liberty to continue a trade or any hazardous business in which the truster was engaged, or to hold shares in a trading concern which he held, than themselves to make a trade investment. It is their duty to put the trust funds in a position of safety although the truster may have left them in a position of danger."

I do not thereby mean, and the Lord Ordinary did not mean, that it was the duty of trustees instantly to realise funds which they found at the death of the truster in a position of insecurity. A reasonable discretion must be allowed as to the time of realisation. The question of time must always be one of circumstances, but although that be so, the attitude of the trustees must be that of persons having it in view without delay to realise the moveable estate in so far as it is not held on investments which they themselves might make, and to put the funds in such securities as they are themselves entitled to invest in. The principle of the rule has, I think, been very clearly stated by your Lordship. I think trustees as administrators and not proper owners in their own right of an estate—as administering for behoof of others (in many cases minors who can have no voice in the management)—must look primarily to the security of the funds, and in a secondary degree to the income which these funds will produce. Your Lordship has referred to what Lord Wood said in the case of *Cochrane* v. *Black*. The same thing is there very clearly stated by the Lord Justice-Clerk—"What a man chooses to do and runs the risk of, be it for high interest during his lifetime, is the act of the absolute proprietor of the fund. But when with a view to the management and security of his estate and effects after his death he appoints trustees, they are not the owners of the funds—they are not entitled to act as such to the same effect—they are not entitled to place or keep the funds in jeopardy."

As to the time which may be regarded as reasonable for the realisation of such an estate, I have said that must be a question of circumstances. It may probably be reasonable to hold here, as in England, that unless there be something special to justify retaining money in a hazardous investment, a period of a year should be the limit. We know that executors are held liable after the lapse of a year for interest upon funds which they have not ingathered as they ought to have done. But I do not think that any absolute rule can be laid down. In the present case we are saved from considering any question of that kind, for it is impossible to justify the retaining of the funds in this stock for so long a period as thirteen years. Of course in anything that is decided in this case there is no suggestion that a testator may not, if he think fit, give the largest possible powers of investment to his trustees, enabling them to put and leave money at hazard if he pleases, but in the absence of any directions or powers to that effect, I think the law must be as stated by your Lordship and the Lord Ordinary.

I regret with your Lordships the result in this case. There is no doubt that the trustees were acting in perfect *bona fides*, and there is hardship to them in being made personally responsible without recourse upon the estate. But I think the rule to which we are now giving effect is one that is absolutely necessary for public ends in the administration of trusts, and although it may lead to hardship in a few cases—cases of this kind—it will save hardship in a very much larger class of cases. If trustees were left the option of retaining the trust-funds precisely in the position in which the truster left them, for it might be a period of years, with the risk of the whole estate being swept away, the consequences would in many cases be ruinous to the beneficiaries, who are often widows and children in minority. Accordingly, I agree with your Lordships in thinking that the Lord Ordinary's judgment should be adhered to.

The Court adhered.

Counsel for Complainers—Asher—Mackintosh. Agent—J. Young Guthrie, S.S.C.

Counsel for Respondents (Reclaimers)—Dean of Faculty (Fraser)—Ure. Agent—J. Gillon Fergusson, W.S.

Friday, July 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LOCAL AUTHORITY OF CADDER *v.* LANG.

Public Health (Scotland) Act 1867; *Interpretation Clause; secs.* 16, 18, 19 *and* 22—"*Author of a Nuisance*"—*Local Authority*—*Cost of Removal*—*Procedure to make Author of Nuisance Liable in Cost of Removal.*

Held that under the above-quoted sections of the Public Health (Scotland Act) 1867, in order that the local authority may recover from "the author of a nuisance" the cost of removing it, it is necessary either that the Sheriff should have ordained him to execute the removal himself, and only on his failure have then ordained the local authority to do so, or that at the date of the order on the local authority it should have appeared that the author of the nuisance was unknown.

