hand, that the present defender is the disponee infeft of Mrs Anderson, the widow of the original Lewis Anderson, who had allocated to his property the sittings in this pew, No. 22, as part and pertinent of his estate within the parish of Elgin. The result at which I arrive is that that to which the Sheriff came is right, for he has refused interdict, but the grounds on which he refused it I cannot adopt.

Lord Mure—I am of the same opinion. I think it was made abundantly clear by the principle of the decisions cited to us, who the parties are who are liable to be assessed for the building of a parish church. I need not point out that if this question had been raised in a purely landward parish it is quite settled that the right in church sittings could not be separated from the property to which they had been originally attached, because the pew is a pertinent of the property according to all the authorities. There are no doubt special cases to which your Lordship has referred, such as that of magistrates having power to acquire right for the inhabitants of the burgh, but that case does not arise here. In the present circumstances the division of the parish church has been made on precisely the same principle as if the parish had been a purely landward one. This seat was attached to a property, and to that property it must remain attached. I cannot therefore see any ground in law by which an assignation such as we have here could be made the means of transferring from the defender's predecessor the title to this seat.

Lord Adam—The solution of this question lies in the principle stated by Mr Balfour that the right to the seats in a parish church is a pertinent of the land, and cannot be separated from the land to which the seats have been apportioned. That, I think, is invariably the rule in landward parishes, and I did not understand the Dean of Faculty to dispute the point. In the present case, though the lands lie partly within the burgh, the division of the church area proceeded as if it had been an entirely landward parish. The seats were allocated to each owner of land, and that being in my view a perfectly legal mode of allocation, I think the same result must follow as if this had been an entirely landward parish. I therefore concur in the opinion of your Lordships, and I am authorised by Lord Shand, who is unable to be present, to say that he also takes the same view.

The Court recalled the interlocutor of the Sheriff-Substitute, and refused the petition.

Counsel for the Pursuer—D. F. Mackintosh—Fleming. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender—Balfour, Q.C.—H. Johnston. Agents—Philip, Laing, & Traill, S.S C.

Friday, November 18.

FIRST DIVISION.

[Lord Fraser, Ordinary.

ALSTON *v.* MACDOUGALL.

Process—Summons—Commencement of Action—Citation of Defender.

In all cases the commencement of an action is the time at which the defender in the action is cited.

Process — Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *secs.* 3 *and* 4—*Public Health (Scotland) Act* 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 118.

The Public Health Act 1867 provides by sec. 118 that "every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen." The Citation Amendment Act 1882, after providing by section 3 for citation by means of posting a registered letter containing the summons and warrant of citation, declares that such posting "shall constitute a legal and valid citation." Sec. 4, sub-sec. 2, provides that in cases of service by registered letter "the *inducia* or period of notice shall be reckoned from twenty-four hours after the time of posting."

The summons in an action, to which the 118th section of the Public Health Act applied, was served by registered letter posted upon the evening of the 3d of March. The cause of action had arisen upon the 3d of January. *Held* that the action had been commenced within two months, as the posting of the registered letter upon 3d March was "a legal and valid citation" of the defender.

This was an action of damages for slander at the instance of Mrs Jane Kitchen or Alston, who had been matron of the Cowglen Fever Hospital, against James Macdougall, a member of the sanitary committee of the Parochial Board of the parish of Eastwood in the county of Renfrew.

The Cowglen Hospital was conducted under the Public Health (Scotland) Act 1867, and as such was under the control and management or superintendence of this Parochial Board and local authority. The slander which the pursuer complained of was alleged to have been uttered by the defender at a meeting of the Parochial Board and local authority of Eastwood on 3d January 1887.

The defender pleaded, *inter alia*—"(2) The present action should be dismissed, in respect that it is excluded by section 118 of the Act 30 and 31 Vict. c. 101."

This section provides that "the local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act, and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts, in respect of all costs, liabilities, and charges to which he may be subjected, and every action or

prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen."

