Magistrates is anything but that of a person employed under a contract of employment, they are not applicable. Therefore I quite agree that we could not refuse to apply the statute in this case without disturbing a whole course of decisions on the construction of the statute. I concur in holding that the plea cannot apply except to those debts which might have been sued for before the statutory period began to run.

LORD M'LAREN concurred.

The LORD PRESIDENT, who was present at the hearing, having in the interval been appointed a Lord of Appeal in Ordinary, gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to proceed.

Counsel for the Reclaimers—Shaw, Q.C. —Craigie. Agent—R. D. Ker, W.S.

Counsel for the Respondent — Clyde — Cook. Agents—Macpherson & Mackay, W.S.

Friday, November 17.

FIRST DIVISION.

JAMIESON'S TRUSTEES *v.* JAMIESON.

Process — Transmission of Documents in Hands of Sheriff-Clerk.

An application was presented to the Court by parties to a special case for warrant to transmit to the Clerk of Court certain documents, the construction of which formed the subject of the case. The documents were in the hands of the Sheriff-Clerk of Elgin. The applicants founded upon the provisions of sec. 20 of A.S., 16th February 1841, with reference to the procedure in jury cases in the Outer House. The Court pronounced the following interlocutor:—"Grant warrant to the Sheriff-Clerk at Elgin to transmit the trust-disposition and deed of settlement and codicils mentioned in said note to the Clerk of the First Division, to lie in his hands *in retentis* till the case comes on for hearing, under this condition, that said documents are not to be allowed to be borrowed."

Counsel for Applicants — M'Lennan. Agent—Alex. Mustard, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Renfrew.

COMMISSIONERS OF BURGH OF POLLOKSHAWS *v.* M'LEAN.

Sheriff—Jurisdiction—Possession of Heritable Property within County.

The commissioners of a burgh brought an action in the Sheriff Court against the owner of certain heritable subjects within the sheriffdom to recover part of the expense incurred by them in repairing a private street upon which these subjects abutted. The defender resided beyond, and was not personally cited within the sheriffdom. *Held* that the Sheriff had no jurisdiction to deal with the action.

M'Bey v. *Knight*, November 22, 1879, 7 R. 255, *followed*; *Culross Special Water Supply District* v. *Smith Sligo's Trustees*, November 6, 1891, 19 R. 58, *distinguished*.

An action was raised in the Sheriff Court of Renfrew and Bute by the Commissioners of the burgh of barony of Pollokshaws against Mary Gardner M'Lean, residing at 109 South Portland Street, Glasgow, owner of the heritable subjects No. 53 New Street, Pollokshaws, and against Robert Millar, contractor, tenant and occupier of the said subjects.

The pursuers craved the Court to grant decree against the defenders jointly and severally for payment of a sum of £26, which the pursuers averred was the proportionate share due by Miss M'Lean as owner of the subjects, in respect of repairs executed by them on the street upon which the subjects abutted. The decree craved against the tenant was restricted to the amount of rent due by him for the subjects to Miss M'Lean.

No appearance was made for the tenant.

Miss M'Lean pleaded—"(1) No jurisdiction. The defender Mary Gardner M'Lean has no domicile within the sheriffdom of Renfrew and Bute."

The Sheriff-Substitute (HENDERSON) on 4th July pronounced the following interlocutor:—"Sustains the first plea-in-law for the defender Miss Mary Gardner M'Lean, to the effect that he has no jurisdiction in the action as it at present stands, the said defender residing outwith the county of Renfrew, and not having been personally cited: Accordingly dismisses the petition so far as it is directed against the defender, the said Mary Gardner M'Lean," &c.

The pursuers appealed to the Sheriff (CHEYNE), who on 9th September 1898 sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, repelled the defender's preliminary pleas, and allowed the parties a proof.

Note.—"While it is quite true that the fact of possession of heritable property in a county does not by itself give the Sheriff of that county jurisdiction over the owner

of the property, it has been held (*Culross Special Water Supply District Committee* v. *Smith Sligo's Trustees*, 1891, 19 R. 58) that in all actions relating to the possession of his property, or of things locally situated within it, an owner must answer in the Sheriff Court of the county where the property lies, though he does not reside and has not been personally cited within the county, and the present Lord Kincairney, as Sheriff of Stirlingshire, held himself entitled to entertain an action of damages for failure to implement the conditions of a lease of a Stirlingshire farm, though the defender, the owner of the farm, lived in Renfrewshire and was served with the action there—*Taylor* v. *Shaw Stewart*, 1881, 2 Guth. Sel. Cas. 244; and it humbly appears to me that, though I may be somewhat extending, I am not unduly straining, the principles of these two cases when I hold, as by repelling Miss M'Lean's first plea I do, that notwithstanding her being resident and having been cited in another county, I may competently deal with the present action on the ground that, albeit the claim is of the nature of a personal debt, it is founded upon a statutory obligation attaching to Miss M'Lean *qua* owner of property in Renfrewshire, and indeed arises directly from the fact of her ownership."