This action followed upon a litigation which was previously before the High Court of Justiciary, and the facts will be found fully narrated *supra*, vol. xiv. p. 567, and 4 R. (Just. Ca.) 39, and in the opinion of the Lord President *infra*. The question related to the removal of a nuisance under the Public Health (Scotland) Act 1867, and the Cadder Parochial Board brought this action in the Sheriff Court of Lanarkshire to recover from Mr Lang, one of the parties in the former action, the expenses of executing the removal, which had been carried out by them in terms of an interlocutor of the Sheriff dated 17th April 1875.

The pursuers pleaded—"(1) It being provided in 'The Public Health (Scotland) Act 1867' that all expenses incurred by the Local Authority in executing the works may be recovered from the author of the nuisance or the owner of the premises, and the sum sued for being the judicially ascertained expense of the works in question, and the defender being the owner of the premises, the pursuers are entitled to decree. (2) The defender being the owner of the premises

on which the nuisance existed, he is the author of the nuisance in the sense of said Act, and the pursuers are entitled to decree against him as such."

The defender pleaded, *inter alia*—"(4) Even if the defender were the author of the nuisance under the said Act, as he was not decerned to remove it under sections 18 and 19 of the Act, the pursuers are not entitled to recover the cost of the works executed by them from the defender. (6) In any event, the defender cannot be held liable for works executed on ground of which he is not the proprietor—to carry away sewage from houses not belonging to him—and in no case can he be liable to a greater extent than the reasonable cost of the works on his own ground."

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—" . . . Finds that the expenditure for which the pursuer in this action seeks to be reimbursed by the defender was not incurred by them under a valid order in terms of the Public Health (Scotland) Act 1867, as averred: Therefore assoilzies the defender from the prayer of the petition, and decerns: Finds him entitled to expenses from pursuers, &c.

"*Note.*—I am required in this case to dispose of a question which arises out of former proceedings before me in which an unfortunate miscarriage was corrected by the High Court of Justiciary—*United Kingdom Temperance Association* v. *Cadder Parochial Board*, June 14, 1877, 4 Rettie (Jus. Cas.) 39. There is much difficulty in understanding that case, because (1) the rubric of the report entirely misses the point of the decision; (2) the judges have answered only a general question put at the end of all, just like the stereotyped plea of 'In all the circumstances,' &c., and have left unanswered the specific questions put in the Special Case; and (3) because there is some apparent variance in the opinions of the judges by whom the case was decided—Lord Young appearing to rest his judgment entirely on a logical inconsistency between the orders in the Inferior Court, and the other judges relying on a substantive mistake in fact and law which I committed in the course of the proceedings, but failing to indicate that mistake in the interlocutor. Had the fourth question put in the Special Case been distinctly answered, this litigation would probably have been saved.

"After attentively considering the case, I have come to think that the only clear and rational ground of the judgment of the High Court of Justiciary is, that I was wrong in holding at an early stage of the proceedings (20th August 1874) that the authors of the nuisance could not be ascertained; that therefore the order upon the Local Authority to execute the works under the second part of the 22d section was without statutory authority, and the subsequent decree for the expenditure unwarranted. If there was no valid order authorising the Local Authority to do the work at their own hand, the present action also fails. For though the respondents in the former proceedings, of whom the defender was one, were, as the Court evidently thought, the authors of the nuisance, they ought to have been allowed an opportunity of executing the works, and there was no room for applying the second part of the 22d section. The basis of the pursuers' claim is that the works were executed under legal authority in terms of that section. It turns out that they were not so executed, and the pursuers have thus no more right to recover the expenses incurred than if they had done the works without applying to the Sheriff at all."

The Sheriff (CLARK) on appeal pronounced this interlocutor—" . . . Recalls the judgment appealed against, and before further answer appoints the pursuers to state whether they are prepared to make any amendments to the effect that the defender is the real author of the nuisance in question, and for this purpose continues the cause till the 19th inst., at 2·30 o'clock p.m., in chambers.