The Citation Amendment (Scotland) Act 1882 (45 and 26 Vict. c. 77), sec. 8, provides—"In any civil action or proceeding in any Court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the Court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice might lawfully execute the same, or by an enrolled law-agent, or by sending to the known residence or place of business of the person upon whom such summary, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the officer of the keeper of edictal citations, where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing a copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

On 15th June 1887 the Lord Ordinary sustained the second plea for the defender and dismissed the action.

"*Opinion.*—A question of some novelty on the construction of the Citation Amendment Act is raised in this case. It is an action brought by the matron of the Cowglen Fever Hospital, Pollokshaws, near Glasgow, claiming damages against a member of the local authority for the parish of Eastwood, who, at a meeting of that board, had used in reference to her, language which she describes as slanderous. The Lord Ordinary is not at present called upon to pronounce any opinion as to the relevancy of the accusation, and this because of preliminary pleas which have been stated by the defender . . . the second plea-in-law for the defender, which is that 'the present action should be dismissed, in respect that it is excluded by section 118 of the Act 30 and 31 Vict. c. 101,' must be sustained. This section provides—[*reads section quoted above*]. Now, has the present action been commenced within two months after the cause of action has arisen? The Lord Ordinary is of opinion that it has not. The cause of action originated on the 3d of January 1887 by the speech of the defender at the meeting of the local authority. The summons in the action was signeted on the 3d of March 1887. It was not served by a messenger-at-arms, the pursuer contenting herself with the more easy and economical, but at the same time perfectly competent way of serving the summons by a registered letter. This letter was registered between the hours of five and six p.m. on the 3d of March, the last day of the two months. Now, it could not reach the defender on the same day, and it was for that kind of case that sub-section 2 of section 4 of the Act 45 and 46 Vict. c. 77, was enacted, which says that 'the *inducia* or period of notice shall be reckoned from twenty-four hours after the time of posting.' Therefore the time of notice must be reckoned in the present case from the 4th of March 1887, and consequently more than two months elapsed before the commencement of the present action, and therefore it must be dismissed."

The pursuer reclaimed, and argued—The action was commenced within two months of the cause of action arising—*Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708. Had this summons been served by a messenger on 3d March it would have been in time. But by the 3d section of the Citation Amendment Act of 1882 it was provided that the posting of a summons "shall constitute a legal and valid citation." The summons here was posted on the 3d of March, so the defender was thus validly cited within the two months. Further, this action was commenced within the two months, because the signeting of the summons was the commencement of the action—Stair, iv. 3, 20; Ersk. iii. 6, 3; *Aitken* v. *Dick*, July 7, 1863, 1 Macph. 1038; *Dunlop* v. *Higgins*, July 2, 1847, 9 D. 1407, and 6 Bell's App. 195; *Thomson* v. *James*, November 13, 1855, 18 D. 1; *Charleson* v. *Duffes*, June 10, 1881, 8 R. (J.C.) 34.

Replied for the respondent—The commencement of an action was the execution of the summons—*Ferguson* v. *M'Ewan*, February 7, 1852, 14 D. 457. The Citation Amendment Act provided a more economical mode of citation, but one attended with risk; if the pursuer selected that method of executing her summons she must run the risk. This letter should have been posted on the 2d of March to have reached the defender in time.

At advising—

Lord President—Two points have been dealt with by the Lord Ordinary in the interlocutor which is now under review. In the first place, it was maintained by the pursuer that this action was commenced "within two months after the cause of action" had arisen, because the summons was signeted within the two months, and the Lord Ordinary has held that the signeting of a summons is not the commencement of an action. In that judgment I entirely concur. I think that in all cases the commencement of an action is the time at which the defender in the action is cited, and therefore it is impossible to sustain the mere signeting of a summons, of which the defender may not hear for a long time afterwards, as the commencement of an action within the meaning of this class of statutes.

But then there is another question which has been decided by the Lord Ordinary, and that relates to the execution of the summons. That question is, whether this summons was executed within the two months? The cause of action had arisen on the 3rd of January, and the summons was sent on the 3rd of March. Was the summons, then, executed within the two months? or,

in other words, was the defender cited on the 3rd of March? The execution shows sufficiently what took place on the 3rd of March. A post-letter containing the summons and all the other particulars required by the statute, to which I am about to refer, was posted on that day by the pursuer's agent. Now, the 3rd section of the Citation Amendment Act of 1882 provides that the summons, warrant of citation, or of service, or judicial intimation, may be served as at present; or there is the alternative, that service may be made by sending "a registered letter by post containing a copy of the summons or petition or other document required by law in the particular case to be served with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

It does not appear to me that these words are in any way ambiguous. They distinctly imply that the posting of a letter with the contents here described shall constitute a legal and valid citation.

