Thursday, July 10.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

BRUCE *v.* BRITISH MOTOR TRADING CORPORATION, LIMITED.

Process—Reduction of Decree of Payment Pronounced in Absence—Title to Sue—Decree Obtempered to Stay Sequestration Proceedings—Averment that Decree Improperly Obtained—Interest to Sue.

Personal Bar—Reduction of Decree of Payment Pronounced in Absence—Decree Obtempered to Stay Sequestration Proceedings and Petition for Sequestration Withdrawn—Whether Proceedings Equivalent to Transaction between Parties to Action.

A defender while maintaining that decree in absence had been improperly granted against him paid the sum sued for in order to avoid sequestration proceedings, and the petition for sequestration was by arrangement accordingly withdrawn. No qualification in regard to the payment was made by the defender at the time, nor did he make any reservation of his rights to sue for reduction of the decree. In an action at his instance for reduction of the decree, *held* (*diss.* Lord Hunter) that his obtempering the decree did not in the circumstances amount in law to a transaction or compromise between the parties—there being no averment by the defenders that they had been induced by the pursuer's actings to do something which they would not otherwise have done and the doing of which had altered their position to their prejudice—and that accordingly he was not personally barred from insisting in his action of reduction.

Opinion (*per* the Lord Justice-Clerk) that where a decree had been improperly obtained the defender was entitled to have it set aside whether or not he could qualify a patrimonial interest.

Process—Reclaiming Note—Review, after Proof on the Merits, of Prior Interlocutor Repelling Preliminary Plea—Competency—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 52.

In an action for reduction of a decree the Lord Ordinary repelled the defenders' plea of personal bar, and after a proof on the merits granted decree. The defenders reclaimed. *Held* that in the circumstances the defenders were entitled to submit to review the interlocutor of the Lord Ordinary repelling the preliminary plea as well as the interlocutor granting decree.

Process—Sheriff—Citation—Postal Citation—"Place of Business"—Citation Amendment (*Scotland*) *Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 3.

Held that the citation of a defender in a Sheriff Court action at an address within the sheriffdom at which he had previously carried on a branch business was invalid in respect that at the date of citation he no longer had a place of business there, the facts (*a*) that he was liable for the rent of the premises at the date in question, (*b*) that his name was still on the door when the registered letter containing the citation was tendered, and (*c*) that certain unimportant correspondence for him continued to be delivered at the premises, not being sufficient on the evidence as a whole to instruct that he still had a place of business there.

Process—Citation—Postal Citation—Letter Refused—Decision of Sheriff-Substitute as to Validity of Citation—Finality of Sheriff-Substitute's Decision—Citation Amendment (*Scotland*) *Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 4 (5).

The Citation Amendment (Scotland) Act 1882, sec. 4 (5), enacts with regard to service by registered letter—"Where the judge . . . is satisfied that the letter has been tendered at the proper address of the party . . . and refused, he may . . . in the case of a party hold the tender equal to a good citation."

In an action in the Sheriff Court the initial writ was served by registered letter at an address which was no longer the defender's place of business, and was returned through the Post Office marked "refused." The Sheriff-Substitute having granted decree in absence the defender raised an action in the Court of Session for reduction of the decree on the ground that the citation was invalid. In answer it was pleaded that the Sheriff's decision that the tender of the letter of citation was equal to a good citation was final and not open to review. The Court *repelled* the plea, *holding* that the Sheriff-Substitute had never applied his mind to the question whether the defender in the original action had a place of business in the sheriffdom, and that in these circumstances he could not make a citation good which was fundamentally bad, and do so without review.

Sheriff—Jurisdiction—Actions Competent in Sheriff Court—"Where the Defender Carries on Business and has a Place of Business within the Jurisdiction"—Sheriff Courts (*Scotland*) *Act* 1907 (7 *Edw. VII, cap.* 51, *sec.* 6 (*b*)—*Sheriff Courts* (*Scotland*) *Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 3, *First Schedule.*

The Sheriff Courts (Scotland) Act 1907, sec. 6, as amended by the Sheriff Courts (Scotland) Act 1913, sec. 3, First Schedule, enacts—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the sheriff— . . . (*b*) Where the defender carries on business and has a place of business within the jurisdiction. . . ."

Circumstances in which *held* that the Sheriff-Substitute had no jurisdiction to entertain an action in respect that the defender had ceased to carry on business and to have a place of business within the sheriffdom.

The Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sec. 4 (5), enacts—[*Quoted in rubric*].

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 6 (*b*), as amended by the Sheriff Courts (Scotland) Act 1913, sec. 3, First Schedule, enacts—[*Quoted in rubric.*]

William Robertson Bruce, wholesale fish merchant and fish curer, Aberdeen, *pursuer*, brought an action against the British Motor Trading Corporation, Limited, Glasgow, *defenders*, for reduction of a decree in absence, dated 7th and extracted 23rd June 1922, which the defenders obtained against him in the Sheriff Court at Glasgow.

The following narrative is taken from the opinion of the Lord Justice-Clerk (*infra*):—"The pursuer in this case seeks to reduce a decree in absence which the defenders obtained against him in the Sheriff Court at Glasgow. The pleas upon which the pursuer bases his claim are (1) that the citation which preceded the decree was invalid, and (2) that the Court which granted the decree had no jurisdiction over him. The second of these pleas did not appear in the pursuer's original summons, but was added by way of amendment in the course of the evidence led before the Lord Ordinary. The defenders in reply maintain that the citation of the pursuer was good, and that the jurisdiction of the Court which pronounced the decree was unchallengeable. They further contend that the pursuer is personally barred from challenging the decree, and that he has no title or interest to sue the present action. The last plea was not included in the original defences to the action, but was added by the defenders in the course of the debate upon the reclaiming note before this Court. The circumstances under which the decree was obtained by the defenders against the pursuer are as follow:—The pursuer is a wholesale fish merchant and fish curer, whose principal place of business is at Albert Quay, Aberdeen. He also had a branch place of business at 91 King Street, Glasgow. On 17th April 1922 the pursuer sold his business and plant in Glasgow to Messrs Thomas Craig & Company, fish merchants, Dunbar, and they obtained possession of the subjects sold on 24th April 1922. The pursuer, however, remained liable under the lease with his landlords for the rent of the premises up to Whitsunday 1922, and he left upon the door of his office in Glasgow a plate with his name upon it. In October 1921 the pursuer's car broke down while passing through Stirling, and certain repairs were thereby rendered necessary and certain new parts had to be obtained. The repairs were executed and the new parts were obtained by the defenders, who rendered an account arising out of these services to the pursuer. He disputed the amount of the account, and in particular he repudiated liability for the largest item which it contained. Certain correspondence regarding the account ensued between the pursuer on the one hand and the defenders' law agents in Glasgow on the other hand. No agreement having been reached regarding the matters in dispute, the defenders determined to sue the pursuer for the amount of their account. On 26th May 1922 their law agents posted a copy of the initial writ which contained the defenders' claim against the pursuer in a registered letter addressed to him at 91 King Street, Glasgow. The postman took the letter to that address and there interviewed the manager of Messrs Thomas Craig & Company, who were then in occupation of the premises. The evidence regarding what took place between the postman and the manager is conflicting, but in the result the postman marked the letter 'refused' and returned it to the Sheriff-Clerk's office. Thereafter the defenders enrolled the initial writ before Sheriff A. S. D. Thomson, and he granted decree against the pursuer as craved with £7, 7s. 10d. of taxed expenses. On 21st August 1922 the pursuer was served by a sheriff-officer with a charge of payment, the warrant of which was the decree to which I have referred. A correspondence ensued between the pursuer's and the defenders' law agents. The defenders proceeded to present a petition for the sequestration of the pursuer's estates, upon which a first deliverance was pronounced, and a notice of which appeared in the *Gazette*. The pursuer's agents thereupon, in order to avoid further damage to his credit, undertook that if the petition were withdrawn they would pay the amount of the defenders' claim and expenses. The petition was accordingly dismissed, and the pursuer's agents remitted to the defenders' agents the amount decerned for, with interest and expenses. The pursuer thereafter raised the present action, which concludes for reduction of the decree upon which diligence was done against him in the manner I have narrated."