"*Note.*—As I understand the opinions of the judges in the appeal to the Justiciary Court in the previous action, the error committed by the Sheriff-Substitute was, that without finding the defenders in that process to have been the authors of the nuisance in the sense of the statute, and giving them the option within the limited time to do what was necessary for its abatement, he at once directed the necessary operations to be performed by the Local Authority, and thereafter in the same process decerned against the said defenders for the costs of these operations. By the course thus adopted he travelled out of the statute under the provisions of which the proceedings were taken, and prevented the expenses being recovered in the process before him. Under that process the defenders might incur liability to abate the nuisance though not really its authors, on the simple ground that they were owners of the land; but the Legislature in making that provision adjected the condition—no doubt from equitable considerations—that the costs of abating the nuisance should only be recoverable against them where they had got an opportunity of removing it at their own hand, and having failed to do so, necessitated the Local Authority to disburse the funds necessary for that purpose. To render, therefore, the said defenders liable under that process for the disbursements of the Local Authority, it would have been necessary to find that they were responsible for the nuisance in the sense of the statute, and to have given them the option of removing it in the first instance. These things not being done, the statutory conditions were not complied with, and under that process decree for the disbursements could not issue.

"It is a very different question whether under a new action those expenses may not be recovered? If it can be proved that a certain person or persons were the real authors of the nuisance, and not simply owners of the ground where it existed, it may be fairly contended that they, being the *origo mali*, cannot escape liability for expenses which were caused simply and entirely by the necessity of abating what they themselves had created. But to make such action relevant, it would be necessary to libel that the defender or defenders were the real, not the constructive, authors of the nuisance. Now, that has not been done in the present case, and the action is therefore defective in relevancy. But if I am right in the views I have stated, it does not seem proper to grant absolvitor. Dismissal would be the appropriate course. It is possible, however, that this want of relevancy may even yet be cured by amendment. I have accordingly directed the case to be put to the roll in order that the pursuers may be in a position to state whether they are prepared to make amendments on such terms as may appear equitable, or whether they would prefer the dis-

missal of the action, leaving them at liberty to bring such new action, either against the defender or against him in conjunction with others, as they may be advised."

But on the 16th January 1879 the Sheriff (Clark) in respect the pursuers, in a minute lodged for them, declined to make any amendments in terms of the above interlocutor, for the reasons already stated in the note to that interlocutor, dismissed the action and decerned.

The pursuers appealed.

At advising—

Lord President—In this case I am of opinion that the Sheriff-Substitute's interlocutor is quite sound. He "finds that the expenditure for which the pursuers in this action seek to be reimbursed by the defender was not incurred by them under a valid order in terms of the Public Health (Scotland) Act 1867, as averred: Therefore assoilzies the defender from the prayer of the petition, and decerns." And the reason which he assigns for this opinion in his note is quite satisfactory—[*His Lordship here read the second paragraph of the Sheriff-Substitute's note, ut supra*]. The Sheriff on appeal seems to have thought that perhaps if the petitioners were to make a distinct averment that the defenders were the real authors of the nuisance something might be made of the action, but they did not adopt that suggestion, and so the Sheriff comes to take substantially the same view as the Sheriff-Substitute.

The whole matter depends on the construction of the statute, which does not appear to me to be very difficult. In the first place, in the interpretation clause the expression "author of a nuisance" is explained thus—"The expression 'author of a nuisance' shall signify the person through whose act or default nuisance is caused, exists, or is continued, whether he be the owner or occupier, or both." That plainly assumes that the nuisance exists in some property of which there must be an owner, and may also be a separate occupier. Then when we come to the description or enumeration of the different classes of nuisance intended to be put down by the Act, we see also that almost all of the ten separate heads of the 16th section are cases in which the nuisance must be caused either by the owner or occupier of the property. Two only, namely, the pollution of running water and the deposit of manure, are cases in which an intruder or third party may be the cause. But I do not think that that at all derogates from the general principle that the author of the nuisance is either the owner or the occupier of the premises on which the nuisance takes place, and that seems to me to be not only a reasonable but a most expedient rule.

