

Friday, November 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MAGISTRATES OF FALKIRK v.
NEILSON.

Prescription—Triennial—Salary of Sanitary Officer—Written Obligation—Act 1589, c. 83.

Held (a) (rev. judgment of Lord Kincairney, Ordinary) that the salary of a sanitary officer in a burgh falls under the triennial prescription; (b) that an averment by a pursuer that he had formerly held the appointment of sanitary inspector on a written agreement, and that on a certain date that appointment had been superseded, and he had been appointed, by resolution of the commissioners of the burgh, to a variety of offices involving the same duties which he had formerly performed, did not amount to a relevant averment that arrears of salary due to him since the date of his new appointment were founded on a written obligation so as to elide the plea of prescription; and (c) that the fact that the amount of an official's salary had never been definitely fixed did not prevent its falling under the triennial prescription.

William Wood Neilson, superintendent of the Falkirk and Larbert Water Trust, brought this action against the Provost, Magistrates, and Town Council of Falkirk, concluding for payment of certain sums, amounting in all to £891, 17s. 4d., which he alleged to be due to him in respect of certain offices held by him in the burgh of Falkirk, and which were made up as follows:—

	From 3rd Mar. h 1890 to 15th May 1893.	From 15th May 1893 to 5th November 1897.	TOTAL.
Inspector of Cleansing, @ £30 per annum	£96 0 0	£134 6 0	£230 6 0
Inspector of Lighting, @ £15 per annum	48 0 0	67 3 0	115 3 0
Inspector under the Margarine Act, @ £10 per annum	32 0 0	44 15 4	76 15 4
Inspector under the Contagious Diseases (Animals) Act, @ £10 per annum	32 0 0	44 15 4	76 15 4
Inspector under the Food and Drugs Act, @ £10 per annum	32 0 0	44 15 4	76 15 4
Fee for Burgh Im- provement Plans and Reports -	210 0 0
Firemaster, @ £12 per annum -	38 8 0	53 14 4	...
		£92 2 4	
Less sum paid to account of Firemaster's salary on 6th June 1897 -	- - -	6 0 0	£86 2 4

With respect to this account Neilson averred that he had, by agreement dated 12th August 1880, been appointed sanitary

inspector of the burgh of Falkirk, and that he had in March 1890 received the additional appointment of superintendent of the waterworks. With regard to what afterwards occurred his averments were in the following terms:—“(Cond. 5) The agreement of 1880 was accordingly superseded and terminated. The pursuer was appointed sanitary inspector under the Public Health Act at a fixed salary of £40, and road surveyor at a fixed salary of £10. Instead of contracting for the cartage required in connection with the Cleansing Department as the defenders had hitherto done, they resolved to supply the cartage themselves, and for that purpose appointed an assistant in the cleansing department at a wage of 30s. per week, to whom were assigned the duties of assistant-inspector of cleansing and assistant road surveyor. The pursuer was further appointed to and his services were retained in connection with the following appointments:—The inspectorship of cleansing, the inspectorship of lighting, the fire-mastership, and the inspectorships under the Margarine Act, the Contagious Diseases Acts, and the Food and Drugs Act. The Commissioners resolved to pay to the pursuer regular salaries in respect of each of these appointments. The pursuer was appointed to and his services were retained in connection with the said appointments, on the footing and on the understanding and agreement of both parties that he was to be suitably remunerated by fixed salary for each and all of the same. The defenders, however, postponed the adjustment of the amounts of said salaries, except in the case of the sanitary inspectorship, leaving the adjustment over for subsequent arrangement. The pursuer continued thereafter to discharge the whole of said duties. In July 1891 the pursuer's salary as sanitary inspector was, in consideration of the still increasing extent of the duties falling to be discharged by him as such inspector, increased from £40 to £70 per annum. The Commissioners did not, however, then increase his salary as road surveyor, nor did they fix the salaries for the other duties which the pursuer performed. The pursuer repeatedly pressed the defenders to fix the salaries therefor, but while the defenders did not dispute their liability to remunerate the pursuer, they delayed fixing any definite annual payment to be paid to him. (Cond. 6) On 15th May 1893 the Burgh Police (Scotland) Act 1892 came into operation, and on said date the offices held by the pursuer were reconstituted as follows:—He was re-appointed to the office of sanitary inspector, and was also of new appointed surveyor of the burgh, inspector of cleansing, and inspector of lighting, superintendent of the fire brigade, and master of works. It was then resolved by the Commissioners that his salary as sanitary inspector was to be the same as fixed in July 1891, namely, £70 per annum. With regard to the remuneration to be paid to the pursuer for the said offices other than that of sanitary inspector, the Commissioners resolved that he should be paid by salary, and that the