The pursuer pleaded—"1. The decree libelled having been obtained by the defenders in the absence of the pursuer, and without any legal service upon him of the initial writ upon which the decree proceeded, and without citation of the pursuer, the pursuer is entitled to decree of reduction as concluded for. 2. The pursuer not having been on 26th May 1922 subject to the jurisdiction of the Sheriff of Lanarkshire, the said decree in absence was null and void, and decree of reduction ought to be granted as craved. [Above plea-in-law (2) was added in terms of minute of amendment referred to in Lord Ordinary's interlocutor of 18th October 1923, *infra*.] 3. The defences being irrelevant ought to be repelled."

The defender pleaded—"1. The action being incompetent generally, and particularly in respect (1) that the pursuer being in timeous knowledge of the facts constituting the alleged invalidity did not exhaust his statutory rights and remedies; (2) that the decree sought to be reduced has been obtempered; (3) that the payment of the sum in the decree interest and expenses was made as part of a transaction or compromise, it ought to be dismissed. 2. The pursuer's averments being irrelevant, the action should be dismissed. 3. The pursuer

being personally barred from challenging the validity of the said decree, the defenders should be assoilzied. 5. The Sheriff-Substitute who pronounced the decree now sought to be reduced having been satisfied that the said letter of citation had been tendered at the proper address of the pursuer and refused, and having held the tender equal to a good citation, the said decree is valid and not open to reduction. [Above plea-in-law (5) was added in terms of minute of amendment referred to in Lord Ordinary's interlocutor of 18th October 1923, *infra.*] 6. The pursuer having no title in or interest to sue the present action, the action should be dismissed." [Above plea-in-law (6) was added by way of amendment in course of debate upon reclaiming note.]

On 19th July 1923 the Lord Ordinary (BLACKBURN) repelled the first plea-in-law for the defenders and allowed to the pursuer a proof of his averments on the merits and to the defenders a conjunct probation.

On 18th October 1923 the Lord Ordinary (BLACKBURN) having taking the proof adduced for the parties and heard counsel, opened up the record and allowed the pursuer to add his second plea-in-law (*quoted supra*) and the defenders to add their fifth plea-in-law (*quoted supra*) in terms of minutes of amendment, and the amendments having been made, of new closed the record and made avizandum.

On 7th November 1923 his Lordship sustained the second plea-in-law for the pursuer and granted decree of reduction in terms of the conclusion of the summons.

Opinion.—"The facts averred by the pursuer on record are in my opinion fully established by the proof which has now been led. The pursuer's place of residence and principal place of business has all along been in Aberdeen. In 1919 he leased a site at 91 King Street, Glasgow, from the Glasgow and South-Western Railway Company, where he erected business premises containing an office, one other small room, and four rooms used for smoking fish. Here he carried on a branch business intermittently, and it is proved that for some months prior to April 1922 the business there was suspended. It was re-started about the beginning of April 1922, and on 17th April the pursuer sold the business to Messrs Thomas Craig & Company, a firm of which the sole partner is the witness Mrs Rennie Mackay. That firm started business at 91 King Street on Monday, 24th April, and since that date the pursuer has had no connection with these premises or any other place of business in Glasgow. Between 17th and 24th April the pursuer and Mrs Mackay visited the offices of the railway company, and it was arranged that she should be accepted as tenant of the premises from 24th April in place of the pursuer, although for convenience the lease was not to be transferred till the approaching term of Whitsunday. The pursuer on parting with the business cancelled his registered telephone and telegraphic addresses in Glasgow, and by arrangement with Mrs Mackay instructed a house painter to delete his name from the signboard over the door and window of 91 King Street and to substitute the name of Messrs Craig for his own. This was done, but without the knowledge of the pursuer a small brass plate on the door bearing the words 'William R. Bruce, Head Office, Albert Quay, Aberdeen,' was left in position. I have no doubt that the transaction was a perfectly *bona fide* one, and that from 24th April inclusive the pursuer had no place of business in Glasgow. There was nothing to connect him with 91 King Street except the plate with his Aberdeen address on it and a reference on his unexhausted notepaper to the Glasgow branch. This letter paper also contained an instruction to address replies to the pursuer to 'Albert Quay, Aberdeen.' It appears, as might be expected, that after the pursuer had given up his Glasgow branch a certain number of circulars and unimportant letters addressed to him at 91 King Street were delivered there. The evidence of the postman John Mackay shows that the number of these documents was trifling, and I think it is clear that the majority of them must have been left in the letter-box at the morning delivery and not handed to anyone in the employment of Messrs Craig & Co. What became of them is not very clear, but some at all events appear to have been re-directed and to have reached the pursuer in Aberdeen. He had given no instructions or authority to Messrs Craig & Company to accept letters on his behalf or to forward them, and he himself says that he thought the letters had been forwarded by the Post Office authorities in Glasgow. This is explained by the fact that during the period when his business was suspended, prior to April 1922, he had given instructions to the post office to forward to Aberdeen all letters addressed to him at 91 King Street, and that he had never cancelled these instructions, although as soon as he himself reopened the premises at King Street his correspondence was delivered there in ordinary course by the postman. When the registered letter addressed to the pursuer, which contained the citation, arrived at 91 King Street it was tendered to Mr Hannan by Mackay, the postman, who states in evidence that he knew Mr Hannan 'as manager of Messrs Craig & Company.' With reference to what passed between these two on that occasion I preferred the evidence of Mr Hannan to that of Mackay. After hearing their evidence I entertained no doubt that when Mr Hannan refused to accept the letter he made it quite clear to Mackay that his reason for doing so was that the pursuer had gone away from 91 King Street to Aberdeen, and that he had no authority to accept letters on his behalf. Mackay practically admitted that he was aware that the pursuer had left that address, but instead of marking on the envelope that the letter had not been delivered because the addressee had 'gone away' he marked it 'refused.' He seemed to think that the existence of a brass plate on the door with Mr Bruce's Aberdeen address on it was quite sufficient justification for his doing so. Considering the importance

which attaches to the delivery of a citation by registered letter, I think it right to say that I hope that such an erroneous idea of the duties of a postman under such circumstances is not general in the service.

"At the discussion in the procedure roll no reference whatever was made to the proceedings before the Sheriff after the registered letter had been returned to the sheriff-clerk marked 'refused.' The only question debated was whether the defenders were to be entitled to lead evidence on the plea of personal bar. This I refused for the reasons given in my former note, and I understood that the only question remitted to proof was whether the letter had been offered at an address where the pursuer carried on business. At the proof, however, defender's counsel proposed to lead evidence as to what had passed before the Sheriff for the purpose of proving that the Sheriff had satisfied himself that the letter had been tendered at the proper address of the pursuer, and held the tender equal to a good citation. Counsel referred to the Citation Amendment Act 1882 (45 and 46 Vict. cap. 77), section 4 (5), and stated that he was prepared to argue that a finding by the Sheriff that the citation was good was final and not subject to review. The line of evidence was objected to on the ground that there were no relevant averments on record to support it, but after discussion between the parties the objection was withdrawn on the understanding that both parties should be allowed to amend. I had considerable doubt as to the competency of evidence tending to show what the Sheriff had done in view of the fact that there was no finding by the Sheriff in the papers before me that he made any inquiry into the matter at all, but in view of the objection being withdrawn I considered it advisable to allow the evidence before dealing with the question finally. The defenders then added an averment at the end of answer 4 and put on a new plea-in-law raising the question referred to under the Citation Act. The pursuer added a plea to the effect that the Sheriff had no jurisdiction. According to the evidence led it is the practice in the Sheriff Court in Glasgow, when the citation of a defender by registered letter has been returned through the post office marked 'refused,' and the pursuer in the action desires decree, for the initial writ with the service copy and envelope to be laid before the Sheriff. If the Sheriff is satisfied that the citation has been sufficient and is prepared to grant decree, he places his initials on the front of the initial writ. An interlocutor granting decree is then prepared for the Sheriff's signature, but this interlocutor contains no reference to the fact that the Sheriff has satisfied himself that this citation which has been returned is a good citation. It is proved that on this occasion the service copy and envelope were laid before the Sheriff, and he had an interview with the witness Mr Gemmell, a procurator in the employment of the defenders' agents. Mr Gemmell states that he informed the Sheriff that his firm had at one time acted as agent for the pursuer, that they had communicated with him at 91 King Street both by letter and telephone, and that the pursuer's name was in both the Glasgow Directory and the Glasgow Telephone Directory. The Sheriff thereupon placed his initials on the initial writ and subsequently signed the interlocutor which is set out in condescendence 5. Mr Gemmell did not, however, inform the Sheriff that his firm had not communicated with the pursuer at that address for some months, and that no attempt had been made by them to ascertain whether the pursuer was still carrying on business at that address or not. Thus the statements made were not inaccurate, but they were most misleading and presumably led the Sheriff to initial the writ and sign the interlocutor granting decree. I have no doubt that the citation was bad in respect that it was not tendered at the pursuer's place of business, nor to anyone who had any authority to accept it on his behalf. Had the pursuer been subject to the Sheriff's jurisdiction I should have had to deal with the question under the Citation Act raised by the defenders' plea. The only authority quoted to support the finality of the Sheriff on the validity of the citation is a dictum by Lord Young in the case of *Steuart* v. *Ree*, 12 R. 563. It may be that where the Sheriff has jurisdiction over the defender in a Sheriff Court action, the proper procedure is for a defender who wants to challenge the validity of a citation which has been held by the Sheriff to be good to seek to be reponed against the decree in absence which has followed. But it is unnecessary for me to express an opinion on this question or on the question whether I was entitled to allow any inquiry into what passed before the Sheriff in the absence of any notification in the process papers by the Sheriff that he had taken steps to satisfy himself as to the citation. In this case not only was the citation bad, but the Sheriff had no jurisdiction to deal with the matter at all, as the pursuer was neither resident in the sheriffdom nor had he a place of business there—Sheriff Court Act 1907, section 6. Whatever powers the Sheriff may have to hold a bad citation as good they cannot be interpreted as a power to give himself jurisdiction where in fact he has none. I shall accordingly sustain the pursuer's second plea-in-law and grant decree as craved."

