The lender abstained from giving such intimation in respect of the undertaking.

The defender says now that he was under essential error when he gave that undertaking, and had in his mind a different property in Windsor Quadrant, and not the property in Windsor Circus. This error was entirely his own error. It was not an error which anyone had done anything to induce. He is not in these circumstances entitled to an issue of essential error in order to prove that he made this error, and so to set aside his obligation. No authority has been cited to us to justify such a contention, and the recent authority (*Stewart* v. *Kennedy*, June 25, 1889, 16 R. 857, and H. of L. March 10, 1890, 27 S.L.R. 469) is to an opposite effect.

I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK—I think there was a binding contract and that no relevant ground has been stated upon which it should be set aside.

LORD LEE—I agree in thinking that no ground has been shown for interfering with the interlocutor of the Lord Ordinary.

LORD YOUNG was absent in the Justiciary Court.

The Court adhered.

Counsel for Pursuers and Respondents—MacWatt. Agents—Mack & Grant, S.S.C.

Counsel for Defender and Reclaimer—Goudy. Agent—Thomas Dalgleish, S.S.C.

Friday, May 23.

FIRST DIVISION.

[Lord Trayner, Ordinary.

BRAND *v.* SMITH (CLERK TO THE ARBROATH POLICE COMMISSIONERS).

Jurisdiction—Review—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 397.

Section 199 of the General Police and Improvement (Scotland) Act 1862 provides, *inter alia*, that if any house within the burgh be not drained to the satisfaction of the Commissioners, they shall provide for the drainage of the house, and recover the expense from the owner. Section 397 of the statute provides for notice to proprietors before works are authorised or performed; and further enacts—"It shall be lawful for any person whose property shall be taken or affected . . . to appeal to the sheriff from any order made or notice given by the commissioners in respect of such matter, . . . and all such appeals, . . . and all other appeals to the sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

A proprietor, upon whom a notice had been served relative to certain drainage operations on his property, appealed to the Sheriff-Substitute, on the ground that the notice was not authorised by the Commissioners, and that the property was sufficiently drained. The Sheriff-Substitute found that the notice was unauthorised, but had been subsequently sanctioned by the Commissioners, and ordered new notice instead of the former irregular procedure. He found further, that the property was not drained to the satisfaction of the Commissioners, and to that extent dismissed the note of appeal.

The proprietor brought a reduction of the Sheriff's decree, on the ground that the notice having been null and void and unauthorised, there was no process before the Sheriff-Substitute in which he could competently issue such a decree.

Held that as the matter in the notice and the decree were within the scope of the statute, the clause of finality contained in section 397 applied, and the action *dismissed* as incompetent.

This was an action of reduction by Robert Brand, builder, Arbroath, of an interlocutor of the Sheriff-Substitute of Forfarshire pronounced in an appeal taken by him against a notice and resolution of the Commissioners of Police of Forfarshire relative to certain drainage operations which they proposed to carry out.

The summons was raised in the following circumstances:—The pursuer, who was proprietor of certain heritable subjects in the burgh of Arbroath, received on 7th December 1888 a notice signed by the Superintendent of Police of the burgh in the following terms:—"Sir,—By clause 199 of the General Police and Improvement (Scotland) Act 1862 it is enacted that 'If any house or building within the burgh be at any time not drained by a sufficient drain or pipe communicating with some sewer or with the sea to the satisfaction of the commissioners, and if there shall be such means or drainage within 100 yards of any part of such house or building, the commissioners shall construct or lay from such house or building a covered branch drain or pipe of such materials, of such size, at such level, and with such fall, as they think necessary for the drainage of such house or building, its areas, water-closets, and offices; and the expense thereof shall be recoverable from the owner of such house or building, over and above any sum that may be charged for the use of the sewers as above provided for.' You are therefore hereby informed that the Commissioners of Police are about to lay down proper pipes to carry the sewage into the main drain from your property at No. 34 St Mary Street, Arbroath (back land), occupied by Mrs Stewart, Arbroath, and that

the expense of constructing the same will be charged against you, all in terms of the above recited Act."