a mounts of these salaries should be 'afterwards considered.' The pursuer was also appointed to and his services were retained in connection with the duties of inspector under the Margarine Act, the Contagious Diseases (Animals) Act, and the Food and Drugs Act. This was done on the footing and on the understanding and agreement of both parties that the pursuer should be suitably remunerated for the discharge of the duties falling to him by salary, the amount of which was to be fixed at an adequate figure. (Cond. 7) In or about July 1893 the defenders fixed £27 per annum as the salary payable in respect of the appointments held by him as burgh surveyor and master of works. In January 1897 the defenders fixed the pursuer's salary as firemaster at £12 per annum; but although the pursuer has from time to time asked the defenders to fix the salaries payable to him in respect of the other appointments held by him, and to remunerate him suitably for the duties discharged by him in connection with his appointments, and has frequently brought the matter before meetings of the defenders, and of their committees, the defenders, while not disputing their liability to the pursuer, never actually fixed or paid the same."

The defender averred in effect that Neilson had been employed at a fixed salary to cover all the appointments he held, and that this salary had been regularly paid.

They pleaded, *inter alia*—" (4) The salaries sued for being prescribed, the pursuer can prove the constitution and the resting-owing thereof only by the writ or oath of the defenders."

By the Act 1579, c. 83, it is provided as follows:—"Item, it is statute and ordained be our Sovereine Lord, with advise of his three estates in Parliament, that all actiones of debt for house-mailles, mennis ordinars, servands fees, merchantes comptes, and uthir the likedebts, that are not founded upon written obligations, be persewed within three yeires, uthirwise the creditour sall have na action except he either preife be writ or be aith of his partie."

On 25th July 1899 the Lord Ordinary (KINCAIRNEY) repelled the fourth plea-in-law for the defender and ordered proof.

Opinion.—"This is an action against the Magistrates of Falkirk for payment by them of arrears of salaries said to be due to the pursuer for various public offices held by him under the Magistrates.

"The defenders by their fourth plea plead the triennial prescription. Two answers are given to that plea—(1) That the Act 1579, c. 83, does not apply to claims by officers in the public service for their salaries, and (2) that the operation of the Act is excluded because the debts said to be due 'are founded upon written obligations.'

"If I required to decide the second point I think it would be necessary to have before the Court the written obligations in question, which must be the minutes of the Town Council. I think the proper course would be to order production of such minutes, or to grant the pursuer a diligence to

recover them, and thereafter to determine whether the application of the Act was excluded on account of them. I think it would be more in ordinary course and more convenient to do so than to allow a proof before answer, leaving the question as to the application of the plea of prescription to arise in the course of the proof, which might be a competent but not a convenient course. But that point would arise only if the pursuer were held to be wrong in his first contention that the claim for arrears of official salary does not fall within the scope of the Act.

"The question so raised is general and important, and on considering the argument I am not prepared to sustain the plea. The statute applies to 'all actions of debt for house mailles, mennis ordinars, servands fees, merchantes comptes, and uthir the like debts that are not founded upon written obligations.' The arrears of salary claimed are said to be 'debts' like 'servands fees.'