Now, observe that when a complaint is made of the existence of a nuisance, the remedy is that the Sheriff shall order the author of the nuisance to provide for its removal. The Sheriff is directed to proceed in a variety of ways, according to the nature of the nuisance, but in the whole of them he is to order the author of the nuisance or owner of the premises to execute the necessary remedy. That is the first step. But if the order of the Sheriff is not complied with, then the provision in section 22 of the Act comes into operation, which is that in case of non-compliance with any decree of the Sheriff, he may, "on application by the local authority, grant warrant to such person or persons as he may deem right to enter the premises to which such decree relates, and remove or remedy the nuisance thereby condemned or interdicted, and do whatever may be necessary in execution of such decree." Now, that makes it very clear that in every case the author of the nuisance is opposed to the local authority, and it is very reasonable that it should be so. He may be able to execute the necessary works at a much cheaper rate than anyone else. It is obvious that he has means of doing this which no outsider can have. But it is needless to inquire into the policy of the Act; it is enough to say that it distinctly provides that the author of the nuisance is to have an opportunity of himself remedying the nuisance, and if the Sheriff orders or empowers the local authority to proceed without giving the author of the nuisance this opportunity he is going outside the statute. No doubt the 22d section provides that "if in the original application it appears to the satisfaction of the Sheriff that the author of the nuisance is not known or cannot be found, then his decree may at once ordain the local authority to execute the works thereby directed, and all expenses incurred by the local authority in executing the works may be recovered from the author of the nuisance or the owner of the premises." But it is abundantly clear that this provision can only be intended to apply to cases in which the author of the nuisance cannot be discovered. In the present case it cannot admit of a doubt that the author of the nuisance was perfectly well known, and that he was before the Sheriff. For the petition, after describing the nature of the nuisance, proceeded—"That the respondent John Lang has been repeatedly warned to remove said nuisance, but has failed to do so, and in the opinion of the petitioners the said nuisance, though removed, is likely to recur or be repeated." Therefore the petitioners pray the Sheriff-Substitute "to ordain the respondent John Lang to remove the said nuisance," and so forth. Now, upon that petition there was certain procedure. There was a remit to a man of skill, and his report suggested to the Sheriff-Substitute that certain other parties were interested in the matter, and these parties were brought into the process accordingly. There being thus in the process not only the owner of the premises, but also these two other persons, it would surely be difficult to hold that the author of the nuisance was unknown. Nevertheless, the Sheriff-Substitute entirely misunderstood his position. On the 20th of August 1874 he ordered the Local Authority to execute the works "in respect it is not satisfactorily ascertained who is the author of the nuisance in question;" but on the 8th May 1877 he comes to an exactly opposite conclusion, for he "finds the various respondents primarily liable, jointly and severally, for the cost of the works," and the ground he assigns for this opinion is, that "It is hardly disputed that the respondents in the second petition are authors of the nuisance to some extent, and therefore I think that decree must be given against them. It was urged for Mr Lang that he was not the author of the nuisance, which came upon his land through no act of his. But I have come to think that he is within the term 'author of the nuisance' as

defined in the Act." He then quotes the definition, and continues—"He might have taken measures to pass the sewage through his ground, and have claimed compensation from the real authors. He is at least one through whose default the nuisance existed and was continued." Now, I am quite of the same opinion with the Sheriff-Substitute on that ground of judgment, but then he ought to have discovered it at the beginning, or rather it is as plain as possible on the face of the statute.

