Lord Mure concurred.

Lord Adam—The pursuers are proprietors of property within the drainage district under the defenders' control, and having this property they pay assessment for drainage, which therefore entitles them to the use of the defenders' sewers.

I am of opinion that the defenders are bound to carry off the pursuers' sewage under certain limitations as to its character and the amount of its volume.

Under the Rivers Pollution Act the defenders are entitled to keep any liquid out of their drains which does not comply with the conditions contained in section 7 of the Rivers Pollution Act. The defenders aver that the liquid from the pursuers' mills is deleterious, but this difficulty has now been got over, for we are told that the incrustation it formed has disappeared when properly treated.

The next point is that the fluid must not prejudicially affect the other sewage for purposes of sale or application to land. No objection has been stated that the sewage will be affected for purposes of sale, but it has been argued that the fluid must not prejudicially affect land, and the question arises, whether the words of the Act apply to land in general or to a particular piece of land. If it means land in general, then it is the character of the sewage which must be taken into account. If it means a particular piece of land, then that involves a consideration not only of the quality but of the quantity of the sewage. I think we must read the Act as applying to land in general, *i.e.*, the damage done must arise from the noxious character of the sewage, and not from the amount of the sewage put on any particular piece of land which may be too limited for its reception. As I think this liquid is harmless in all senses of the Act, I consider the defenders are bound to take the sewage, and to dispose of it as best they can.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 18th December 1884 appealed against: Find and declare that the appellants are bound to receive the resultant liquid issuing from the respondents' settling ponds into the public sewers of Brechin so long as the said liquid is such that it will not prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or is not injurious from its temperature or otherwise in a sanitary point of view: Decern and ordain the appellants to allow the respondents to discharge the resultant liquid issuing from the said settling ponds into the public sewers of Brechin so long as aforesaid: Reserving to the appellants their right to apply to any competent Court in the event of any change of circumstances: Find the appellants entitled to expenses up to and including the first diet of proof in the Sheriff Court, and the respondents entitled to the expenses of the subsequent procedure in the Sheriff Court: Find the respondents entitled to expenses since the date of the Sheriff-Substitute's said interlocutor, but subject to modification, and modify the same to three-fourths of the taxed amount thereof," &c.

Counsel for the Appellants—Sol.-Gen. Robertson—R. Johnstone—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—D.-F. Mackintosh – Guthrie. Agents—W. & J. Burness, W.S.

Wednesday, January 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CRUICKSHANK *v.* GOW & SONS.

Process—Misnomer in Summons—Interdict.

A small-debt decree was obtained against "William Cruickshanks" after personal service of the summons. A charge was given thereon and a poinding followed. The defender then brought an action to have the sale under the poinding interdicted, and to recover damages, on the ground that his name was William Vincent Cruickshank, that he was not the William Cruickshanks who was the pursuers' debtor, and that he had intimated by letter when the summons was served that he knew nothing of the alleged debt. *Held* that he ought to have defended the action or obtained a re-hearing, and that the application for interdict came too late.

On 29th July 1886 J. Gow & Sons, 181 Trongate, Glasgow, raised an action in the Small-Debt Court at Glasgow against "William Cruickshanks, compositor, 78 Waddell Street, Glasgow," for the price of furniture alleged to have been supplied to him, and obtained decree in absence. On 17th August "William Cruickshanks" was charged personally under this decree, and his goods and furniture were poinded. On 18th August "William Vincent Cruickshank, 78 Waddell Street, Glasgow, brought an action in the Sheriff Court at Glasgow against J. Gow & Sons, concluding (*first*) to have the defenders interdicted from selling his furniture, and (*second*) for £25 as damages.

The complainer stated that on 13th July 1886, while he was confined to the house by illness, the defenders sent a messenger to him for payment of an alleged account; that he told the messenger that he had never bought any goods from the defenders, and owed them no account, and was then informed that the defenders had employed an officer of court to recover their account; that his wife called on the officer and explained that he owed the defenders nothing, and was promised that the matter would be inquired into and a letter of apology sent her for her trouble; that when the summons was served he sent a letter to the officer whose name was on the summons, saying that he had received it, but that he knew nothing of the alleged debt; that notwithstanding, the defenders, without inquiry, proceeded with their action, and took decree against the defender named in the summons, and thereafter wrongfully executed the poinding complained of. He further averred—"The said decree is not *ex facie* regular. The summons bears to be in name of 'William Cruickshanks, 78 Waddell Street, while the relative account thereto annexed is in name of the same person

at 70 Waddell Street. The pursuer avers that there was formerly a William Cruickshank or Cruickshanks at 70 Waddell Street, and he believes that the latter, who was a tailor, must be the debtor of the defenders." He further stated that he had lived seven years at 78 Waddell Street, and had never dealt with the defenders or received any account from them until that rendered with the summons, and that his credit and feelings had been injured by the publication of the decree in the local newspapers.