"No case has been quoted in which the Act has been held to apply to salaries for public offices. Persons holding offices of the kind are not, in the ordinary sense of the words servants. They are so in a sense, for they are in the public service. But they do not stand to the magistrates, whose subordinates they are, in the ordinary relation of servants and masters. They are not, strictly speaking, creditors of the magistrates. They are paid out of the public taxes levied by the magistrates for that purpose and other purposes. But it would be a manifest extension of the Act beyond its original scope or object to include such salaries among servants' fees. No doubt the Act has been extended by decisions, but I am not prepared to give this new extension to this old Act, especially considering that if the Act were held to apply in this case, it would apparently apply to every case of employment in any public office, however important.

"Several authorities were referred to at the debate, of which *Blackadder v. Milne*, March 4, 1851, 13 D. 820; and *Barr v. Edinburgh and Glasgow Railway Co.*, June 17, 1864, 2 Macph. 1250, are perhaps the most important. But I do not think they are applicable.

"Two older decisions of closer application were quoted by the pursuer. The first is *Graham v. The Earl of Leven*, July 14, 1709, M. 11,093, in which it was held that a soldier's arrears did not fall under the triennial prescription. There might at the present day be other objections to such an action. But in that case what the Court found was 'that the three years' prescription does not take place in the case of a soldier's arrears, which is not like an ordinary servant's fee.' The other case quoted was *Nicholson v. Monro*, January 20, 1747, M. 11,080, the whole report of which in Morison is in these words—'Schoolmaster's salary held not to fall under the triennial prescription, a judgment which must have proceeded on the same reason that such a salary 'is not like an ordinary servant's fee.' It is said in

Dickson on Evidence, sec. 490, that the session papers show that the pursuer was a parochial schoolmaster. But the reporter of the case, Kilkerran, seems not to have considered that a material circumstance, and no more appears in his reports. These cases certainly support the view that claims for official salaries are not within the scope of the Act.

“For these reasons I shall repel the defender’s fourth plea, and before further answer allow a proof.”

The Magistrates of Falkirk reclaimed, and argued—The triennial prescription applied, because there was no doubt that the pursuer was a servant of the corporation. They appointed him and they could dismiss him. There was no distinction between the magistrates and any other employer. The fact that the Magistrates were not personally liable to the pursuer but only bound to pay him out of the rates, did not take the case out of the statute; every scavenger in a town was in the same position. The cases cited by the Lord Ordinary were distinguishable, because in them—*Graham v. Earl of Leven*, July 14, 1709, M. 11093; *Nicholson v. Mouro*, January 20, 1747, M. 11,080—the pursuers—in the former case a soldier, in the latter a schoolmaster—were not the servants of the defenders, and could not be dismissed by them. Cases much nearer the present were those in which it had been held that the salary of a factor was subject to prescription—*Ross v. Master of Salton*, February 12, 1680, M. 11,089; *Smith’s Children v. Earl of Winton*, December 3, 1714, M. 11,096; *Robertson v. Marquis of Annandale*, December 10, 1749; *I Paton*, 293; *Grubb v. Porteous*, March 3, 1835, 13 S. 603. (2) The argument that this was a case of written obligation was not supported by any averment on record. All that was suggested was a minute of the Town Council recording the pursuer’s appointment. If that was to be founded on, it ought to have been set forth on the record; but in any event it did not satisfy the written obligation required by the statute, which must be bilateral—*Bell’s Comm.* i. 332; *North British Railway Company v. Smith Sligo*, December 20, 1873, 1 R. 309; *Chalmers v. Walker*, 1878, 6 R. 199; *Miller v. Miller*, June 10, 1898, 25 R. 995.

Argued for the respondent—It had been decided that the Act was not to be extended to cover new cases—*Blackadder v. Milne*, March 4, 1851, 13 D. 820; *M’Kinlay v. M’Kinlay*, December 11, 1851, 14 D. 162. Thus “merchants comptes” have been held confined to shopkeeper’s accounts, and not extended to wider mercantile affairs—*Laing v. Henderson*, November 10, 1871, 10 Macph. 74. So “servands fees” should be construed as at the date of the statute, when it would never have been held to cover the case of a public official like the present pursuer. He is not a servant of the Magistrates; both he and they are part of the statutory machinery for local government. The magistrates in appointing do not act as master to servant, but as a public body who are under an obligation

to appoint an official. If he is dismissed by them he can appeal to the Local Government Board, who would decide whether his dismissal was justifiable; whereas if he were a servant the sole question would be whether in his dismissal the terms of the contract had been observed.