The defenders reclaimed, and argued—1. The pursuer was personally barred from challenging the validity of the decree in respect that (1) the defenders were misled by the pursuer into thinking that he still had a place of business and carried on business at the Glasgow address, (2) the pursuer had failed to avail himself of the remedies of reponing or suspension, and (3) the payment made by the pursuer was made as part of a transaction or compromise without any reservation of the right to sue the present action—*Bell* v. *Gunn*, 1859, 21 D. 1008, *per* Lord President (M'Neill) at 1009; *Gillespie* v. *Dods*, 1857, 19 D. 475, *per* Lord Justice-Clerk (Hope) at 479; *Scott* v. *Dunlop*, 21st December 1838, F.C., vol. xiv, p. 303, *per*

Lord Mackenzie at 314; *Sinclair* v. *Brown*, 1837, 15 S. 770, at 772; *Ewing* v. *Cheape*, 1835, 13 S. 515; *M'Donald* v. *M'Kenzie*, 1822, 2 S. (N.E.) 3. The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rules 27, 28, and 29, was also referred to. 2. The pursuer had no title or interest to sue the present action. An action the summons in which contained a bare conclusion for declarator was incompetent. So also was an action such as the present, the summons in which contained a bare conclusion for reduction—*Grigor* v. *Robertson*, 1856, 18 D. 1313, *per* Lord Deas (Ordinary) at 1315. Reduction was a competent mode of review but the remedy was subject to equitable control by the Court—*Taylor's Trustees* v. *M'Gavigan*, 1896, 23 R. 945, 33 S.L.R. 707, *per* Lord Kincairney (Ordinary) at 23 R. 948 and 949, 33 S.L.R. 708 and 709; Mackay, Practice of Court of Session, vol. ii, pp. 496 and 498. 3. The defenders were not now barred from submitting to review the Lord Ordinary's interlocutor repelling their first plea-in-law—Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 52; *Wilson* v. *Hovell*, 1924 S.C. 1, 61 S.L.R. 1. 4. The citation was valid. The evidence showed that at its date the pursuer still had a place of business at the Glasgow address. 5. The Sheriff-Substitute had satisfied himself that the registered letter had been tendered at the proper address and had been refused, and had held the tender equal to a good citation. Accordingly the Sheriff-Substitute's decision in the matter was final and the Court could not review it—Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), section 4 (5); *Steuart* v. *Ree*, 1885, 12 R. 563, 22 S.L.R. 366, *per* Lord Young at 12 R. 564, 22 S.L.R. 366. The cases of *Matheson* v. *Fraser*, 1911, 2 S.L.T. 493, and *Roberts* v. *Crawford*, 1884, 22 S.L.R. 135, were also referred to. 6. The Sheriff-Substitute had jurisdiction to entertain the action. The evidence showed that at the date of citation the pursuer still carried on business and had a place of business within the jurisdiction. Moreover, the plea of "no jurisdiction" in an action of reduction, which was treated as a review, required even more than in an ordinary action to be stated *in limine*, but the pursuer had not stated the plea *in limine*.

Argued for the pursuer and respondent—1. The pursuer was not personally barred from challenging the validity of the decree. In order to maintain the plea it would be necessary for the defenders to aver and prove that the pursuer had represented to them that he had a place of business in Glasgow and that they relied on the representation and acted on it so as to change their position to their prejudice, but there were no such averments—Rankine, Personal Bar, pp. 2-5 and 210; Bower, Estoppel, p. 121; *Carr* v. *London and North-Western Railway Company*, (1875) L.R., 10 C.P. 307; *Freeman* v. *Cooke*, 1848, 2 Ex. 654, *per* Park at 663. The pursuer was not barred by reason of his not seeking to be reponed and not suspending or by reason of the payment which he had made—*Black* v. *John Williams & Company* (*Wishaw*), 1924 S.C. (H.L.) 22, 61 S.L.R. 26; *Taylor's Trustees* v. *M'Gavigan* (*cit.*); *M'Lachlan* v. *Rutherford*, 1854, 16 D. 937; Mackay, Practice of Court of Session, vol. ii, p. 498. 2. The pursuer had a title and an interest to sue the present action. The reduction of the decree was a necessary preliminary to an action of damages. Moreover, the continued existence of the decree was a reflection on the pursuer's financial stability and might be fatal to his credit in the commercial world—*Mazure* v. *Stubbs, Limited*, 1919 S.C. (H.L.) 112, 56 S.L.R. 535; *Gibson & Company* v. *Anderson & Company*, 1897, 24 R. 556, 34 S.L.R. 435. In any case it was not necessary for the respondent to show a patrimonial interest in having the decree set aside, provided that he showed that the decree had been improperly obtained—*Rachkind* v. *Donald & Sons*, 1916 S.C. 751; *Ferguson* v. *Malcolm*, 1850, 12 D. 732; *Beattie* v. *M'Lellan*, 1844, 6 D. 1088. The payment which the pursuer had made to the defenders was made of necessity to avoid his being sequestrated. 3. The defenders were now barred from submitting to review the Lord Ordinary's interlocutor which repelled their first plea-in-law. They had joined issue on the averments which the Lord Ordinary had remitted to probation, without having challenged his repelling of the plea. The authorities showed that there were well-recognised exceptions to the general rule of section 52 of the Court of Session (Scotland) Act 1868—*Wilson* v. *Robertson*, 1884, 11 R. 893, 21 S.L.R. 616; *Duncan's Factor* v. *Duncan*, 1874, 1 R. 964; *North British Railway Company* v. *Gledden*, 1872, 10 Macph. 870; Mackay, Manual of Practice, p. 304. The case of *Wilson* v. *Hovell*, *cit.*, was a case of proof before answer—see Lord Justice-Clerk (Alness) at 1924 S.C. 10, 61 S.L.R. 6. The point in question was not decided in that case—see Lord Ormidale at 1924 S.C. 13, 66 S.L.R. 7, and Lord Anderson at 1924 S.C. 13, 61 S.L.R. 8. 4. The citation was invalid. The evidence showed that at its date the pursuer had ceased to have a place of business at the Glasgow address. Accordingly the decree was fundamentally bad—*Clark* v. *Beattie*, 1909 S.C. 299, 46 S.L.R. 214, *per* Lord President (Dunedin) at 1909 S.C. 303, 46 S.L.R. 216. 5. The Sheriff-Substitute had not, in terms of section 4 (5) of the Citation Amendment (Scotland) Act 1882, satisfied himself that the registered letter had been tendered at the proper address and had been refused, and had not held the tender equal to a good citation. The letter was not presented to him as required by the sub-section—Dove Wilson, Sheriff Court Practice (4th ed.), p. 125. Moreover, he had pronounced no interlocutor. In any case he had no jurisdiction to deal with the case. Accordingly the validity of the citation was still open to challenge. 6. The Sheriff-Substitute had no jurisdiction to entertain the action. The evidence showed that the pursuer had ceased to have a place of business and to carry on business within the jurisdiction at the date of citation. The Sheriff Courts (Scotland)

Act 1907, sec. 6 (*d*), and the Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), sec. 46, were referred to.

