quiry—acting indeed through his servant, who understood that the little child did not come on her own account, but must have been sent by somebody else—gave her the half glass, which she took away in a bottle, and which she paid for with the money which her mother had given her for the purpose. This complaint was then made under the statute. According to the construction of the statute, and upon the reason of the thing, and in conformity with the opinion of the Court in the case of *Donaldson* v. *Linton*, I am of opinion that, when in point of fact a child is sent as a messenger for an adult the liquor sold or supplied is not sold or supplied to the child at all, within the meaning of the statute, but to the person who sent the child as a messenger. But, the appellant here was convicted upon the extraordinary ground that he had accidentally, and without due inquiry, arrived at a right conclusion, which excluded the statutory offence altogether. According to the law in the case of *Donaldson*, where the child was not a messenger, but had gone on his own account, the publican might still in that state of facts have his defence of *bona fides*, viz., that he had made inquiry and had been deceived, or that the child had been habitually sent as a messenger on former occasions. But here the facts were different; the offence libelled was never committed at all, and to hold the appellant guilty because he might have committed it—because he did not himself ascertain the fact that he was within the Act—is altogether out of the question.

The Lord Justice-Clerk and Lord Craighill concurred.

The Court answered the question in the negative, reversed the determination of the Magistrate, and modified expenses to £7, 7s.

Counsel for Appellant—R. V. Campbell. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Respondent—Lang. Agents—Campbell & Smith, S.S.C.

Friday, December 22.

PETITION—BARTLETT.

Process—Jury—Roll of Jurors.

A native and citizen of the United States of America was manager to a company in Edinburgh, but had not been naturalised. In an application to the High Court of Justiciary to have his name removed from the Roll of Jurors, the Court, without deciding the question whether or not an alien is liable or competent to serve on a jury, recommended that the applicant should not be cited unless there should be some case rendering his attendance desirable.

This was a petition at the instance of William Erskine Bartlett of New York, residing in Edinburgh, setting forth the following particulars. The petitioner was a native and citizen of the United States of America. He was at the date of this case manager of the North British Rubber Company (Limited), Castle Mills, Edinburgh. He had not been naturalised. His name had been put by the Sheriff-Clerk of Mid-Lothian and Haddington on the roll of persons in Edinburgh liable to serve on juries; and citations were from time to time served upon him. As an alien he was not eligible or liable to serve as a juror. He had petitioned the Sheriff of Mid-Lothian and Haddington to remove his name from the roll, but his petition had been refused. He therefore prayed the High Court to ordain the Sheriff-Clerk to remove his name from the roll, or to pronounce such other order as might be required for the purpose of discharging the petitioner from service as a juror.

The Roll of Jurors is made up by the Sheriffs, under the Act 6 Geo. IV. c. 22, entitled "an Act to regulate the qualification and the manner of enrolling jurors in Scotland, and of choosing jurors on criminal trials there," and the Act 7 Geo. IV. c. 8, which amends the previous Act in so far only as it relates to the qualifications of special jurors. The statutory qualifications are—(1) Age, between twenty-one and sixty; and (2) having an estate of inheritance, or life estate, in lands worth £5 a-year, or being worth £200 in goods, chattels, and personal estate. The exceptions mentioned in the Act are in favour of peers, judges, the learned professions, public servants and officers, &c. Besides the right of objection of want of statutory qualification (which can be proved only by the oath of the juror objected to), and the unlimited challenge on other cause shewn, there is in criminal cases a right of challenge without cause stated, to the extent of five challenges. There is also a power in the Courts, both civil and criminal, to excuse jurors from service on cause stated in open Court. By the 4th section of the second-mentioned Act it is provided that when any person whose name is entered on the Roll of Jurors dies or becomes disqualified as a juror, whether from loss of property, absence, or other legal cause, the Sheriff may pass over his name in the next return, making an entry of the date and reason.

Argued for the petitioner—The Sheriff is not bound to enter on the roll the name of a person who is incapable at common law of discharging the functions of a juror. At least, under sec. 4 of the second-mentioned Act, the name of such a person ought to be passed over in issuing citations. The Acts were intended to apply only to British subjects. [Interlocutor in petition of *The Incorporation of Fleshers*, May 29, 1826, Shaw's Justiciary Cases, p. 156, where "Her Majesty's subjects" are spoken of. See also Hume on Crimes, ii. p. 314, where, anticipating the decision, he says, "It is not therefore a clear point that by the bare disuse of calling them they have come to be disqualified."] An alien is at common law disqualified for every public office. [Ross' Bell's Dict. *voce* Alien, p. 43; Ersk. Prin. iv. 457, where the expression "a jury of his countrymen" occurs. In Reg. Maj. i. 12, 8, the assize is spoken of as "trulie loyall men," and Hume describes the right as "a birthright."] The Act 33 Vict. c. 14, sec. 2, no doubt confers on aliens the capacity to hold real and personal property in the same way as natural born British subjects, but it is expressly declared that this section shall not entitle an alien to any rights other than the rights of holding property there mentioned, and shall not qualify an alien for any office or franchise. By 33 and 34 Vict. c. 77, sec. 8, which applies only to England, it is specially

