tion of property, and I would assoilzie the defender from the conclusions of the action of declarator.

LORD NEAVES—I think it is important in this case to observe how the question arose. The pursuers were not contented to stand upon the possessory rights which they allege, but they raised an action of declarator, and practically say, "you must find in favour of somebody, and you must decide in my favour." No further issue was raised than the exclusive title of the pursuers or their exclusive possession. I cannot see any possession here save one of a mixed character, and it is quite possible that this may have followed upon some old arrangement by conterminous owners for their mutual convenience and benefit. It would have been most injudicious on the part of the defenders had they prohibited the erection of the buttresses.

LORD ORMIDALE concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against, and, in place thereof, find that the pursuers in the action of declarator have failed to prove that the space described in the summons, lying between the western and south-western wall of the granary, or range of granaries, erected on the defenders' property, and the wall erected parallel to the said granary wall, and at a distance of about two feet therefrom, is the exclusive property of the pursuers in the said declarator: Therefore, in the said action assoilzie the defenders from the whole conclusions of the action, and decern; and in the action of suspension and interdict at the instance of William Walker Gibson and others, being the other of the present conjoined actions,—Recal the interim interdict already granted, and in place thereof, and of new, interdict, prohibit, and discharge the respondents in the said process of suspension and interdict from building upon the said space above mentioned any other or different buildings than the portion of stone wall and the brick butresses which were erected upon the said space or part thereof prior to the recent operations of the said respondents complained of in the said suspension and interdict, and decern; further, decern and ordain the respondents in the said process of suspension and interdict to take down and remove a portion of new wall which the said respondents have recently erected upon a portion of the said space, which new wall is close to and abuts upon the wall of the suspenders' granary, and which closes up certain windows or openings in the said granary; and decern and ordain the said respondents to restore the said space to the same condition in which it was prior to the erection of the said new wall now ordered to be removed: *Quoad ultra* refuse the prayer of the note of suspension and interdict, and decern: Find the defenders in the action of declarator, and the suspenders in the action of suspension and interdict, entitled to expenses in both actions and in the conjoined actions," &c.

Counsel for Pursuers (Reclaimers)—Solicitor-General (Watson), Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Clark), Q.C., Asher, and G. Watson. Agents—Morton, Neilson, & Smart, W.S.

[*J.*, Clerk.

Tuesday, December 8.

FIRST DIVISION.

LARKIN *v.* M'GRADY.

Lunatic—Cognition of Insanity—Title to Sue.

Held that a person who was cousin-german of the lunatic, and immediate younger brother of the nearest agnate, had a good title to sue out a brieve of insanity.

Lunatic—Cognition of Insanity—Act of Sederunt, 3d December 1868, § 6.

In a cognition of insanity in which the pursuer and claimant was not the nearest agnate, the Jury delivered a verdict in which they cognosced in terms of the brieve, found that the pursuer was not nearest agnate, nor the heir-at-law or next of kin of the respondents, and that A was the nearest agnate, and was of lawful age. *Held* that this was not one of those cases in which, in terms of the provisions of section 6 of the Act of Sederunt of 3d December 1868, no other verdict than one of Not Proven could be returned.

This was a Bill of Exceptions in a cognition of insanity in which Edward Larkin was pursuer, and Edward M'Grady was respondent. The Bill of Exceptions was in the following terms:—

"Whereas a brieve from Chancery, dated the 23d day of September in the year 1874, was presented to the Lord President of the Court of Session, commanding him in the Queen's name to inquire whether the said Edward M'Grady, respondent, is insane, who is his nearest agnate, and whether such agnate is of lawful age:

"And whereas, on 20th October in the year 1874 the Lord President appointed the said Edward Larkin, pursuer and claimant, who claimed the office of curator, to lodge his claim to the said office within eight days, and the said Edward M'Grady, or other party claiming to appear as respondent, to lodge answers, if so advised, within eight days thereafter:

"And whereas, at Edinburgh, on Monday the 23d day of November in the year 1864, before the Right Honourable the Lord President of the Court of Session, the said brieve came to be tried by a special jury; on which day came there as well the said claimant as the said respondent by their respective counsel and agents; and the jurors being called, also came and were then and there in due manner empannelled and sworn to try the said brieve.

"And upon the trial of the said brieve, the counsel for the claimant having in his opening address to the jury admitted that the claimant is not the nearest male agnate, but only the younger brother of the nearest male agnate, and that he is neither the heir nor one of the next of kin:

Counsel for the respondent contended—

"(1.) That the claimant had no title to purchase the brieve, and the jury ought therefore to be discharged, or directed to find a verdict of not proven;

"(2.) In respect of the above admission, and of the provision of section 6th of the Act of Sederunt, 3d December 1868, no other verdict than one of not proven could be returned.

"The Lord President allowed the trial to proceed, reserving the effect of the above objections for the consideration of the Court.

"Whereupon the counsel for the respondent excepted to the course adopted by the Lord President of allowing the trial to proceed reserving the effect of the above objections.