The pursuer appealed to the Sheriff of the county of Forfar in terms of the said General Police and Improvement (Scotland) Act 1862, sections 396 and 397, against the said notice and the said pretended resolution of the Commissioners, on the following grounds—(1) That the Commissioners of Police never passed an order or resolution to lay down the pipes in question; (2) that the said notice given to the pursuer by the said Duncan M'Neill was not authorised by the Commissioners, and was insufficient; and (3) that the said property was already well and sufficiently drained.

After various procedure in the cause the Sheriff-Substitute (ROBERTSON) on 21st December 1888 pronounced the following interlocutor and note:—"The Sheriff-Substitute having heard parties' procurators on the appeal by Robert Brand, and having taken evidence in the summary way provided by section 397 of the Police and Improvement (Scotland) Act, Finds that the Commissioners of Police are bound under the above section of the Act to give notice to the appellant of their intention to alter the drainage on his property: Finds that the notice which was sent to him by the Superintendent was sent without the knowledge, sanction, or authority of the Commissioners: Finds that since the present appeal was taken the Commissioners have met and sanctioned the notice, and have resolved to execute the alterations alluded to in the present note of appeal: Finds in law that the procedure is informal and irregular, and ordains the Commissioners of new to send notice to the appellant: Finds, with reference to the merits, that the appellant's property is unhealthy and damp, and is not drained to the satisfaction of the Commissioners, and to this extent dismisses the note of appeal, and refuses to quash the resolution of the Commissioners complained of: Finds the Commissioners entitled to expenses, modified to one-half: Remits to the Auditor, and decerns.

"*Note.*—I think that before any alterations on a man's property are commenced he should receive notice of what the Commissioners propose to do. The alterations proposed on the appellant's property are those referred to in section 199 of the Act, and although nothing is said in that section about notice, there is a general instruction given in section 397, to give notice to proprietors before works are authorised or performed. And accordingly the Superintendent of Police did send a notice to the appellant. But he did this at his own hand and without sanction. It is quite true that the Commissioners have since met and sanctioned the performance of the work; and that they have approved of the notice. This, however, is an inconvenient and irregular way of doing business, for if their Superintendent of Police does anything hasty or without due consideration, the Commissioners are tempted to back him up or else throw him over. For example, in the present case the Superintendent of Police admitted in the witness box that he had not full information when he issued the notice and resolved upon these works. He thought that the roof water was not conducted into pipes, whereas in point of fact it is. He never knew that there was a drain filled in with broken metal behind the house, but thought that the damp soil touched the back wall down to the foundation. These are facts that he did not know of, and I am not surprised that the appellant complained. But when everything is said and done, the fact remains and was clearly proved that the Commissioners are still not satisfied, and that the appellant's property is unhealthy and damp.

"A mass of evidence was led by the appellant to show that his property is well drained, and a mass of evidence was led by the Commissioners to show that it is not. If this were an ordinary case I would require to sift the evidence and say where the truth lay. But I am not to be the judge of this matter—the Act says the Commissioners are to be satisfied—and as I see they are not satisfied the work must go on.

"As to expenses, the Commissioners have been successful on the merits of the case, but not on the preliminary pleas which affect the procedure. And the appellant was so far justified in coming to the Sheriff."

The pursuer averred that the notice served upon him on 7th December 1888 was null and void, it being served without the authority of the Police Commissioners, and that as without authorised notice there was no proper process before the Sheriff-Substitute his decree was illegal.

The defenders averred that sec. 397 of the General Police (Scotland) Act 1862, which sanctioned appeals to the Sheriff, declared that his decision should in all cases be final and conclusive, and not subject to review in any manner of way.

The defenders pleaded, *inter alia*—(1) No jurisdiction; and (2) the present action is incompetent.