At advising—

LORD JUSTICE-CLERK (ALNESS)—[*After narrative quoted supra*]—The first question in the case is whether the pursuer has a title and interest to sue. The defenders maintain that he has not. They point to the bare conclusion of reduction which the summons contains, and they seek to assimilate the action to one in which a mere decree of declarator is sought—a form of process which has been held on more than one occasion to be incompetent. The pursuer maintains in reply (*a*) that he has a patrimonial interest to sue the action, and (*b*) that in any event that is unnecessary. (*a*) The pursuer argued that his patrimonial interest consisted in this, that he is entitled to repayment of the sum which his agents paid under duress in order to get rid of the decree, and also that he is entitled to recover damages for the wrong inflicted by the defenders upon him. To the affirmance of these claims the pursuer represents that reduction of the decree obtained against him is a necessary preliminary, and in the present proceedings he reserves these claims. He contends that his agents had no option but to pay the money at the time when it was paid as the pistol was held at his head, and that in order to salve his credit payment of the sum decerned for became imperative. The pursuer further maintains that he has an interest to remove from the books an entry which records the passing of a decree in absence against him, inasmuch as such a decree signifies to the commercial world that he is unable to pay his debts, or at any rate that he is tardy in doing so. The pursuer argues that if inquiries were made by his customers regarding his financial stability the discovery that a decree in absence stood against him might prove fatal to his credit. He therefore contends that he has both a right and an interest to reduce the decree in absence. He founded on the cases of *Mazure*, 1919 S.C. (H.L.) 112 and *Gibson*, 24 R. 556. I am of opinion that the argument of the pursuer is well founded, and that no adequate answer to it was offered by the defenders.

But the pursuer went further. He boldly maintained that, whether or no he can qualify a patrimonial interest to set aside the decree, he has an absolute right to get rid of it if he can show that it was improperly obtained. He referred to what he claimed to be the analogous case of reduction of a will, where though there are no petitory conclusions the process is undoubtedly competent. The cases which the pursuer cited appear to me fully to bear out his contention. They are—*Beattie*, 6 D. 1088, *Ferguson*, 12 D. 732, and *Rachkind*, 1916 S.C. 751.

In *Beattie*, which was an action for reduction of a Sheriff Court decree on a technical ground, the Lord Justice-Clerk said (at p. 1093)—"In judging of this case I could not have allowed myself to be influenced, even if I had agreed with the Lord Ordinary generally, by the varied supposed considerations in equity by which he seems to think that objections otherwise good could in this case be disregarded. The only question is, are the irregularities material and fatal or are they not? If they are we must give effect to them." And Lord Moncreiff says (at p. 1096)—"I am therefore of opinion that this is a fatal defect in the execution of poinding, and I cannot think that it is obviated or the reduction barred by the circumstance of the debt having been paid by another party so as to prevent the poinding being carried into effect before the action was raised. That may be very important in regard to any ulterior proceedings but I can well conceive that in much higher things, and in regard to higher parties than those now before us, it may be thought necessary or important for a friend, himself perhaps bound for a debt, to stay the actual course of diligence used on illegal warrants without at all barring the principal party from complaining in due form of law of the illegality." Again in *Ferguson* the Lord Justice-Clerk said (at p. 735)—"Repayment of the sum levied, whether there was or was not an assessment, in no degree satisfies the justice of the case or extinguishes the right of the pursuer. Every man is entitled to set aside legal proceedings directed against his property and person and insisted in to diligence if the same were without the professed warrant, which alone could give them the appearance of legality, and perhaps even more so if the professed warrant—viz., the assessment—was incompetently and illegally imposed. Every man has a clear right to sweep away such proceedings." In *Rashkind* a decree was reduced although the summons contained none but reductive conclusions. The principles laid down in these cases appear to me to rule the present case. I have no doubt therefore that the defenders' tardy plea of no title or interest falls to be repelled.

I now proceed to consider the pursuer's pleas that he was not properly cited and that the Court in Glasgow had no jurisdiction over him, leaving for subsequent and separate consideration the plea of personal bar which he has to meet. Was the pursuer properly cited to the Glasgow Sheriff Court? The answer to that question depends on the application of section 3 of the Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77) to the circumstances of this case. It was admitted by the defenders that 91 King Street, Glasgow, was not in the sense of that section at the date of the alleged citation the pursuer's known residence nor his last known address. They peril their case on establishing that the pursuer was cited at his "place of business." Was he? Had he on 26th May 1922 a place of business in Glasgow? That is a question of fact on which it appears to me that the evidence is all the one way. It is certain that the pursuer sold his business in Glasgow on 17th April. It is equally certain that he ceased to carry on business there after 22nd April, on which date the last entry in his day-book appears. He did

not cross the door of 81 King Street after 24th April, and from that date onwards his successors were in possession of the premises and were carrying on business there. The pursuer also before leaving Glasgow cancelled his telegraphic address and surrendered his telephone. These facts *prima facie* seem to me to establish that at the date of citation the pursuer had no place of business in Glasgow. But it is said by the defenders (*a*) that the pursuer remained liable for the rent of the premises in Glasgow till Whitsunday 1922, and (*b*) that a brass plate with his name upon it remained on the door of his Glasgow office, and was there when the letter containing the initial writ was tendered at 91 King Street. The defenders maintained that these facts instructed that the pursuer still had a place of business in Glasgow. As regards (*a*) it is proved that the railway company, who were the pursuer's landlords, objected to his breaking the lease in mid-term and held him liable for the rent till Whitsunday. But it is also proved that Mrs Mackay on behalf of the purchasers of the business was in occupation of the premises from 24th April onwards as a sub-tenant of the pursuer, and that her name was painted on the sign above the door. The pursuer, as I have already said, never sought to enter the premises after 24th April, and had he done so Mrs Makay could have excluded him. As regards (*b*) the name plate appears to have been inadvertently left by the pursuer, and it was immediately taken down when the postman directed the attention of his successors in business to its presence. In that state of facts I am of opinion that the pursuer had no place of business in Glasgow when the citation was tendered by the postman at 81 King Street and that he was not properly cited there. And if there was no due citation then it is clear that the decree which followed was fundamentally bad—*Clark*, 1909 S.C. 299.

The question, however, remains, was the citation which *ex hypothesi* of the argument was fundamentally bad made good by what subsequently transpired before the Sheriff-Substitute? The procedure taken bore to follow the provisions of section 4 (5) of the Citation Amendment (Scotland) Act 1882. It was argued by the defenders that the Sheriff-Substitute was final in the matter and that this Court cannot review what he did. If the evidence led regarding this topic was competent, which I take leave to doubt, then I think it is clear that the Sheriff-Substitute never applied his mind to the real point at issue between the parties. He assumed that the pursuer had a place of business in the sheriffdom and that he had personally refused the citation. These were misapprehensions on his part. He never addressed his mind to the question whether the citation had been refused by the pursuer or by some person authorised by him to do so, or to the question whether the pursuer had a place of business in the sheriffdom. The Sheriff-Substitute in these circumstances could not in my opinion by anything he did make a citation good which was fundamentally bad and do so without review. It is in any event difficult to see that where no interlocutor was pronounced by the Sheriff-Substitute the plea of *res judicata* can apply. I am of opinion that the Sheriff-Substitute's decision, if it be a decision, is subject to review, inasmuch as it does not appear that he ever applied his mind to the real question which under the section had arisen between the parties.