The defenders admitted that the summons was against "William Cruickshanks." They stated that their decree was against the pursuer, that it was obtained on 5th August, and that he was charged on it on 6th August.

They pleaded, *inter alia*—"(3) The pursuer not having taken the usual means of having the decree reviewed, he is not entitled to have the same set aside now, as the judgment has become final, and is not open to review."

The pursuer, in obedience to an interlocutor of the Sheriff-Substitute, consigned the sum of £12, being the amount contained in the decree.

On 27th August 1886 the Sheriff-Substitute (SPENS) sustained the third plea-in-law stated for the defenders, and assoilzied them.

"*Note.*—It seems to me that unless the pursuer got an express undertaking from the defenders to withdraw the action he ought to have appeared in Court to state that the goods were not supplied to him. Rightly or wrongly by serving the action upon him the defenders had indicated that he was the party to whom they were looking for payment. But even assuming that he had grounds for believing that the defenders had departed from their action, what excuse can be made for not seeing to the case being sisted when he was charged upon the decree in absence. I have therefore come to the conclusion that, assuming the pursuers' story to be all true, he has lost his remedy by not taking the ordinary means of bringing up the decree in absence for review."

On appeal the Sheriff (BERRY) on 12th July 1887 adhered.

The complainer appealed, and argued that the case was ruled by the case of *Brown* v. *Rodger*, December 13, 1884, 12 R. 340. There a mistake in the defender's name led to a suspension of the proceedings, and the Court refused to allow proof of an averment that the suspender had been personally cited and charged on the decree—*Spalding* v. *Valentine*, July 4, 1883, 10 R. 1092.

Argued for the respondents—The decree was against the pursuer. The mistake—Cruickshanks for Cruickshank—was trifling, and was no excuse for the appellant not defending the action. If the defence was good on the merits it should have been stated. This was an attempt to get the case re-heard. The only way to do that was under the Small Debt Act 1837 (1 Vict. c. 41), sec. 16.

At advising—

LORD JUSTICE-CLERK—I think the appellant has himself to blame. It seems that he, though the summons was served upon him, and the account as well, took no proper steps to have the alleged error rectified. I do not see that we are justified in interfering.

LORD CRAIGHILL—This man got the summons and the account. There was the same alleged error of name in both. But if he had looked he would have seen that the account showed that there had been a payment to account of the debt. That might have given him further information. But he remained at home, and took no further steps to prevent decree being taken against him. I think he has now no answer to Gow & Sons' claim.

LORD RUTHERFURD CLARK—I think the only question is, whether there is or is not a decree against the pursuer of this action. If there is, then it can be enforced against him, and that being so, we cannot enter on the merits. But it is said—and I think it is the only thing which can be said—that the decree is no decree against the pursuer, because the only decree which exists, and is said to be against him, does not set out his name correctly. If that is well founded in law, I think that the pursuer is entitled to redress. The question then comes to be, whether when the summons was left at the pursuer's house, and was erroneous to the extent only of the name being spelt "Cruickshanks" instead of "Cruickshank," he was entitled to disregard it, and assume that it was not intended for him at all, and that the decree would not affect him. I do not think he was entitled to take up that position. I think a person in the pursuer's position must know if a summons is intended for him, and if the objection to it is a good one, he is bound to appear and state it. If not, the decree which is pronounced against him notwithstanding the error, will avail against him.

The Court dismissed the appeal, affirmed the interlocutors of the Sheriff-Substitute and the Sheriff appealed against, and of new assoilzied the defenders from the conclusions of the action.

Counsel for the Appellant—Fleming. Agents—Winchester & Nicolson, W.S.

Counsel for the Respondents—Shaw. Agents—M'Gregor & Cochrane, S.S.C.

Wednesday, February 8.

SECOND DIVISION.

LYON *v.* LYON.

Succession—Simple Substitution—Evacuation.

A testator disponed his heritable property to his sister Margaret, but provided that if Margaret should marry or predecease his sister Ann, then in the first case, Ann should receive the half, and in the second, the whole property, provided that if both died without marrying, the property should go in equal shares to his two brothers George and David, or their heirs and successors. Both sisters survived the testator. Ann predeceased Margaret. Margaret died unmarried, leaving a settlement disposing, *inter alia*, of the whole heritable estate. In a competition between the heir under Margaret's