By section 199 of the General Police and Improvement (Scotland) Act 1862, it is enacted that, 'If any house or building within the burgh be at any time not drained by a sufficient drain or pipe communicating with some sewer or with the sea, to the satisfaction of the commissioners, and if there shall be such means or drainage within 100 yards of any part of such house or building, the commissioners shall construct or lay from such house or building a covered branch drain or pipe of such materials, of such size, at such level, and with such fall, as they think necessary for the drainage of such house or building, its areas, water-closets, and offices; and the expense thereof shall be recoverable from the owner of such house or building, over and above any sum that may be charged for the use of the sewers as above provided for." Section 397 provides . . . . . "It shall be lawful for any person where property shall be taken or affected . . . to appeal to the sheriff from any order made or notice given by the commissioners in respect of such matter . . . and all such

appeals . . . and all other appeals to the sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

On 10th July 1889 the Lord Ordinary (TRAYNER) repelled the preliminary defences for the defender in so far as insisted in against satisfying the production.

"*Opinion.*—The defenders plead that the present action is (1) incompetent, and (2) that the Court has no jurisdiction to entertain it, on the ground that the Sheriff's judgment, which is sought to be reduced, was pronounced in proceedings taken under the General Police Act 1862, and is therefore final, and not subject to review. If the proceedings and the judgment are within and conform to the statutory provisions, no doubt the finality clause relied on by the defender would exclude all review. But the pursuer avers (and the findings of the Sheriff, as quoted on record, afford *prima facie* support to the averment) that the proceedings of the defender, and especially the notice which forms the groundwork of their proceedings, are null, in respect of disconformity to the statutory requirements. If the defender and the Sheriff have gone beyond the statute, have disregarded it, or acted in opposition to its provisions, then the finality clause will not protect their proceedings or his judgment. Besides, I am not asked to review the Sheriff's judgment, but to set it (with the relative proceedings) entirely aside, as disconform to statute. I am certainly not prepared to sustain the preliminary defences now urged, at all events at this stage of the case, and I will repel them in so far as pleaded against satisfying production. When the whole proceedings are before me, and a record made up on the merits, the defenders may repeat their pleas to competency and jurisdiction if they think them maintainable.

"I cannot refrain from saying that I think this is an unfortunate litigation, and one which it can serve no good purpose to continue. The parties would do well to consider whether it should be carried any further. The judgment of the Sheriff seems to me one which it will be difficult for the defender to maintain, in the face of the finding that the original notice was not one issued by the Commissioners, but by their inspector, without authority. I refrain from saying anything more about the Sheriff's judgment in the meantime, in the hope that the parties may by arrangement make further observations upon it unnecessary."

The defender reclaimed, and argued—That the Sheriff-Substitute's decree was within the scope of the Act, and that being so, it fell under the provisions of section 397, and was final and not subject to review. Whether the Sheriff had acted rightly or wrongly was not a matter which it was within the province of the Court to determine, and the present action therefore fell to be dismissed as incompetent—*Graham* v. *Mackay*, February 25, 1845, 7 D. 515; *Macdonald* v. *Dobbie*, January 14, 1864, 2 Macph. 407; *Lennon* v. *Tully*, July 12, 1879, 6 R. 1253; *Greenock Board of Police* v. *Liquidator of Greenock Property Investment Society*, March 13, 1885, 12 R. 832; *Robertson* v. *Pringle*, February 5, 1887, 14 R. 474.