I now pass to the next question, which relates to jurisdiction. It arises under section 6 (*b*) of the Sheriff Court Act 1907. That section provides that any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff where the defender carries on business, and has a place of business within the sheriffdom, and is cited either personally or at such place of business. The question accordingly is, had the pursuer on 26th May a place of business in Glasgow, and did he carry on business there? To found jurisdiction against him both these propositions must be established. As regards the pursuer's place of business, I refer to what I have already said on that matter in connection with the problem of citation. But apart from that is there any evidence that the pursuer was "carrying on business" in Glasgow on the crucial date? The only relevant suggestion which the defenders made in that connection was that he was receiving letters there. The evidence shows that some circulars were delivered at 81 King Street, after the pursuer left, and that one letter may have been delivered there. That to my mind is clearly insufficient to establish that he was carrying on business at 81 King Street. The defenders are constrained to argue that the pursuer was carrying on business in premises where it is clear that someone else was carrying on business. The argument is in my opinion extravagant. I agree with the Lord Ordinary in the conclusion at which he arrived. I am of opinion that it is not established that the pursuer at the date of citation had a place of business in Glasgow, and that he was carrying on business there. Accordingly he was not subject to the jurisdiction of the Glasgow Sheriff Court. If the plea of "no jurisdiction" is good, then it is of course unnecessary to consider and determine the validity or otherwise of the citation, but as I have formed a clear opinion on that topic, I have thought it proper to express it.

There remains the question whether the pursuer is personally barred from insisting in this action. Now, in the first place, I desire to say that in my opinion the first plea-in-law for the defenders, which the Lord Ordinary repelled in the procedure roll, and on which his judgment was allowed to become final, is not, as it bears to be, a plea of competency but a plea of personal bar and nothing else. The Lord Ordinary should, I think, having regard to the opinion which he pronounced, have also repelled the third plea-in-law for the defenders, the plea *eo nomine* of personal bar. Assuming that their first plea-in-law is still open to the defenders, they argue in the first place that the pursuer should have sought to be reponed against the decree in absence, and

that having failed to do this, he is barred from any other remedy. I can see no warrant for holding that, if the pursuer failed to avail himself of the remedy of reponing, assuming it to have been open to him, he has thereby barred himself from suing the present action. If he had sought to be reponed and was reponed, he might have closed the door against his plea of bad citation. In any event, I am not prepared to hold that merely because the pursuer omitted to avail himself of the remedy of reponing, he is barred from all other remedies (*cf. M'Lachlan*, 16 D. 937, *Taylor's Trustees*, 23 R. 945). Nor do I think that the steps, which the pursuers had instantly to take in order to secure the withdrawal of the sequestration, bar him from suing this action. I cannot regard these steps as amounting to a transaction or compromise. They constituted an emergency measure which in the circumstances any business man would have adopted. There was no other way open to the pursuer of averting commercial disaster. But it is quite another thing to suggest that he thereby passed from his claim to maintain that the citation which preceded the decree was bad. It is said that the pursuer should have, when the debt was paid by his agents, reserved his right to sue this action. His omission to do so was in my view immaterial. That omission cannot, I think, be reared up as an obstacle to his subsequent challenge of the citation, nor can it be construed as involving abandonment on the part of the pursuer of his rights. The defenders must spell out of the pursuer's omission to reserve his rights a representation of waiver of these rights. They have in my opinion failed to do so.

I have said that the defenders' first plea-in-law is to my mind not a plea of incompetency but a plea of personal bar, and I have hitherto assumed that it is still open to them. But there are further and weighty considerations which arise with regard to the plea of personal bar. A case of personal bar must be averred, and it must be proved. Here in my judgment both averment and proof are lacking. The defenders in my judgment were bound, in order to avail themselves of the plea, to aver and to prove that the pursuer by his words or by his conduct represented to them a certain state of facts, that they relied upon the representation, that they acted upon it, and that in consequence they changed their position to their prejudice. The defenders do not either aver or prove that they were aware of the plate on the door, or of the terms of the lease, or of the fact that letters arrived at the pursuer's place of business, and that in knowledge of these facts they were misled into supposing that the pursuer had a place of business in Glasgow, and that they therefore proceeded to serve him there. The pursuer referred in this connection to *Freeman*, 2 Ex. 654, and Rankine on Personal Bar, p. 210. There is no suggestion in averment or in evidence that the pursuer made any representation to the defenders by conduct or by speech and intended them to act upon it, that they did so, and that they were thereby misled. The truth is that the defenders seek to buttress their plea of personal bar by knowledge which they subsequently acquired. This in my opinion will not do. I therefore think that the plea of personal bar falls to be repelled, unsupported as it is by any relevant averment, or by any relevant evidence.

In the result I suggest to your Lordships that we should hold that the pursuer is entitled to the decree of reduction which he seeks, that the Lord Ordinary was right in the conclusion at which he arrived, and that his interlocutor should be affirmed.

LORD ORMIDALE—In the course of the hearing before us an additional plea-in-law was stated by the defenders which challenges the pursuer's interest to raise the present action. The defenders have, in my opinion, failed to substantiate this plea. It is quite true that the debt having been paid the decree following upon the citation cannot now be enforced against the pursuer, but it is obvious that the existence in the Sheriff Court Books of an entry of a decree in absence may be read to mean that the pursuer is, if not unable, at any rate reluctant and unwilling promptly to pay his just debts, and may tend to damage his credit amongst his customers and business people generally—*Mazure* v. *Stubbs Limited*, 1919 S.C. (H.L.) 112; *Gibson & Company* v. *Anderson & Company*, 24 R. 556. Further, standing the decree, he is barred from reclaiming payment, in whole or in part, of the sum paid primarily to stay the sequestration proceedings which followed on the decree, and from recovering damages for any loss or injury which he may have incurred from a decree improperly obtained. His own alleged neglect to adopt other remedies which may have been open to him by reponing or suspension may have weight in any future action he may bring, but is not a conclusive answer or, indeed, a relevant consideration in the present action. That proposition is established by the cases of *Beattie* (6 D. 1088) and *Ferguson* (12 D. 732), whose authority on this point is in no way derogated from by the comments made on them by Lord Deas in *Grigor* v. *Robertson*, 18 D. 1313. A sufficient interest is qualified by the averment that the decree libelled followed on a citation which was fundamentally defective.

To pass to the other points in the present case, it is contended by the pursuer that not only was the citation inept, but also that the Sheriff had no jurisdiction to deal with the action against the pursuer. If the latter contention is well founded, then it is immaterial whether the citation was valid or invalid, but as the two contentions are based on essentially the same facts, and both points were debated, I shall deal with both. I keep in view that the statutory provisions affecting the two questions are not identical. The matter of citation is provided for by the Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), section 3, which enacts, *inter alia*, that citation may be by registered letter sent to

"the place of business" of the person who is to be served with the writ. The question of jurisdiction is determined by the Sheriff Courts (Scotland) Act 1913, section 6, subsection (4), which is as follows:— "Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*d*) where the defender carries on business, and has a place of business within the jurisdiction, and is cited either personally or at such place of business." It appears to me to be clear on the evidence that the pursuer neither had a place of business at 91 King Street, Glasgow, nor carried on business there on 26th May 1922, when the registered letter containing the initial writ was tendered at that address by the postman. It had ceased to be his business address, and he had ceased to carry on business there not later than the 24th April. On that date he sold the business formerly carried on by him to a Mrs Mackay, who traded under the name of Craig & Company, and she took entry on that date. The name of her firm was substituted for that of the pursuer on the sign which extended right across the whole front of the building. A small plate bearing the pursuer's name was inadvertently left on the door. The pursuer had given instructions to have it taken away when he vacated the premises but these had been neglected, but it was at once removed when the attention of Mrs Mackay's manager was called to its existence. The defenders laid great stress on the fact that the proprietors of the premises declined to terminate the pursuer's lease between terms, and that as between them and him he continued to be tenant until 28th May, and the assignation of the lease to Mrs Mackay only took effect from that date. But they consented to the occupation of the premises by Mrs Mackay, and duly accepted her as tenant in fact in room and place of the pursuer. It was also maintained by the defenders that letters continued to be addressed to the pursuer at 91 King Street and there delivered, but there is no evidence at all that a single letter was received there for him. It is true that circulars and other documents of no importance addressed to him were taken in, but nothing at all was redirected to him from the premises. After the 24th April the pursuer was never in the premises. He had cancelled his telegraphic address, and Mrs Mackay had taken over his telephone number. Mrs Mackay's manager, to whom the registered letter was tendered, declined to accept it, and the postman, having marked it "refused," returned it to the sheriff-clerk. Holding as I do on the facts thus proven that the pursuer had no business address and carried on no business at 91 King Street the citation was clearly inept, and as clearly the Sheriff had no jurisdiction.