A proof was led before the Sheriff-Substitute, who on 22nd November 1898 granted decree against the defender Miss M'Lean for the amount concluded for in the action.

The defender appealed to the First Division on the question of jurisdiction, and argued—The mere possession of heritage in a county was insufficient to render a person subject to the jurisdiction of the Sheriff in a personal action if he resided outside the county—*M'Bey* v. *Knight*, November 22, 1879, 7 R. 255. The Sheriff's ground of decision that the pursuer's claim was founded upon a statutory obligation attaching to the defender *qua* owner of property in Renfrewshire, and that therefore she was subject to his jurisdiction, was not supported by the case quoted by him—*Culross Special Water Supply District* v. *Smith Sligo's Trustees*, November 6, 1891, 19 R. 58. That case related to the possession of the property itself, and accordingly it was in a different position from the present case, which related merely to a claim for the recovery of an ordinary debt, payment of which could be enforced in the same manner as that of any other debt.

Argued for respondents—The case of *Smith Sligo's Trustees*, though not identical with the present one, was a strong authority for the proposition that where a debt was founded upon a statutory obligation attaching to a person *qua* owner of property within a sheriffdom, such person would be subject to the jurisdiction of the Sheriff of the county. While the pursuers were seeking to recover this debt, in the manner in which ordinary debts were recoverable by the law of Scotland, it would have been open to them to do so in a manner which was by statute specially appropriated to the sheriff within whose sheriffdom the subjects were situated—Burgh Police Act 1892 (55 and 56 Vict. c. 55), secs. 353 and 369. That supported the view that though the pursuers had chosen to recover the debt by an ordinary action, it would still fall within the Sheriff's jurisdiction.

At advising—

LORD M'LAREN—This is an action at the instance of the Burgh Commissioners of Pollokshaws claiming reimbursement of the cost of putting a private street into repair under the 135th section of the Burgh Police Act 1892. It is directed against the owner of the heritable subjects, and also against the tenant, against whom the Act of Parliament imposes a subsidiary liability. The tenant did not appear, and it is stated in the note to the Sheriff-Substitute's interlocutor of 4th July 1898 that no motion for decree against him was made. The only question argued to us was the question whether the Sheriff of Renfrew and Bute has jurisdiction to entertain an action against Miss M'Lean, the owner, who is non-resident, in respect of her ownership of heritable estate within the county. The Sheriff-Substitute, by interlocutor dated 4th July 1898, sustained the plea to the jurisdiction and dismissed the action. The Sheriff, on appeal, repelled this plea and allowed a proof. A proof was taken before the Sheriff-Substitute, and decree was granted for the amount concluded for. The case is now appealed to this Court on the question of jurisdiction.

The case of *M'Bey* v. *Knight*, 7 R. 255, decided by the Second Division of the Court in 1879, is a clear authority to the effect that the possession of heritable property in a county does not *per se* render the owner subject to the jurisdiction of the Sheriff in a personal action. It is pointed out in the opinions of Lord Ormidale and Lord Gifford that ownership of heritable estate in Scotland is sufficient to found jurisdiction against a non-resident defender in the supreme courts, but that the *ratio rei sitæ* had never been extended as a ground of ordinary jurisdiction to Sheriff Court actions. *Prima facie*, then, the objection to the jurisdiction would appear to be well founded.

But the Sheriff has expressed the opinion, founded on a more recent case in this Division of the Court, that the local jurisdiction may be sustained on the ground that, while the claim is of the nature of a personal debt, it is founded upon a statutory obligation attaching to the owner, as such, of property in Renfrewshire, and arising directly from the fact of ownership.