"And evidence having been adduced for the claimant, and afterwards for the respondent, and their respective counsel having addressed the jury, and the Lord President having charged the jury, the said jury did thereafter deliver a verdict, which was noted by the clerk of Court in the following terms:—

"The jury 'cognosce' in terms of the brieve; but find that Edward Larkin is not the nearest agnate, neither is he the heir-at-law or next of kin of Edward M'Grady; and that Patrick Larkin, miner, Hamilton, is the nearest agnate, and is of full age."

"Whereupon the said counsel for the respondent did then and there propose the foresaid exceptions, and requested the said Lord President to sign this Bill of Exceptions, according to the form of the statute in such cases made and provided; and the said Lord President did sign this Bill of Exceptions on the 2d day of December 1874, in the 38th year of Her Majesty's reign."

It appeared that the claimant was immediate younger brother of the nearest agnate, and cousin-german of the lunatic.

The respondents argued—(1) There was no authority for saying that, failing the nearest agnate, any person except one of the nearest of kin, could sue out such a brieve. Distant relations could not do so. Even if near relations, who were not next of kin, could sue, it must be because they had an interest to do so, and the interest which was necessary was an interest in the property. The claimant in this case was not one of the next of kin, nor the heir, and he had no interest in the property—therefore he had no title to sue. (2) In terms of section 6 of the A. S. of 3d December 1868, the whole heads of the brieve not having been answered by the Jury in favour of a person claiming in the character of nearest agnate, the verdict must be entered as Not Proven.

The claimant argued—The whole authorities pointed to this, that any relation of the insane person could sue such a brieve. In this case the claimant was a near relation, and undoubtedly had a title to sue. In regard to the second point the A. S. did not contemplate such a case as this, but the case of the nearest agnate suing. The claimant did not claim in the character of nearest agnate; he only averred his relationship. The important point looked to in the Act was an affirmative answer to the three heads of the brieve, and in this case that condition was complied with.

Authorities—*Bryce* v. *Graham*, 25th Jan. 1828, 6 S. 425; Balfour's Prin., p. 433; *M'Allister*, 6 S. 440; Fraser (Parent and Child), p. 536; Stair, 1. 6. 25: Act 1585, c. 18; *Inglis*, 1701, 4 Brown's Sup., 517; *Bonnar*, M. 6285; *Moncrieff*, M. 6286; Bell's Prin., § 2609; *Stark*, M. 6291; *Gartsherrie*, 5 Brown's Sup., 745, 5 W. & S., 745.

At advising—

Lord Deas—There were two objections taken at the Jury trial in this case.

I am clearly that it was the right and proper course to allow the trial to proceed under reservation of the objections. As this is sufficient to dispose of the bill of exceptions, I in the meantime limit my observation to that point.

Lord Mure—I concur.

Lord President—I concur. I think the course which I adopted was both expedient and competent. We therefore disallow the exceptions.

It is, however, expedient to dispose of the other matters which have been raised in this discussion.

The Jury, under my directions, returned a verdict in this form:—

"The jury 'cognosce' in terms of the brieve but find that Edward Larkin is not the nearest agnate, neither is he the heir-at-law or next of kin of Edward M'Grady; and that Patrick Larkin, miner, Hamilton, is the nearest agnate, and is of full age."

The question is, whether this verdict ought to be put in such a shape in answer to the three heads of the brieve. The respondents say that it cannot for two reasons. In the first place, they say that the claimant has no title to purchase the brieve, and that the Jury ought to have been discharged. In the second place, they say that no such verdict could be returned in view of the provisions of the 6th section of the Act of Sederunt of 3d December 1868.

On the first of these points I have arrived at an opinion in favour of the claimant; the result of the whole authorities is that a brieve can be purchased and prosecuted not only by the next agnate, but by any one having interest if in the position of a near relation. It is not necessary to determine how far that term may extend, but if the claimant is a cousin to the person to be cognosced, and immediate younger brother of the nearest agnate, he is certainly in the category of near relations. I am therefore of opinion that the title of the claimant is good.

In regard to the second point, there is no doubt some difficulty under the sixth section of the Act of Sederunt. The section is in the following terms:—"When the jury return their verdict, affirming the whole heads of the brieve, it shall be noted generally 'cognosce,' but when the jury do not affirm the whole heads of the brieve, the verdict shall be noted generally 'not cognosce,' unless there be any special finding regarding the person claiming in the character of nearest agnate (in which case the clerk shall make such note as the presiding Judge shall direct), and the jury shall then be discharged. And it shall be the duty of the clerk thereafter to make out and subscribe a formal writing, embodying the verdict, and answering the different heads of the brieve, shall be returned to Chancery, if the several heads of the brieve are affirmed, but not otherwise. And if the whole heads of the brieve are not affirmed by the jury in favour of the person claiming as nearest agnate, then the formal writing made out and subscribed by the clerk shall bear that the brieve and claim are not proven, and that the claim is therefore dismissed by the jury, which formal writing shall be recorded in the books of sederunt."