Thereafter, the returned letter was put before the Sheriff and he initialled the writ. This proceeding, the defenders, relying on the Citation Act 1882, section 4 (5), maintained, rendered the citation, which was otherwise fundamentally bad, a good and valid citation, and they further maintained that the Sheriff's judgment on the matter is final and not open to review. In the absence of any interlocutor over the Sheriff's signature it is difficult to accept the view that the Sheriff pronounced any judgment at all, and I share your Lordship's doubt whether it was competent to allow evidence as to what took place. The proceeding was of the most informal character, and it is evident that the Sheriff did not apply his mind to the crucial question whether the pursuer had or had not a place of business in Glasgow. He was misled by an *ex parte* statement of the defenders' agent—no doubt made in the best of faith—and by the marking of the word "refused" on the envelope which enclosed the letter, into assuming that the pursuer had a place of business in Glasgow, and that the letter had been tendered, if not to the pursuer himself, at anyrate to someone authorised to represent him, and was by him refused. This view appears to me to be confirmed by the terms of the decree of 7th June 1922. In such circumstances I should not be disposed to hold that it was incompetent for this Court to review the proceeding, but it is enough to say that if the Sheriff had no jurisdiction to deal with the matter at all, and in my opinion he had not, it was beyond his power to give himself jurisdiction, and section 4 (5) has therefore no application.

With regard to the contention that the pursuer was personally barred from insisting in those proceedings, it is always difficult to deal with such a plea when the topic has not been made the subject of proof. That is the case here, the only proof allowed having been restricted by the Lord Ordinary's interlocutor to a proof "on the merits," and "the merits," from what is said in his Lordship's note, mean the question of the pursuer's having or not having a place of business in Glasgow and the consequent validity or invalidity of the citation. At the proof evidence bearing on the matter of bar was excluded. It further appears to me that along with plea 1, which undoubtedly, *inter alia*, raised the question of bar, the third plea which expressly does so ought also to have been repelled. But it appears to have escaped notice and that was not done, and the defenders contended that there was enough ascertained by the proof that was led and by what is admitted in the pleadings and by the letters that passed between the parties to warrant the plea being sustained. They point especially to what is said in answer 8, but neither there nor anywhere else do they aver that they were induced by the pursuer's actings or representations to do something which they would not otherwise have done and the doing of which has altered their position to their prejudice. Many of the facts on which they now found as having misled them into thinking that the pursuer had a place of business in Glasgow only came to their knowledge after they had taken action. From the failure of the pursuer to get himself reponed *in limine*, on which they also rely, it does not appear to me to be a reason-

able inference that he thereby intended to pass from his right to challenge a citation that was fundamentally bad. Nor can it be held that mere failure to suspend infers forfeiture of a right to reduce a decree that is without a valid warrant. The third part of the first plea of the defenders, namely, that the payment of the sum in the decree, interest, and expenses was made as part of a transaction or compromise, appears to me, as stated, to be no more than a variant of the plea of personal bar. It refers to the fact that in order to induce the defenders to withdraw their petition for the sequestration of the pursuer's estates the agents of the latter undertook to pay the defenders' account in full. There is no averment on record that there was any compromise or settlement of the claims the parties might have *hinc inde*. It was well known that the pursuer intended to reduce, if possible, the decree which had been wrongously obtained against him, and it is not averred by the defenders that it was made a condition of their withdrawing the petition for sequestration that he should undertake not to do so. All that is said is that no reservation or qualification was made "in regard to said payment at the time, and the pursuer thereby unreservedly obtempered the said decree." That he made no reservation does not in my judgment warrant the inference that he consented to waive his right to reduce the decree. He does not appear to have been asked to do so. In my opinion no such transaction or compromise as is suggested in the plea has been proved. The letters, no doubt, are admitted, but it is quite impossible to spell out of them a compromise of the nature alleged. On the contrary, they disclose very clearly that the payment was made, not because of the decree or with the intention of implementing it, but simply and solely to stay the sequestration.

On the whole matter I agree that the reclaiming note should be refused.

LORD HUNTER—The decree sought to be set aside in this action was pronounced against the pursuer in the Sheriff Court, Glasgow, on 7th June 1922, and extracted on the 23rd of the same month. The grounds upon which the reduction is sought are (first) that there was no legal service of the initial writ upon the pursuer, and (second) that the pursuer was not subject to the jurisdiction of the Sheriff of Lanarkshire.

In October 1921 the pursuer incurred an account to the defenders in connection with the repair of a motor car belonging to him. Correspondence passed between the pursuer and the defenders' agents as to payment of the account. To one of the items in the account the pursuer took objection, apparently on the ground that although the pursuer ordered a new gear box from the defenders, it was in fact supplied to them by the makers of the car. Whether the pursuer ever had any good ground for objecting to the payment does not appear from any letter sent by him to the defenders' agents or from the meagre averment which he makes about the matter upon record. The pursuer's residence and principal place of business are in Aberdeen. For some considerable time he carried on a branch business at 91 King Street, Glasgow. He appears to have been well known to one of the partners of the firm of law agents acting for the defenders. Unfortunately that gentleman had to go into a nursing home about the end of May 1922. During his absence from business his firm on 26th May 1922 obtained a warrant for serving a writ upon the pursuer concluding for payment of the account incurred by him to the defenders. Service of this writ was effected by registered letter addressed to the pursuer as follows:—"Wm. R. Bruce, Esq., Wholesale Fish Merchant and Curer, 91 King Street, Glasgow." The letter containing the writ was not taken delivery of at the address mentioned, and the postman returned it to the sheriff-clerk marked "Refused." Before the decree was granted the Sheriff-Substitute had an interview with a representative of the firm acting for the defenders and apparently satisfied himself that the service was in order. The pursuer was not aware that a writ in the Sheriff Court of Glasgow had been served upon him until 23rd June 1922, when he received a letter from the defenders' agents dated the previous day. In that letter they inform him of the facts, and state further that if he wished to resist the action, he had still an opportunity of being reponed. On 28th June the pursuer replied that he had never received the summons, and that any decree got against him would certainly be reversed. About 21st August the pursuer was charged to make payment of the amount in the decree. He then consulted his law agents in Aberdeen, who on 24th August wrote the defenders' law agents that, at the date of the decree and for a considerable time before, Mr Bruce had no place of business in Glasgow, "so the service and all that followed upon it is inept." The defenders' agents appear to have thought that notwithstanding this statement the pursuer had in fact a place of business in Glasgow at the date when the writ was served. Correspondence took place between the parties' agents, and on 12th October 1922 the defenders' agents intimated that they were in course of presenting a petition for sequestration of the pursuer's estates. On 25th October this petition was dismissed, the pursuer's agents having given an undertaking that they would pay the amount of the defenders' account and the expenses incurred. Payment was accordingly made in terms of this arrangement on 26th October, the amount paid including the expenses connected with obtaining the decree and also those incurred in connection with the sequestration proceedings. No reservation or qualification was made in regard to this payment at the time. On 22nd February 1923 the pursuer raised the present action of reduction of the Sheriff Court decree.

In defence to the action a number of pleas, preliminary and on the merits, were taken by the defenders. A discussion took place

in the procedure roll before the Lord Ordinary, when he repelled certain pleas of the defenders, and allowed the pursuer a proof of his averments on the merits and to the defenders a conjunct probation. I am inclined to think that it would have been preferable if the Lord Ordinary had allowed parties a proof of their averments generally without repelling all the branches of the badly-expressed first plea of the defenders to the competence of the action. It is to be noted that while the Lord Ordinary did not repel the third plea of the defenders, which is founded on personal bar, he excluded at the proof any evidence directed to establishing this plea. At the conclusion of the proof the Lord Ordinary held that the pursuer had proved that on 17th April 1922 he sold his business at 91 King Street, Glasgow, to another firm, who started business on 24th April, and that from the latter date he has had no business connection with those premises or any other place in Glasgow. The accuracy of these findings in fact by the Lord Ordinary was challenged by the defenders before us. There are certainly circumstances which explain, if they do not excuse, the assumption of the defenders' agents that the pursuer was carrying on business in Glasgow at the time when the writ was served on him. Among the more important of these circumstances were the following. The pursuer had a lease of the premises in respect of which, although abandoned to the purchasers *currente termino*, he remained liable for the rent till Whitsunday 1922. On the door of the premises a small plate with his name on it remained until after the postman tendered delivery of the registered letter with the writ. There is also evidence that correspondence for the pursuer, although probably principally if not entirely circulars, was delivered at the Glasgow address and was forwarded to his Aberdeen address. These circumstances do not, however, appear to me to be of sufficient cogency to justify our taking a different view from that taken by the Lord Ordinary to the effect that the pursuer at the date of the service of the writ was not carrying on business in Glasgow.