(2) The Magistrates are barred from pleading prescription, because by failing to fix the pursuer’s salary they induced him to allow the question to lie over until the three years had elapsed. That had been held to exclude the statute—*Caledonian Railway Company v. Chisholm*, March 17, 1886, 13 R. 773. (3) The debt was founded on a written obligation contained in the minutes of the Town Council. It was not necessary for the pursuer to have the obligation in his hands when he came into Court; that might be, as it was here, impossible. He was entitled to prove that such an obligation existed. It was not essential that it should be bilateral—*Blackadder v. Milne*, March 4, 1851, 13 D. 820.

At advising—

LORD ADAM—This is an action brought by the pursuer against the Provost and Magistrates of Falkirk for payment of arrears of salaries alleged to be due to him for various offices held by him under them.

These offices are—inspector of cleaning, inspector of lighting, inspector under the Margarine Act, inspector under the Contagious Diseases Animals Act, inspector under the Food and Drugs Act, and fire-master.

The arrears of salaries claimed embrace a period extending from 3rd March 1890 to 5th November 1897.

The claim is met by the plea that the Act 1579, cap. 83, applies to the case, and that the alleged debt can only be proved by the writ or oath of the debtor. The Lord Ordinary has repelled this plea; and the question which we have now to consider is, whether he was right in so doing?

I may remark that the plea, if sustained, would not apply to the whole of the claim made. The action was raised on 12th January 1899, so that the plea would not affect the claim for salaries, if any, falling due between 12th January 1896 and 5th November 1897.

I may also point out that it would not affect the claim for £210 “for fee for burgh improvement, plans, and reports” The pursuer avers that he was instructed to prepare these plans in October 1896. The claim, therefore, necessarily falls without the prescriptive period.

It is desirable, I think, in the first place, to see what the pursuer avers on record as to his appointment to the various offices for which he claims payment of arrears of salaries.

It appears that he first entered the service of the defenders under an agreement dated 12th August 1880 as inspector of the burgh, which he says included a number of inspectorships for various purposes, at a salary of £80. He avers that he continued to act under the agreement until March 1890 (his salary having been increased from

time to time) when the agreement was superseded and terminated. He avers that at that date he was appointed to various offices and inspectorships, of which he discharged the duties until May 1892. It is unnecessary, however, to refer further to these, because the material averments as to his appointment to the inspectorships and offices for which he now claims payment of arrears of salaries are to be found in the 6th article of his condescence. He there avers that on the Burgh Police Act coming into operation in May 1893 the offices held by him were reconstituted—that he was re-appointed sanitary inspector, and was also of new appointed surveyor of the burgh, inspector of cleaning and lighting, superintendent of the fire brigade, and master of works, and that his salary as sanitary inspector was to be the same as before. He then avers that, with regard to the remuneration to be paid to him for the said offices, other than that of sanitary inspector, the defenders resolved that he should be paid by salary, and that the amount of these salaries should be afterwards considered; that he was also appointed inspector under the Margarine Act, the Contagious Diseases Animals Act, and the Food and Drugs Act, and that this was done on the footing and understanding that he should be suitably remunerated by salary, the amount of which was to be fixed at an adequate figure. He then avers (art. 7) that the defenders fixed the salaries payable to him as burgh surveyor, and master of works, and as firemaster, but that although he from time to time asked the defenders to fix the salaries payable to him in respect of the other appointments, they had never fixed or paid the same.

I have narrated the averments of the pursuer in this detail because it was maintained to us that the operation of the Act was excluded in respect that the debts claimed were founded on written obligations.

