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 lockhole 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, 30th 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-

tained in the small-debt summons, was cited to compear in the Small Debt Court of the Sheriff of Midlothian at Edinburgh on 9th October 1878 (1) by lockhole service of a copy of said summons, effected on 30th September 1878, and (2) by the posting on 4th of said month of October of a registered letter containing another copy of said summons: Finds as matter of law that said summons was not legally or validly served according to the sound construction of the 1st Vict. c. 41, sec. 3, and the 34th and 35th Vict. c. 42, secs. 2 and 3, but this without prejudice to any plea that may be available to the defender should it appear that by said service, such as it was, or otherwise the said pursuer came to the knowledge of the raising of said summons before decree in absence thereon was pronounced: And before further answer allows to both parties a proof of their respective averments, and to each a conjunct probation—this proof to proceed before the Lord Ordinary on a day to be afterwards fixed; reserving meantime all questions of expenses.

"*Note.*—(1) The Lord Ordinary was anxious, if he could, to dispose of the reductive conclusions of the summons upon the closed record, as that would have saved time, trouble, and expense, and as the grounds of challenge appeared to be rather technical than substantial; but after he came to the consideration of the question which has been dealt with in the foregoing interlocutor, he found that this could not be accomplished. The small-debt summons not having been 'legally or validly' served, much, if not everything, must come to depend upon the pursuer's knowledge of the institution of that action, and as to this proof is indispensable, because parties are at issue upon the facts of the case.

"(2) The following are the steps by which the Lord Ordinary has reached the conclusion to which effect has been given in the foregoing interlocutor:—In the first place, the 1st Vict. c. 41, sec. 3, enacts that the diet of compearance in a small-debt action shall not be sooner than upon the sixth day after citation. In the second place, lockhole service, which till 34 and 35 Vict. c. 42, was passed, had been a legal citation, was by section 2 of that Act declared not to be legal or valid. In the third place, though lockhole service is now neither legal nor valid—that is to say, is *per se* insufficient—it forms part of that composite service introduced by section 3 of the last-mentioned statute, which enacts that 'where an officer of any Small-Debt Court is satisfied that the defender named in any summons, complaint, decree, and warrant, or other order of such Small-Debt Court, or writ following upon such summons or complaint, is refusing access or concealing himself to avoid citation or service, or has within a period of forty days removed from the house or premises occupied by him, his place of dwelling for the time not being known, it shall be lawful for such officer, after he has affixed to the gate or door of such house or premises, or left in the hands of an inmate there, the said summons, complaint, decree, and warrant, or other writ, to send to the address which, after diligent inquiry, he may deem most likely to find the defender, or to his last known address, a registered letter by post, containing a copy of such summons, complaint, decree, and warrant, or other order or writ'—it being further enacted that 'the affixing or leaving of such summons, complaint, decree, and warrant, or other order or writ, and the posting of such intimation, shall constitute a legal and valid citation or service.' In the last place, the warrant, and the only warrant, for this composite service is the warrant contained in the small-debt summons, which as regards *inducice* must be conformable to section 3 of 1 Vict. c. 41; consequently both portions of the service must, as the Lord Ordinary thinks, be performed in such time as to afford an interval between the service and the specified diet of Court not shorter than the *inducice* specified in sec. 3 of 1 Vict. c. 41."

The defender reclaimed, and argued that the Court had no jurisdiction, and could not deal with the question whether the summons had been validly served or not. By the Small-Debt Act (1 Vict. c. 41), sec. 30, it was enacted "that no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review, or stay of execution, other than that provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or on any other ground or reason whatever." Section 31 of the same Act enacted—"That it shall be competent for any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary, or when there are no Circuit Courts before the High Court of Justiciary in Edinburgh," &c. The pursuers here had brought no such appeal, and therefore the Court should dismiss the action.

Authorities—*Crombie* v. *M'Ewan*, Jan. 17, 1861, 23 D. 333; *Miller* v. *Henderson*, Feb. 2, 1850, 12 D. 656; *Graham* v. *M'Kay*, Feb. 25, 1845, 7 D. 515; *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800.

The respondents argued that the case here proceeded on no citation, and that neither the summons nor the decree in absence having been lawfully brought to their knowledge they could not bring an appeal before the High Court of Justiciary, as by the "Heritable Jurisdiction Abolition Act" the time for taking such an appeal was limited to ten days after the decree. Besides, unless the provisions of the Small-Debt Act were all complied with, decrees under it were not protected, and so could be dealt with as was proposed in this case.

At advising—

Lord President—It is very odd, and I cannot understand it very well, that this question has not been disposed of in the Outer House, for after the judgment in the case of *Graham* v. *M'Kay*, 7 D. 515, and others which have followed it, it appears to me out of the question for us to entertain the pursuer's contention. Apart from these cases the thing seems too clear for argument. It happens that the terms of the 30th section of the Small-Debt Act are peculiarly applicable in this case, as here there was "an omission or an irregularity in citation." That is the very ground on which the party comes into Court, and that being so, it is said in so many words that this Court has no jurisdiction in the case. Apart

from that, however, and on the preceding cases, I think it very clear that the only competent court of appeal is the Court of Justiciary—either the High Court or a Circuit Court. That being so, I have no doubt whatever we must throw out the action on the ground of no jurisdiction.