By the Sheriff Courts Act 1907, section 6, as amended in 1913, it is provided that "any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*b*) where the defender carries on business and has a place of business within the jurisdiction and is cited either personally or at such place of business." It appears to follow that if these stipulated conditions are not complied with, the Sheriff has no jurisdiction to entertain an action against one resident outwith his sheriffdom. Carrying on business must refer to having a substantial place of business in the sheriffdom. On the footing therefore that the Lord Ordinary was right in negativing the view that the pursuer was carrying on business in Glasgow at the date when the writ was served, I do not think that a Sheriff-Substitute within that sheriffdom had jurisdiction to entertain an action against the pursuer. No facts are disclosed that would justify our holding that the pursuer had homologated the jurisdiction of the Sheriff Court in Glasgow or that would preclude him from maintaining as in a question with the defenders that he did not have a place of business in Glasgow.

On the closed record as originally framed the pursuer relied entirely upon a plea founded upon the absence of legal service upon him of the writ. At the proof the defenders were allowed to amend their pleadings by adding a plea to the following effect:—"The Sheriff-Substitute who pronounced the decree now sought to be reduced having been satisfied that the said letter of citation had been tendered at the proper address of the pursuer and refused, and having held the tender equal to a good citation the said decree is valid and not open to reduction." In reply to the amendment so allowed the pursuer added a plea that the decree was null in respect that he was not subject to the jurisdiction of the Sheriff of Lanarkshire. That in my opinion should have been the principal plea from the start of the action. The defenders' plea as to the Sheriff-Substitute's determination on the question of the validity of the citation being final appears to be founded upon a statement made by Lord Young in *Steuart*, 12 R. 563. In that case, which was an action of suspension of a decree in absence and charge following thereon, a question arose as to whether a person had been validly cited in terms of the Citation Amendment Act 1882. Lord Young said (at p. 564)—"I take leave to repeat what I said in the course of the argument that the statute does not contemplate a suspension in this Court, appealed it may be to the House of Lords, as the means of proving what the statute requires. The proof is to be proof in the Court before which it is desired that the person should be cited, and for this proof there is abundance of means." It is not necessary to consider whether what is indicated by Lord Young is not the proper, perhaps the only, procedure in ordinary cases where the validity of a citation is challenged. It appears to me, however, to be impossible to ascribe finality to the determination of the Sheriff upon such a point where his jurisdiction to entertain the action is successfully challenged.

The most important point in the case seems to me to be whether or not the pursuer, having obtempered the decree, is now entitled to insist in an action of reduction thereof. His avowed object is to recover the whole or a substantial part of the amount he has paid to the defenders. He appears also to contemplate raising an action of damages against them for wrongous use of diligence. I agree with what the Lord Ordinary says in his opinion repelling the first plea-in-law for the defenders that so far as appears from the averments on record or from what was disclosed in argument the pursuer will have great difficulty in establishing such a case. He was himself largely, if not entirely, responsible for any damage he may have sustained by the presentation of the petition for

sequestration of his estates. The Lord Ordinary, however, thought that the transaction into which the pursuer entered with the defenders afforded no obstacle to his success in the present action of reduction. For the pursuer it was maintained that as the defenders did not reclaim at the time against the Lord Ordinary's interlocutor repelling their first plea, the third branch of which was founded upon his payment of the sum in the decree, interest, and expenses, but on the contrary joined issue on the averments which the Lord Ordinary remitted to probation, it was too late to challenge what the Lord Ordinary did by way of repelling the defenders' preliminary pleas. In this I do not agree. Section 52 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), provides that the effect of a reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date . . . to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor. This section appears to me to give us complete power to reverse the Lord Ordinary in so far as he repelled the first plea of the defenders. The pursuer referred to certain cases where it was held that notwithstanding the terms of section 52 of the Court of Session Act a party was not entitled after protracted procedure to reopen a purely preliminary point. In *Wilson* (11 R. 893) it was held that one who had unsuccessfully raised a plea of no jurisdiction was not entitled, after joining issue in a proof on the merits before the Lord Ordinary, to reopen the plea in a reclaiming note against the decision of the Lord Ordinary upon the facts as established in the proof. Lord Craighill said (at p. 898)—"Proof was allowed before the Lord Ordinary—against the interlocutor allowing this proof a reclaiming note had not been presented. It might have been presented, and might have been expected to be presented, when the defender was urging a plea of no jurisdiction. He did not take that course, but joined issue with respect to the question of fact, and so took his chance that the proof would turn in his favour. He must in doing so be held to have acquiesced in the jurisdiction of this Court, and is not now entitled to come to us to have the Lord Ordinary's interlocutor reversed, not upon its merits, but upon another plea which must be held to have been finally repelled." That case does not appear to me to afford the pursuer any sufficient foundation for the contention in the present case that no part of the defenders' first plea repelled by the Lord Ordinary before proof can now be considered by us.

In repelling the defenders' plea to the competency of the action—it should probably have been a plea to the pursuer's title to sue the action—based upon the transaction between the parties in virtue of which the pursuer satisfied the decree, the Lord Ordinary seems to hold that this was the only course open to the pursuer with a view to avoid sequestration of his estates. I do not think this was the case. He might have suspended the charge against him to make payment of the amount in the decree. If he had done so, he would have avoided the application for sequestration. He knew that the defenders were in the belief that he had been carrying on business in Glasgow up to the date of the decree, and that, in their opinion, he had no good defence either to payment of the account or to the decree which had been obtained. In these circumstances he chose to transact with the defenders upon the footing that he would satisfy their claims based upon the decree.

A number of cases bearing upon the conditions under which a plea of personal bar may be successfully taken against a litigant were cited to us, but these cases have no bearing upon what is the essentially different plea of transaction. In such a case the only question is whether what occurred amounted in law to a transaction between the parties. If it did, a party thereto cannot repudiate it. As the proved or admitted facts in the present case appear to me to disclose a legal transaction between the parties, I think that the defenders' pleas founded thereon ought to be affirmed and the action dismissed.

LORD ANDERSON—Three points were argued on the reclaiming note with reference to the proceedings in the Sheriff Court of Lanarkshire—(1) Citation, (2) Jurisdiction, and (3) Whether the pursuer was barred in this action from urging either of these pleas.

(1) Under the topic of citation a number of points were canvassed some of which were not without difficulty. The evidence was examined for the purpose of ascertaining whether on 26th May 1922, the date of postal citation, the pursuer had a place of business in Glasgow. Another matter of contention was as to whether the Sheriff-Substitute had validated an ineffective postal citation by procedure under section 4 (5) of the Citation Amendment Act 1882. A third matter of controversy was as to whether the Sheriff-Substitute was final in what he did under this section. If, however, it be the case that the Sheriff-Substitute of Lanarkshire had no jurisdiction to pronounce any decree against the pursuer, none of the points bearing on the question of citation need be determined. Even if the citation were unchallengeable and unimpeachable, it avails nothing if there is no jurisdiction. Logically, therefore, the plea of jurisdiction falls to be determined *primo loco*.

