expressly repudiated by his counsel. The respondent cannot force such a claim upon the Duke for the purpose of aiding his argument.

On these grounds I am for recalling this interlocutor, and finding that the respondents have failed to prove their alleged right, and therefore of granting interdict craved.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the reclaiming-note for the complainer against Lord Kinnear's interlocutor of 29th January 1889, Recal the said interlocutor, grant interdict in terms of the prayer of the note of suspension and interdict: Find the complainer entitled to expenses," &c.

Counsel for the Appellant — Guthrie—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents — Lord Advocate Robertson—D.-F. Balfour—C. S. Dickson. Agents—Davidson & Syme, W.S.

Friday, January 24.

OUTER HOUSE.

[Lord Trayner.

A *v.* B.

Process—Evidence—Divorce—Identification—Competency of Using Photograph where Party fails to Appear after Citation on Order by the Court for Identification.

Where a party to an action of divorce has been cited to appear at the trial and fails to appear, it is competent to show a photograph of such party to witnesses for the purpose of identification.

Observations on *Grieve* v. *Grieve*, May 22, 1885, 12 R. 964.

This was an action of divorce on the ground of adultery. The defender, who was in England, was cited to appear at the trial upon a warrant in the special form necessary for the citation of witnesses who are in England. She failed to appear. The pursuer proposed to show a photograph of the defender to witnesses for the purpose of identification. The defender objected.

Counsel for the pursuer was not called on.

The Lord Ordinary (TRAYNER) allowed the photograph to be used, reserving the objection till the conclusion of the evidence.

"*Opinion.*—I entertain no doubt upon this question. The rule I understand to be that when the Court has pronounced an order appointing a defender to appear for identification, and the defender being cited on that order fails to appear, then a photograph of the defender may be used for purposes of identification—*Forbes* v. *Forbes*, 24 D. 145. Such a defender cannot object that the use of a photograph in such circumstances is inadmissible, being only secondary evidence, because that defender has, himself or herself, rendered it necessary to resort to secondary evidence by refusing to obey the orders of Court. I confess to some surprise at hearing the opinion of Lord Fraser, which the counsel for the defender quoted (*Grieve* v. *Grieve*, May 22, 1885, 12 R. 964), because this matter of identification by a photograph was a subject of conversation between his Lordship and myself on more than one occasion, in the course of which he never suggested that before using a photograph it was necessary (where a defender ordered to appear had failed to do so) to resort to the apprehension of the defender or letters of second diligence, nor that a photograph could only be used when personal attendance could not thus be enforced. On the contrary, I understood Lord Fraser to hold the view I have stated as my understanding of the rule upon this subject.

"Without discussing this matter, I may perhaps say that the course which, upon the authority of Lord Fraser's decision, the defender's counsel maintains to be settled would at the least be a very inconvenient one. Letters of second diligence or warrant to apprehend cannot be obtained until, on the case being called for proof, it is ascertained that the defender has not appeared for identification in obedience to the order of Court. To apply for letters of second diligence at that stage would necessarily involve the postponement of the proof, which would again involve the discharge of all the witnesses in attendance, and entail on the pursuer an expense and inconvenience which should not be imposed upon him if it can be avoided.

"As regards the merits of this case, I think that the pursuer has established his averments, and I shall therefore pronounce decree of divorce."

Decree of divorce was pronounced.

Counsel for the Pursuer—D.-F. Balfour—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Sir C. Pearson—Sym. Agents—H. J. Rollo & Robertson, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

M'LEOD *v.* TANCRED, ARROL, & COMPANY.

Process—Jurisdiction—Proof.

In an action of reparation raised in a Sheriff Court, the defenders pleaded "no jurisdiction." The Sheriff-Substitute allowed the parties a proof of their averments, "reserving the question of jurisdiction to be tried along with the merits." Upon the pursuer appealing for jury trial, the Court *held* that the procedure adopted was wrong, unless

in very exceptional circumstances, and *remitted* the case back to the Sheriff-Substitute to have the question of jurisdiction disposed of.