The case cited by the Sheriff is the *Culross Special Water Supply* v. *Smith Sligo's Trustees*, reported 19 R. 58. It was an action of interdict at the instance of the local authority to restrain the defender from making use of a supply of water (which he had obtained for a limited purpose by agreement with the local authority) for the benefit of property other than that

for which the supply was granted. Under such an action no decree could be obtained to any effect except the regulation of possession. The decree would not bar the proprietor from maintaining his construction of the agreement, and the consequent rights upon it, which he asserted by an action in the Supreme Court. In sustaining the jurisdiction we affirmed nothing more than the well-settled principle that the judge-ordinary has jurisdiction to maintain the existing state of possession as to heritable property and things locally situated within the county. The learned Sheriff has quite accurately stated the import of the decision, and nearly in the words which I have used. That this was the true ground of decision is evident from the concluding paragraph of the opinion of Lord President Robertson, who says:—"To restore against unlawful changes in such subjects is a judicial duty which can effectively and conveniently be done by the local court of the territory alone, as is most clearly seen perhaps in the case of the judge being asked to appoint the work of restoration to be done at the sight of the Court." Lord Adam observed—"There is no doubt that the pipes which are the subject-matter of this action lie within the bounds of the Sheriff's jurisdiction, and the question raised is a merely possessory one, whether the pursuers are to be protected in the possession of these pipes." The only other Judge present was myself, and as my opinion was merely a concurrence in that of the Lord President, I wish to take this opportunity of saying that if his Lordship is correctly reported, I would wish to qualify my own opinion by omitting the word "alone" in the sentence which I have quoted. I think that the arm of the Supreme Court is strong enough to maintain all owners of property in Scotland in the possession of their rights, and I do not think that the Lord President meant to say anything to the contrary, but only to affirm that in such a case as that with which he was dealing the Sheriff Court is the more convenient Court for the settlement of questions of disputed possession.

Now, I think that to argue from the judgment in *Smith-Sligo's* case that the Sheriff has universal jurisdiction *ratione rei sitae*, is an example of unsound induction from an isolated case. In our judgment we did not consider any case except that of disputed possession; and the authority of the case of *M'Bey* v. *Knight* is in no way affected by anything that was said in *Smith-Sligo's* case by the judges of this Division of the Court.

I wish to guard myself against being supposed to touch the question of the effect of a statutory warrant of distress or other legal process directed against a plurality of defaulting ratepayers.

It may be that where the name of a non-resident owner is lawfully included in such a list the statute is a warrant for diligence against his estate within the county. In the present case the local authority has elected to proceed by way of action against the owner-ratepayer, and our decision only applies to the jurisdiction of the Sheriff under an ordinary action in his Court.

I think we should return to the judgment of the Sheriff-Substitute of 4th July 1898; sustain the appeal, and dismiss the action.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor—

"Sustain the appeal: Find in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute, dated 4th July 1898: Affirm the said interlocutor: Recal the interlocutor of the Sheriff, dated 9th September 1898: Of new dismiss the petition so far as it is directed against the defender Mary Gardner or M'Lean, and decern: Find said defender entitled to expenses to 4th July 1898, and to additional expenses from said date, and remit the accounts of said expenses to the Auditor to tax and to report: Also dismiss the action against the defender Robert Millar."

Counsel for Pursuers—Guthrie, Q.C.—Guy. Agent—F. J. Martin, W.S.

Counsel for Defender—Findlay. Agents—Gill & Pringle, W.S.

Friday, November 17.

FIRST DIVISION.

DUNCAN *v.* MOIR.

Proving the Tenor—No Written Adminicles—Parole Evidence—Wilful Destruction.

Parole evidence on which, in the absence of written adminicles, the Court *held* the tenor of an informal holograph testamentary writing to be proved, the *casus amissionis* having been the wilful destruction of the document by a daughter of the maker of the will, who took no benefit thereunder.

An action of proving the tenor was raised by Mr William Oswald Duncan, *curator bonis* to Charlotte Jane Calder, an inmate of the Royal Lunatic Asylum, Aberdeen, against Mrs Moir and others, being the next-of-kin and representatives of next-of-kin of the late Mrs Isabella Low or Calder. The summons concluded to have it found and declared "that the last will and testament of the deceased Mrs Isabella Low or Calder, widow of the late Charles Calder, merchant in Aberdeen, was an authentic document subscribed by the said Mrs Isabella Low or Calder, and of the tenor following:—'I wish, when die, I that my daughter Charlotte Calder get everything belonging to me, with power to her to divide between her sisters Agnes and Janet as she pleases, and I appoint her to be my executrix.—ISABELLA LOW CALDER;' or of such tenor and effect as may be found by our said Lords in the course of the process to follow hereon; and it ought further to