provided that aliens domiciled for ten years in England and Wales, and otherwise qualified, shall be liable to serve on juries and inquests. [In the English Jury Act, 6 Geo. IV. c. 50, it is provided (sec. 3) that "no man, not being a natural born subject of the King, is or shall be qualified to serve on juries or inquests, except only in the cases hereinafter expressly provided for." The 47th section then provides for the right of an alien to be tried by a jury *de medietate linguæ* (by a moiety of voices), *i.e.*, the Sheriff is to return for one-half of the jury a competent number of aliens. On this Act it was held (*King* v. *Sutton*, 1828, 6 Barn. and Cress. p. 417) that while alienage was a ground of challenge *propter defectum patriæ*, the challenge must be made before trial, and that the verdict will not afterwards be disturbed. Now, however, by 33 Vict. c. 14, sec. 5, the right to a jury *de medietate linguæ* is abolished. In Scotland the right never existed. *Hansen*, 3 Irv. Just. Rep. p. 3. But see Macdonald's Crim. Law, p. 517, note 2, for a case where Englishmen seem to have served on the trial of an Englishman.]

At advising—

Lord Justice-Clerk—We have considered this petition carefully. We are not prepared to say that an alien is not liable or competent to serve on a jury, but we have come to be of opinion that it is not desirable that a gentleman in this position should be cited. We have therefore made a recommendation in the proper quarter, which I have no doubt will be acted on, that the petitioner should not be cited unless there should be some case rendering his attendance desirable.

Lords Young and Craighill concurred.

Counsel for Petitioner—Moody Stuart. Agents—Boyd, Macdonald, & Lowson, S.S.C.

COURT OF SESSION.

Friday, December 22.

OUTER HOUSE.

WALLACE *v.* HENDERSON.

Process—Expenses—Condition-Precedent.

Where the pursuer in an action concluded both for damages and for count and reckoning, and the Inner House, upon a report on issues by the Lord Ordinary, dismissed the conclusion for damages as irrelevantly averred with expenses—*held* (per Lord Curriehill), in conformity with *Struthers* v. *Dykes*, 8 D. 815, that the payment of expenses to the defender was a condition-precedent to any subsequent procedure under the other conclusion of the action.

Process—Expenses—Extract-Decree—Interest.

Held (per Lord Curriehill) in conformity with *Dalmahoy & Cowan* v. *Mags. of Brechin*, 21 D. 210, that interest runs upon an interim decree for expenses when the decree has been extracted and charged upon.

On 27th February 1866 Robert Wallace raised an action concluding for £2000 in name of damages for breach of agreement, against James Henderson, Esquire of Bilbster, in Caithness. He also concluded for count and reckoning as to the rents of certain subjects belonging to him, with which the defender had intromitted.

On 11th January 1867 the Lord Ordinary (Kinloch) reported the case on issues to the First Division, and of that date the Court pronounced this interlocutor:—"Find that there are not on record averments relevant or sufficient to warrant the issues proposed by the pursuer: Remit to the Lord Ordinary to dismiss the action in so far as regards the first conclusion for £2000; and to proceed with the other conclusions of the action: Find the pursuer liable to the defender in expenses since the date of the closing of the record, and remit," &c.

Mr Henderson lodged his account, had it taxed and approved of, and extracted and charged on the decree—Wallace not having paid the expenses—and the action fell asleep.

On 12th October 1874 Wallace, with the concurrence of his wife, raised another action of count and reckoning with regard to the rents of the same subject against Mr Henderson.

The Lord Ordinary (Young) on 4th March 1875 sustained the defender's plea of *lis alibi pendens*, in respect of the former action being still in Court, and dismissed the action, with expenses.

The First Division, on advising a reclaiming note on 20th July 1875, recalled the Lord Ordinary's interlocutor, and sustained the action as a good action with regard to the rents from and after the date of the signeting of the summons in the first action, with £5, 5s. of expenses.

This second action was subsequently remitted to the Lord Ordinary's bar, in which the former action was pending. Wallace had died before the reclaiming note in the second action was lodged. His widow was decerned executrix-dative to him, and as such, after the first action had been wakened, was sisted in both actions.

The causes were then put to the roll by Mrs Wallace, to have them conjoined.

The defender opposed this motion, on the ground that no step could be taken in the first action until the expenses found due in the Inner House in January 1867 had been paid, with interest, and relied on the case of *Struthers* v. *Dykes*, June 16, 1846, 8 D. 815, where payment of such expenses were held to be a condition-precedent to going on with the action. With respect to the interest upon the extracted decree, the defender referred to the case of *Dalmahoy & Cowan* v. *Mags. of Brechin*, Jan. 5. 1859, 21 D. 210.

The pursuer denied that *Struthers* v. *Dykes* had ever been followed as a precedent, and argued that at all events, as the defender could have imprisoned Wallace upon his failure to pay when charged, he had no right to interest. It was also maintained that the pursuer was entitled to deduct the five guineas of expenses, to which she had been found entitled by the First Division in the second action, from any payment made to the defender in name of expenses.

The Lord Ordinary, on the authority of the case of *Struthers* v. *Dykes* and *Dalmahoy & Cowan* v. *Mags. of Brechin*, refused to conjoin the actions until the expenses decerned for in the first action had been paid, with interest, but under deduction of the five guineas decerned for in the pursuer's favour in the second action.