Jurisdiction in the Sheriff Court is regulated by the provisions of the Sheriff Courts (Scotland) Act 1907, section 6, which as amended in 1913 enacts, *inter alia*, that there is jurisdiction "(*b*) where the defender carries on business and has a place of business within the jurisdiction and is cited either personally or at such place of business." I am satisfied on the evidence that on 26th May 1922, the date on which the action purported to be commenced, the pursuer of this action neither carried on

business in Glasgow nor had a place of business there. The meaning of the subsection seems to be that there must be possession of a place of business on the day of citation, and that actual business should be conducted either there or elsewhere within the territory, not necessarily on the day of citation but on or about that date. Had then the pursuer possession of a place of business in Glasgow on 26th May 1922? He was tenant of the premises at 91 King Street till 28th May, but this circumstance does not found jurisdiction in an action unrelated to the property leased (see Sheriff Courts (Scotland) Act 1907, section 6 (*d*)). The evidence shows that the pursuer had ceded possession of these premises on 24th April to the firm of Craig & Company, who thereafter possessed them and carried on business therein. It was suggested that there was joint possession of the premises and that two businesses were carried on therein after 24th April. The defenders argued that there were two circumstances which showed that the pursuer possessed and carried on business at said premises after 24th April and down to 26th May. One was that a small brass plate bearing his name remained on the outer door. I am satisfied, however, that the non-removal of that plate, when the firm of Craig & Company took possession, was due to inadvertence. When the attention of the manager of that firm was drawn to the plate it was at once removed. The other circumstance relied on was that certain correspondence for the pursuer was delivered at said office. The evidence appears to me to establish that this correspondence consisted mainly, if not entirely, of circulars and similar unimportant communications which continued to be delivered at said premises because the senders had not ascertained that the pursuer had finally left them. I therefore attach no importance to this postal delivery as indicating that the pursuer carried on business at said premises.

The question of onus is of some importance in the determination of this plea. Where jurisdiction has been challenged it is for the person who has invoked the jurisdiction to show that it exists. I am satisfied, on the evidence, that the defenders entirely failed to discharge that onus and that it must be held that the decree which was challenged was pronounced by a judge who had no jurisdiction to grant it.

Such a decree is fundamentally null, and there would be no answer to the pursuer's demand to have it reduced were it not for certain transactions which took place between the granting of the decree and the raising of the present action. Two pleas are based on these transactions—(*a*) That the pursuer is now barred from urging his plea of no jurisdiction, and (*b*) that he has no title or interest to have the decree set aside.

As to the defenders' plea of bar the pursuer's rejoinder is that there are no relevant averments in the defences to support it. It was pointed out that the essential averments in support of a plea in bar are these—(1) That the person said to be barred made either by word or conduct certain representations, (2) that these representations were made for the purpose of inducing his opponent to take certain action, or that they had this tendency, (3) that action followed on the faith of the representations, and (4) that the person so acting was in consequence prejudiced — Rankine, Personal Bar, pp. 2-5; *Carr*, 10 C.P. 307, Brett, J., at p. 316; Bower on Estoppel, 121; *Black*, 1924 S.C. (H.L.) 24. No such averments, it was maintained, are discoverable in the defenders' pleadings. This contention appears to me to be well founded. It was suggested by the defenders that the pursuer having been invited to get himself reponed ought to have done so. But while the pursuer might thus have prorogated the jurisdiction of the Sheriff of Lanarkshire he was not bound to do so in a cause in which he was not otherwise subject to the jurisdiction. The only other point urged in support of the plea of bar was that the pursuer, having obtempered the decree by paying the whole sum decerned for, cannot now challenge the decree. I am satisfied, however, that the pursuer made the said payment, not for the purpose of discharging the decree, but with the object of getting rid of the process of sequestration. It was an emergency payment or compulsory levy made upon him for the purpose of getting rid of a harassing and injurious diligence. It is true that the payment was made without any reservation, but its purpose being what I have indicated I am not prepared to hold that the pursuer thereby barred himself from attacking an invalid decree. The defenders' plea of bar therefore fails.

As to the plea of no title or interest to sue the present reduction I was at first inclined to take the view that there was substance in this contention. It is obvious that as the sum claimed under the decree has been paid, the continued existence of the decree cannot be any disadvantage to the pursuer as regards the future. It also appeared to me that in respect of the pursuer's actings the reduction of the decree could not be of advantage to him as regards the future. This latter point, however, does not seem plain on the present pleadings and proceedings. The pursuer could, it is true, have prevented the sequestration by suspending the charge or even the threatened charge, and it may be that this supineness on his part will prevent him from recovering damages in respect of the wrongous sequestration. Again it may be that the fact of his having paid the amount due under the decree without any reservation will be a bar to any claim for repetition of that sum. But it is doubtful if there is material in the present case to enable these two points to be properly determined. They will only emerge in the subsequent proceedings which are threatened, and they can only be properly and conclusively dealt with in that process. Moreover, in a case like the present, where there is a fundamental nullity, the duty of the Court appears to be to give legal effect to the challenge based on nullity without consideration of equities or possible future consequences — *Beattie*,

6 D. 1088, *per* Lord Moncreiff, at p. 1095; *Ferguson*, 12 D. 732; *Gibson*, 24 R. 556; *Masure*, 1919 S.C. (H.L.) 112. I am therefore of opinion that the plea of no title or interest is not well founded.

The result is that the reclaiming note falls to be refused and the interlocutor of the Lord Ordinary affirmed.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Mackay, K.C. — J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent (Pursuer)—MacRobert, K.C.—A. R. Brown. Agents—Alexander Morison & Company, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

GRANT & SONS, LIMITED *v.* MAGISTRATES OF DUFFTOWN.

Expenses — Taxation — Agent and Client — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap* 61), *sec.* 1 *and* (*b*)—*Applicability — Unsuccessful Action against Local Authority—Question as to Competing Water Rights.*

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) provides — Section 1 — "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:— . . . (*b*) Wherever in any such action a judgment is obtained by the defendant it shall carry costs as between solicitor and client."

In an unsuccessful action against the local authority of a burgh for declarator of an exclusive servitude right of water and for interdict against encroachment on the servitude right for the purpose of supplying water to the burgh, *held* that as the predominating character of the action was for the purpose of determining the meaning and effect of competing water rights, the defenders were not entitled under the section to have their expenses taxed as between solicitor and client.

William Grant & Sons, Limited, Glenfiddich, Distillery, Dufftown, *pursuers*, brought an action against the Provost, Magistrates, and Councillors of the Burgh of Dufftown, *defenders*, concluding for declarator (1st) that the pursuers were in right of a servitude right to the exclusive use of the water in and from certain streams, but excepting the water supplies from certain springs as were at the date of entry of the pursuers' authors enjoyed during the pleasure of the superior of the lands by the local authority of the burgh of Dufftown, and also the said springs themselves, and reserving the rights of other proprietors, &c.; and (2nd) that the defenders had by various works executed without the permission of the superior in prejudice of the pursuers' said servitude right collected and drawn and were drawing more water than they were entitled to take, and that the defenders should be ordained (1) to disconnect their water-collecting works constructed in prejudice of the pursuers' servitude right and without permission of the superior, and (2) to take such action as might be necessary to prevent the flow of water in excess of the water drawn by them with the permission of the superior, or in any event of more water than would flow through a pipe 2½ inches diameter, and that the defenders should be interdicted from withdrawing a greater quantity of water than they were in use to take with the permission of the superior, and in particular from withdrawing more water than could be conveyed by a pipe of 2½ inches diameter.

The pursuers averred that under a feu-charter granted in 1894 by the Duke of Fife in favour of their authors with entry as at Whitsunday 1893 they were in right to a servitude of the exclusive use of the water in certain streams, but excluding the rights of proprietors and others, and excepting and reserving to the Duke of Fife and his heirs and assignees, the water supplies from certain springs as at the said date of entry were enjoyed by the local authority of the burgh of Dufftown, and also the springs themselves. They also averred that prior to the said date of entry the defenders as the local authority of the burgh of Dufftown had by permission of the Duke of Fife as superior constructed certain works whereby they were withdrawing with his permission and during his pleasure a certain portion of the water from the springs, and that by works constructed since the said date of entry they had without having obtained any further permission from the superior largely increased the amount of water which they were withdrawing to the prejudice of the pursuers' right.

The defenders denied that they had constructed new works, as alleged, since the said date of entry, and that they were withdrawing from the springs a greater quantity of water than was withdrawn by their predecessors at Whitsunday 1893. They explained that under a feu-charter granted in 1895 by the Duke of Fife in favour of their predecessors they were in right to a servitude of water so far as he had right or power to grant the same from the springs, as the same had been enjoyed by the defenders' predecessors at Whitsunday 1894, and they maintained that on the terms of the pursuers' title the pursuers had no right to object to the defenders' use of the water from the springs.

The Lord Ordinary (BLACKBURN) after a proof granted declarator in terms of the conclusions of the summons, ordained the