asked the judge to direct the jury (1) that, in order to entitle the pursuers to a verdict, it was not sufficient for them to prove that the material with which the whisky was coloured was injurious to the marketable quality of the whisky; (2) that in order to entitle the pursuers to a verdict, it was necessary for them to prove that the colouring matter was injurious to the health of the consumer; (3) that the words in the issue, "similar to the said sample," related to the colour of the whisky