Lord Deas—I am of the same opinion. The object of the Small-Debt Act was to give a summary remedy for small cases, and by the 30th and 31st sections a cheap and summary mode of reviewing judgments of the Small Debt Court was given. With that intent the review is limited either to a Circuit Court or to the High Court of Justiciary. Here the decree being pronounced in Midlothian, the appeal lay to the High Court. Had an appeal been taken to the High Court, and had the only ground stated against the reduction been that the ten days during which it is competent to appeal had elapsed, it could, and no doubt would, have been stated that the decree had not come to the knowledge of the party within the requisite time. If the Court had then been satisfied that justice had from that cause not been done, they would no doubt have granted the remedy. The party certainly had the remedy of going to the High Court, and he has not taken advantage of it.

The only case which has even the appearance of being against this view is that of *Murchie* v. *Fairbairn*, 1 Macph. 800; but when that case is considered, it is really a precedent in favour of the result we have arrived at. The only question there was, whether the extract written out by the Sheriff-Clerk was the judgment? All the Judges were of opinion that if that was the judgment of the Inferior Court reduction was incompetent. But they held that what was objected to was something done after judgment, and that therefore reduction was competent in the Court of Session. There is nothing in that case adverse, but everything favourable, to the course your Lordship has proposed here.

Lord Mure and Lord Shand concurred.

The Court therefore recalled the Lord Ordinary's interlocutor, and dismissed the action with expenses.

Counsel for Pursuer (Respondent)—Campbell Smith—Rhind. Agent—A. Clark, S.S.C.

Counsel for Defender (Reclaimer)—Asher—Shaw. Agent—P. Morison, S.S.C.

Tuesday, July 15.

SECOND DIVISION.

SPECIAL CASE—MELVILLE *v.* DAVIDSON AND OTHERS (MELVILLE'S TRUSTEES).

Husband and Wife — Mutual Trust-Disposition—Revocable Deed—Donation—Onerous Consideration.

A husband and wife, there being no antenuptial contract, executed a mutual trust-disposition and settlement of their "whole estate . . . presently belonging and addebted to us . . . or which shall belong or be addebted to us at the time of our decease," in favour of trustees, for themselves and the survivor in liferent, and the issue of the marriage in fee. The whole estate save a fund of £400 (as to which *jus mariti* and rights of administration were expressly excluded) belonged to the husband. *Held*, on the death of the wife, that the mutual deed was revocable in so far as the husband's estate was concerned, the conveyance of it having been truly a donation by the husband, and neither remuneratory nor a provision for the issue of the marriage.

This was a Special Case presented for the opinion of the Court by (1) Captain William G. B. Melville, Fraserburgh, and (2) Sylvester Davidson and others, trustees under a trust-disposition and settlement executed by Captain Melville and his wife Mrs Sarah Noble or Melville. On September 27, 1875, Captain and Mrs Melville had executed a trust-disposition and settlement by which they conveyed to trustees "all and sundry lands and heritages, ships and shares of ships, and in general the whole estate, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebted to us, or to either of us, or which shall belong or be addebted to us at the time of our decease." The purposes of the trust were principally, after payment of debts, funeral expenses, and the expenses of the trust, that the survivor of the spouses should have the liferent of the whole estate, terminable on his or her second marriage, and that on the death or second marriage of the survivor the whole estate should be divisible equally, share and share alike, among the children of their marriage.

The seventh purpose was—"Declaring further, and hereby specially providing, that the principal sum of £400 sterling which accrued to the said Sarah Noble or Melville through and at the death of her father William Noble, late flesher and shipowner, Fraserburgh, having been handed over by her to the said William Gordon Burnett Melville to be invested by him and in his name in shares of the schooner or vessel 'George Noble' of Fraserburgh, whereof he is also master, the said sum, and all profits accruing therefrom from and after the date of these presents, shall be set apart as a special and separate fund for behoof of our said family or children of our present marriage, and paid to them share and share alike at our death, or upon the second marriage of either of us, as before provided for, and that to the entire exclusion of children or family of any second marriage of either of us."

Mrs Melville died on 13th April 1878 survived by her husband. There were two children of their marriage, aged respectively five and two years.

The property consisted of £1400 in cash and heritable subjects yielding about £50 per annum. The whole of this belonged to Captain Melville, with the exception of the sum of £400 dealt with in the seventh purpose, which was the separate property of Mrs Melville, derived from the estate of her father, under whose settlement the *jus mariti* and right of administration of her husband was expressly excluded. Captain Melville on August 20, 1878, executed a deed of revocation of