It is true that the pursuer alleges that he originally entered the employment of the defenders in 1880 under a written agreement, but then he tells us that this agreement was terminated in 1890, and no claim is made under that agreement.

As regards the arrears of salaries now sued for, the pursuer neither refers to nor founds on any writing obligatory on the defenders in support of his claim. The Lord Ordinary says that before deciding this question it would be necessary to have before the Court the minutes of the Town Council, which he thinks must be the obligatory writing in question. I do not agree with the Lord Ordinary. The minutes are not founded on at all by the pursuer. There is no suggestion even as to what the pursuer hopes or expects to find in them to enable him to prove the constitution and resting-owing of the debt sued for. The pursuer has no plea on record that the operation of the Act is excluded in respect that the claim is founded on obligatory writings, and if he had had I should have been prepared to hold that there were no averments on record relevant to support it.

It was further maintained to us that the Act did not apply, because the amount of the salaries alleged to be due to the pursuer had never been fixed by the defenders. But I think there is nothing in that contention. If the pursuer had been unable to sue for them during the currency of the years of prescription the case might have been different. But there was nothing to prevent him from suing for them. He might have brought an action against the defenders, in terms similar to the present, at any time during the currency of the years of prescription.

That brings us to a consideration of the grounds on which the Lord Ordinary has held that the Act does not apply in this case.

Now, I see nothing in the nature or character of the employment or duties of the defenders to take the case out of the Act. It is quite settled that the word "servant" in the Act is not limited to persons employed in a menial capacity. It has been held to embrace agents, factors, engineers, surgeons, and the like, and I do not understand the Lord Ordinary to think that an inspector of cleaning and lighting would not also be considered a servant in the sense of the Act, as interpreted by the decisions of the Court, if only he had been employed by a private employer. "No case," he says, "has been quoted in which the Act is held to apply to salaries for public offices." I do not know what the result might be in the case of a person holding a public office in Her Majesty's service. But that is not the case we have to consider here. The pursuer was employed by the Magistrates of the burgh, no doubt, for the benefit of the inhabitants of the burgh. But I do not see why on that account he does not stand to the Magistrates in the ordinary relation of master and servant. He is employed by them, he can be dismissed by them, and he is paid by them. They (that is, persons in the pursuer's position) are not, the Lord Ordinary says, strictly speaking, creditors of the Magistrates. They are paid out of the public taxes levied by the Magistrates for that and other purposes. That the pursuer considers himself, and is, the creditor of the Magistrates sufficiently appears from the existence of the present action; and I do not see that it concerns the creditor whence the funds are derived from which he is paid, whether out of the Magistrates' own pocket or out of the burgh rates. If the Lord Ordinary's views are sound it would seem to follow that the scavengers and lamplighters employed in a burgh are not to be considered as the servants of the Magistrates. Equally with the pursuer, they are not employed for the personal service of the Magistrates but for the benefit of the burgh, and they are paid out of the rates. I should hesitate to say that a scavenger's wages are not "servant's fees" in the sense of the Act.

I do not think that the cases of *Graham* and *Nicholson*, referred to by the Lord Ordinary, support the view that claims for official salaries such as the present are not

within the scope of the Act. In the first of these cases it was found "that the three years' prescription takes no place in the case of a soldier's arrears, which is not like an ordinary servant's fee." It does not appear what the terms of a soldier's engagement were at the date of the case (1709), but if they at all resembled those of the present day they were certainly not like an ordinary servant's fee.

In *Nicholson's* case the whole report is in these words—"Schoolmaster's salary held not to fall under the triennial prescription." If the schoolmaster, as is probable, was a parochial schoolmaster, there is a good ground for the judgment, as he held his appointment *ad vitam aut culpam*. If he was not a parochial schoolmaster, the decision would scarcely be held to be sound law in the present day.

I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that it should be found that the Act applies to all claims prior to 12th January 1896, which can only be proved by the writ or oath of the defenders, and the case remitted to the Lord Ordinary to proceed as may be just.