It is under the last clause that the respondent contends that this verdict should have been Not Proven, because the heads of the brieve have not been affirmed in favour of the person claiming as nearest agnate—meaning the person called the claimant in this cognition. But the claimant here has never claimed as nearest agnate. He admitted that he was not so. So it is plain that the Act of Sederunt is not intended to apply to a case of this sort at all. It was intended to apply to the case of the nearest agnate applying. In that case, if he fails to satisfy the jury on any one head of

the brieve, the verdict must be Not Proven; and the reason for such a course is obvious. But in this case why should the verdict be Not Proven, for the jury have affirmed each head of the brieve, that is to say, they have found that the respondent is of unsound mind, second, that
is the nearest agnate, and third, that he is of lawful age; and the nearest agnate will yet be entitled to take the office when the formal writing embodying the verdict is returned to Chancery, if he chooses to do so.

I cannot think that a clause of an Act of Sederunt can be construed so as to destroy the title to pursue which otherwise would be good.

The Court pronounced this interlocutor:—

"The Lords having considered the Bill of Exceptions for the defender (respondent) and heard counsel thereon, Disallow the Exceptions."

Counsel for the Claimant—Blair. Agent—John Latta, S.S.C.

Counsel for the Respondents—Balfour and Pearson. Agents—Morton, Neilson & Smart, W.S.

Thursday, December 10.

FIRST DIVISION.

GAIRDNER *v.* YOUNG.

Proof—Conjunct probation—Proof in replication.

A Sheriff in a cause allowed "to both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation." Evidence was led by both parties, and then the pursuer led his conjunct proof, in which he went minutely into various questions raised by him on record, but which he had not touched in his proof. *Held* that the defender was entitled to a proof in replication.

The pursuer John Gairdner, wood merchant, Newton on Ayr, raised an action in the Sheriff-court of Ayrshire against the defenders Messrs J. & T. Young, Engineers, also at Newton on Ayr, to obtain payment for an account of wood furnished.

The defenders admitted that the account sued for was due and resting-owing by them, with the exception of a small sum of £1, 10s. 7½d., which they averred that the pursuer had agreed by writing under his own hand to deduct as an overcharge. But they claimed payment of a contra account due by the pursuer to them for machinery and other articles furnished, and pleaded compensation.

The pursuer, in answers to the defenders' statement of facts objected to the various items of the defenders' account as overcharged.

The Sheriff (N. C. CAMPBELL) on appeal, allowed "both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation," and remitted to the Sheriff-Substitute.

The pursuer, his account generally being admitted, tendered himself as a witness merely to explain the circumstances connected with the allowance of a deduction averred by the defenders, and then closed his proof in chief.

The defenders thereupon adduced two persons in their own employment, and three men of skill, and examined them generally as to the quality of the articles furnished, and the reasonableness of their charges, and closed their proof.

The pursuer then led his conjunct proof, adduced eight witnesses, and entered with great minuteness into the questions of material, workmanship, and price, and also into the question of the efficiency of the article in working.

On the pursuer's conjunct proof being closed, the defenders moved for a proof in replication, which the Sheriff allowed on the particular points specified, and by the witnesses named in a minute put into process.

After the defenders' proof in replication was led, the Sheriff found generally in favour of the defenders in the action.

The pursuer appealed to the Court of Session.

At advising—

LORD PRESIDENT—The first thing to be determined in this case is whether proof in replication was properly allowed to the defender. I cannot say that this process has been well conducted. From first to last the proceedings have been faulty, and the blame attaches equally to all parties concerned. The original allowance of proof was made in the interlocutor of the Sheriff Principal, of 4th June 1869, "Allows both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation." It seems to me that under that order for proof it was the duty of the pursuer to lead evidence on all the points raised by him on record. He was not entitled to confine himself to the particulars of his own account. He had raised the question whether the defender had overcharged the items contained in his contra account, and if he did not lead proof of his averments on this point he was really leaving that proof till his own anticipated conjunct proof came to be led. Such a method of conducting his case was quite unjustifiable. It was depriving the defender of any reply to his proof of the real matter in dispute between them. The pursuer was quite wrong in not entering upon this subject in his proof in chief. Very naturally the defender was not very careful in leading evidence on this point, for he had nothing to meet but the pursuer's averments on record, which had not yet been supported. He contented himself with adducing two of his own people, and two men of skill. But then comes the pursuer's conjunct probation, in which, for the first time, he enters upon a very large question, judged at least by the mass of evidence. He goes minutely into a question of overcharge, and assails not only the material and the workmanship, as well as the price of the article supplied by the defender, but also the effectiveness of the article when put in use. And there, according to the terms of the Sheriff's interlocutor, the proof should have ended. But the Sheriff very naturally said, "Looking to the way in which the pursuer has conducted his proof, he has exposed the defender to a great disadvantage, and a proof in replication must therefore be allowed." I cannot say that he was wrong in this conclusion. It was very wrong that the case should ever have come into such a position as to require a proof in replication. But under the circumstances I think the Sheriff was entitled to grant it.

We must therefore enter on a consideration of all the evidence that has been led.