Now, all this came before the Court of Justiciary by appeal, and it is important to observe the views there expressed. Lord Adam says (4 Rettie, 41)—"I think that the appellant Mr Lang, and also the appellants in the two other appeals, are all properly in Court; for I am of opinion that the Local Authority had found the authors of the nuisance in the sense of the statute when they presented their original petitions. In that character these appellants are brought into Court, and in that character they were bound to remove the nuisance, and failing their doing so were liable for the expense of executing the necessary works, and for the expenses of the application. If the Sheriff had followed out the statutory procedure, he should have ordered them within a limited period to remove the nuisance. But he did not take that course. Instead of that, on 17th April 1875 he pronounced an interlocutor to the effect that he could not in the proceedings before him ascertain who was the author of the nuisance, and ordained the Local Authority to execute the necessary works. But the Legislature intended that parties should have, in the first instance, an opportunity of executing the works themselves. What the Sheriff should have done was—having first ordered the appellants to do what was necessary to abate the nuisance, then on their failure, to have, under the 22d section, ordered the Local Authority to execute the necessary works, and laid the cost upon the appellants. I quite agree with Mr Kinnear that the Sheriff was not bound to wait until all the authors of the nuisance were ascertained. But his remedy was to take the parties before him, whether the whole authors of the nuisance or not, and ordain them to do what was necessary, leaving them to settle their rights of relief among themselves. But not having given the appellants an opportunity at their own hands of abating the nuisance, it was incompetent for the Sheriff in the proceedings before him to lay the expense of what was done under his order by the Local Authority upon the appellants." And the Lord Justice-Clerk entirely agrees with Lord Adam.

Now, applying the grounds of judgment in that case, I cannot arrive at any other conclusion than that this money cannot be recovered by the appellants from the respondent. It is for works which Mr Lang would never have been called on to execute, existing as they do, not only on his own ground, but on the ground of other people. Whereas, if he had been ordered by the Sheriff to remove the nuisance, all that he would have done would have been to cover in the drain so far as it passed through his own ground. That would have been removing the nuisance as far as he was concerned.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court therefore refused the appeal.

Counsel for Appellants—Kinnear—J. P. B. Robertson. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent — Balfour — Keir. Agents—Maconochie, Duncan, & Hare, W.S.

Saturday, July 12.

FIRST DIVISION.

[Lord Craighill, Ordinary.

LENNONS *v.* TULLY.

Jurisdiction—Review of Decree in Small Debt Action—Statute 1 *Vict. c.* 41 (*Small Debt Act*), *secs.* 30 *and* 31.

Decree in absence was pronounced in the Sheriff Court against a party in a small-debt action. The defender raised a reduction of the decree in the Court of Session on the ground, *inter alia*, of irregularity in the service of the summons, which had been by lock-hole and registered letter. *Held* (*rev.* the Lord Ordinary, CRAIGHILL) that the Court of Session had no jurisdiction to entertain the action, as under the 30th section of the Small Debt Act the Court of Justiciary has exclusive jurisdiction in the review of Small Debt decrees.

Observations per Lord Deas on the case of *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800.

On September 30, 1878, Andrew Tully raised a small-debt action in the Sheriff Court of Midlothian against Mrs Lennon and her son John Aloysius Lennon for payment of a debt due to him by the latter. The sheriff-officer whose duty it was to serve the summons could not get access into Lennon's house, and left a copy of it within the lockhole of the door, and further sent a registered letter by post containing a copy of it. A certificate from the postmaster acknowledging receipt of this letter, dated October 4, was produced. The defender did not appear in Court, and decree in absence passed against him on October 9, 1878. On November 5 he was charged upon the decree in absence in the same manner as the summons had been served, but no notice was taken by him of any of the proceedings. A poinding was then executed of his effects, and a schedule of poinding of the articles was sent by registered letter, and in February 1879 the goods were sold.

Mrs Lennon and her son then raised an action in the Court of Session, in which they concluded, *inter alia*, that the small-debt decree should be reduced on the ground that the summons had not been "legally and validly" served, on the grounds stated in the following interlocutor and note of the Lord Ordinary (CRAIGHILL):—

"*Edinburgh*, 30*th June* 1879.—The Lord Ordinary having heard parties' procurators on the closed record, and more particularly on the first, second, and third of the pleas-in-law for the defender, and having the debate and whole process, Finds as matter of fact that the pursuer John Aloysius Lennon, in virtue of the warrant con-