LORD KINNEAR—I agree with your Lordship. I also think it clear that this action is not founded on written obligation. That question depends entirely on the condescendence for the pursuer, because it is there only that we are to look for the averments which set forth the grounds of action, and I am unable to find any statement of a written obligation on which it is possible for him to found. He sets out nothing but a series of verbal contracts, following, no doubt, upon a written agreement, which, however, was superseded and determined. And these are the contracts which he seeks to establish by a proof *prout de jure*.

Now, if that is so, I quite agree that we cannot entertain the suggestion that a diligence should be allowed now to recover the minute-books or other documents. The action cannot be founded on writings constituting obligations in favour of the pursuer, and enforceable by him, which are not alleged to have been delivered to the pursuer at any time, and the terms of which are unknown to him even now. It is perfectly obvious that no recovery of documents could alter the nature of the action, or change the grounds on which the pursuer's claim is rested or the averments he has already made, and on which the record has been closed. It may very well be that minutes of the Town Council or other writings may be recovered hereafter under a diligence which may be very good evidence to instruct the pursuer's claim. That is a totally different matter. It is elementary that a writing may be sufficient to prove, though it does not constitute an agreement; and the statute which we are construing proceeds on that distinction, for it enacts that if certain debts are not founded on writing, then if action is brought for them after the lapse of three years, they may be proved by writing, or by oath of party, and not by oral evidence. Therefore, although the pursuer cannot found on an

obligation constituted by writings and enforceable against the defenders by their own strength, it may very well be that if the Act of 1579 is found to apply, he will be entitled to recover by diligence documents tending to prove his debt. But in the meantime we must determine the question raised, with reference to the statements the pursuer himself, as set forth in the condescendence, and so considering it, I cannot say I have any doubt that if the statute is otherwise applicable, it is not excluded on the ground that the alleged debts are founded on a written obligation.

If that be so, the material question is, does the statute apply to a person in the position of the pursuer? On that question I agree with all that your Lordship has said. The statute applies not only to "servant's fees" and the other debts specifically enumerated, but to "servant's fees, &c., and the other like debts." Now, it is clear enough that the kind of debts described as "other the like debts" are not susceptible of very exact definition, because as is pointed out by Lord Mackenzie in a leading case on this subject (*Blackadder v. Milne*, March 4, 1851, 13 D. 820, at p. 827), likeness necessarily "implies the existence of some point of difference," and therefore the Court has to determine in each case as it arises whether the debt has a sufficient resemblance to one or other of the categories of debts specified in the statute to require that it shall fall within the general description. The question has arisen in a great variety of cases which are valuable as guides in the application of the statute. Your Lordship has observed that actions for remuneration by various classes of persons have been held to fall within the statute as "other the like debts." That many of these cases cannot on any reasonable ground be distinguished from the present appears certain. I do not recapitulate the instances of employment which your Lordship has mentioned, but I am unable to doubt that the present case falls within the description of action for "servant's fees," and the other like debts. It is like an action for "servant's fees," in respect that it is for a debt which ought in the ordinary course to have been paid before the lapse of three years from the time when it became due, and that it is a claim for salary earned by service under a contract of employment, and I confess I am unable to see that in any of the cases any nearer or other point of resemblance has been required in order to bring a claim within the statute. It is said that the pursuer is a public officer, and therefore that his salary does not fall under the triennial prescription. We have no definition of that term to show that it applies in ordinary or technical language to any definite class of persons. The pursuer is not a servant of the Crown or of any department of State; he is employed by the Magistrates of a parliamentary burgh for the service, not of the public, but of that particular community. It may be that the words "public officer" are properly applied to describe his position, but if they import that his relation to the

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

LORD M'LAREN concurred.

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

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

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

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

Friday, November 17.

FIRST DIVISION.

JAMIESON'S TRUSTEES v. JAMIESON.

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

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

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

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Renfrew.]

COMMISSIONERS OF BURGH OF POLLOKSHAW v. M'LEAN.

Sheriff—Jurisdiction—Possession of Heritable Property within County.

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

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

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

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

No appearance was made for the tenant.

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

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

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

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