Now, in order to give the fair effect to the meaning of these words, I cannot resist the conclusion that this defender was cited upon the 3rd of March. The posting of a letter is not an ambiguous term. It is to put the letter into the post-office, and so putting it out of the power of the writer to recal or withdraw it, because as soon as it passes under the control of the Postmaster-General it cannot under any circumstances be recalled. Therefore the posting of this letter —that is to say, the putting it into the post-office out of the hands of the writer—constitutes in itself a legal and valid citation, and that this is so is fully borne out by the terms of the first schedule appended to the statute. The only answer which was made to this—and it seems to have been an answer which satisfied the Lord Ordinary—is founded upon the 4th section of the statute and the 2nd sub-section, which provides that the *inducia* or period of notice in the case of citation by posting, is to be reckoned from twenty-four hours after the time of the posting of the letter, and the Lord Ordinary seems to think that this is inconsistent with the notion that the posting or putting the letter into the post-office constitutes in itself a legal and valid citation. It does not, however, appear to me that there is any inconsistency between these two things. The one section—the 3rd—says that the posting shall constitute a legal and valid citation; the 4th section, sub-section 2, says that the *inducia* shall not commence to run, as in the ordinary case, from the date of the citation, but from twenty-four hours after the date of citation. I think therefore that the two sections are quite in harmony with one another, as the whole object of the latter provision is to make the *inducia* longer where the defender is cited by means of a post-letter.

I am therefore of opinion that the view of the Lord Ordinary upon this point is erroneous, and that the defender was well cited within the period prescribed by the Act of Parliament.

Lords Mure and Adam concurred.

Lord Shand was absent.

The Court recalled the Lord Ordinary's interlocutor, repelled, *inter alia*, the second plea-in-law for the defender, and remitted the cause to the Lord Ordinary.

Counsel for the Pursuer—Darling—G. W Burnet. Agent—R. Elmslie, S.S.C.

Counsel for the Defender—Guy. Agent—F. J. Martin, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SINCLAIR *v.* M'EWAN.

Contract—Sale—Rejection—Conform to Contract —Timeous Rejection.

A furniture dealer sold to the proprietor of an hotel several lots of bedroom furniture at a fixed price for each lot, and the articles were delivered on or before 12th July. Each lot included a straw palliasse. About the beginning of August it was found that these palliasses were swarming with minute insects, which had spread to other portions of the furniture. Intimation was made to the seller, who on 11th August removed the palliasses and supplied others in their stead; he also sent a man in his employment to remove the insects from the rest of the furniture, which was successfully done by the end of November. The purchaser, on 24th January 1887, after an action had been raised for payment of the price, rejected the furniture on the ground that the insects might return. *Held*, on the evidence that the furniture, with the exception of the palliasses, was, when delivered, conform to contract, and that the spreading of the insects was not a sufficient ground for rejection.

Opinions that there had not been timeous rejection.

This was an action at the instance of Alexander M'Ewan, timber merchant, Wick, against Alexander Sinclair, auctioneer, Wick, for payment of £454, 1s., the amount of an account for furniture supplied by the pursuer to the defender.

The facts of the case were these—Sinclair, the defender, was the proprietor of an hotel in Wick, of which a person named Bruce was tenant. The pursuer submitted estimates for supplying the hotel with furniture, and these estimates were accepted by the defender. The estimate for each lot was separate, and was separately accepted. The defender admitted liability for the price of certain lots of the furniture, but denied liability for the sum of £223, 11s. 6d., the price of eight lots of bedroom furniture, on the ground that the articles were unfit for the purpose for which they were supplied. Each of these lots included, among other articles, a straw palliasse or mattress. The furniture was delivered to the defender between 5th June and 12th July 1886.