Thomas M'Leod, plater, Dunfermline, brought an action in the Sheriff Court there against Tancred, Arrol, & Company, Forth Bridge contractors, North Queensferry, to recover damages for injuries sustained while working in their employment on the said bridge, and alleged to be caused by their fault and negligence, or by the fault and negligence of those for whom they were responsible.

The first statement of facts for the defenders was as follows—"Section 46 of the Sheriff Courts (Scotland) Act 1876 enacts, *inter alia*, that 'a person carrying on a trade or business and having a place of business within a county, shall be subject to the jurisdiction thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business.' The defenders do not have their domicile either in the county of Fife or the county of Kinross, and have no place of business in either of these counties. Their place of business is in South Queensferry, in the county of Linlithgow."

They pleaded, No jurisdiction.

The Sheriff-Substitute (GILLESPIE) upon 14th January 1890 closed the record and allowed the parties a proof of their averments, "reserving the question of jurisdiction to be tried along with the merits."

The pursuer appealed to the Second Division of the Court of Session for jury trial.

When the case was called the defenders again argued that they were not subject to the jurisdiction of the Sheriff of Fife and Kinross, that they had no place of business upon the north side of the Forth —only a pay-box—but that if that question could not be settled without proof, proof as to jurisdiction should have been taken before a proof on the merits was allowed.

The pursuers argued—That the accident had happened within the jurisdiction of the Sheriff of Fife, that the operations on the bridge in Fife made that a place of business within the county, and that the defenders had a pay-office on the north side of the Firth. If a proof were necessary, the Sheriff-Substitute had adopted a proper course and one calculated to save needless expense.

At advising—

LORD JUSTICE-CLERK—The defender in this case took exception to the jurisdiction of the Sheriff, and the Sheriff left that question open to be tried along with the merits. The pursuer has appealed for jury trial, but the first matter to be decided by us is whether the interlocutor of the Sheriff allowing a proof but reserving the question of jurisdiction can stand. Lord Lee knows personally of a case in which both questions were tried together. I should be sorry to see such a course adopted in practice. I could understand a case now and again arising in which such a course might be pursued—for example, where a proof had to be taken abroad—but it would require very exceptional circumstances indeed to justify it.

I am of opinion that the Sheriff here had no right to refuse to deal with the question of jurisdiction, and that the case must go back to him to have that question disposed of.

LORD RUTHERFURD CLARK—I am of the same opinion. The question of jurisdiction must be disposed of *ante omnia*. I agree that that question cannot be disposed of without a proof, but I think the Sheriff was wrong in proposing to take the proof on that question along with the proof on the merits.

LORD LEE—I agree in thinking that the cases in which a proof upon the question of jurisdiction may be taken along with the proof on the merits must be very exceptional indeed. The only case I know of in which that course was pursued was an undefended case of divorce on the ground of desertion —*Carswell* v. *Carswell*, July 6, 1881, 8 R. 901. There the defender was abroad, and the Court thought the proof as to jurisdiction and the proof on the merits might be taken together, and remitted the case to me accordingly. I think the procedure was wrong, but the circumstances were very exceptional. There are no such exceptional circumstances here. The question of jurisdiction in this case arises under the 46th section of the Sheriff Courts Act of 1876. There is no jurisdiction unless the defenders have a place of business within the Sheriffdom. They say they have none, but that can only be determined after the proof, which should be taken before the case is tried on the merits. It seems to me a trivial matter whether this case is tried in Fife or in Linlithgowshire, but the defenders think it important. Accordingly the case must go back to the Sheriff that he may make the necessary inquiries.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 14th January 1890, remit the cause to the Sheriff with instructions to allow the parties a proof on the question of jurisdiction, and thereafter to proceed as shall be just." . . .

Counsel for the Pursuer—G. W. Burnet. Agent—James Russell, S.S.C.

Counsel for the Defenders — Comrie Thomson—Guy. Agents—Reid & Guild, W.S.