Argued for the respondent—The notice sent to the pursuer was irregular, and so was not a notice under the statute. It was not authorised by the Commissioners, and the effect of the Sheriff ordering it to be served anew was that it was only the procedure following thereon which was in accordance with the statute. All prior procedure was so irregular as almost to amount to oppression. At the time when proof was led before the Sheriff, there was, strictly speaking, no process before him, and all that followed was null and void, and the decree pronounced in such circumstances was *ultra vires* of the powers conferred on him by the statute. In such a case reduction was a competent remedy — *Crosbie* v. *M'Minn*, June 8, 1866, 4 Macph. 803; *Lord Advocate* v. *Police Commissioners of Perth*, December 7, 1869, 8 Macph. 244; *Stirling* v. *Hutcheon*, May 25, 1874, 1 R. 935; *Adam* v. *Police Commissioners of Alloa*, November 24, 1874, 2 R. 143.

At advising—

LORD PRESIDENT—I cannot agree with what the Lord Ordinary has done in the present case. The interlocutor reclaimed against bears that the preliminary defences are repelled "in so far as insisted in against satisfying the production." If, however, the action is incompetent, then I cannot see how either the Lord Ordinary or we can entertain it either to the extent of satisfying the production or, indeed, to any extent whatever. There is only one course which can be followed if the action is to be held incompetent, and that is that it must be dismissed. The question is, whether this action is incompetent under the provisions of section 397 of the statute, and I for my part am prepared to hold it is. It is just in cases of this kind that the Legislature has provided that the interlocutor of the Sheriff shall be final and not subject to review.

If in the course of their actings the Commissioners and the Sheriff, in reviewing their actings, have clearly gone outwith the provisions of the statute, then an entirely different state of matters would arise from what we have here to deal with, but it is obvious from the proceedings in the present case that both the Commissioners and the Sheriff were quite within the scope of the statute. The subject-matter was drainage, which is one specially committed to them by the statute, and it is provided that orders pronounced by the Commissioners dealing with this subject are to be appealable to the Sheriff.

It is to be observed that no mere irregularity in procedure will open the door to an appeal to this Court, because any such right of appeal is expressly excluded by the finality clause in the statute. This is the

principle upon which all that class of cases which arise under the Small Debt Act falls to be determined, and in all of these review is expressly excluded.

If the judgment of the Sheriff-Substitute is to stand, which, in my opinion, it must, appeal being, as I have observed, expressly excluded, then the present question is clearly *res judicata*.

I am therefore for dismissing this action as incompetent.

LORD ADAM—I am of the same opinion. The respondent here is a builder in Arbroath, and upon 7th December 1888 he received a notice under the General Police and Improvement Act of 1862 that the Commissioners of Police were about to lay down certain drain pipes to carry the sewage from his lands into the main drain, and that the expense of constructing the works would be charged against him in terms of the Act. Against that notice and the operations contemplated in it, the respondent appealed to the Sheriff, who, after hearing parties, pronounced the interlocutor which is now sought to be reduced. The judgment of the Sheriff was on the merits, and it is not disputed that the findings in it were within his jurisdiction to find. That being so, and the judgment having been pronounced under the Police Act, the question is whether it is subject to review? It has been urged that the judgment is bad because the Sheriff has held a certain notice sent by the Sanitary Inspector on behalf of the Commissioners, but without their authority, to be a good and sufficient notice under the statute. Whether in so holding the Sheriff was right or wrong is not a matter which it is our province to determine. We cannot touch the judgment on any such ground, and so, as I hold that the provisions of sec. 397 of the statute are applicable to the present case, it follows that the interlocutor of the Sheriff-Substitute appealed against is final and is not subject to review. I am of opinion that the interlocutor of the Lord Ordinary must be recalled and the action dismissed.

LORD M'LAREN concurred.

LORD SHAND was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the 1st and 2nd pleas-in-law for the defender, and dismissed the action.

Counsel for the Pursuer—Kennedy—Law. Agents—T. J. Gordon & Falconer, W.S.

Counsel for the Defender—Murray—C. S. Dickson. Agents — Webster, Will, & Ritchie, S.S.C.

Saturday, May 24.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MOORE *v.* ROSS.

Reparation—Personal Injury—Fall through Trap-Door — Contributory Negligence—Relevancy—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 8—*Superintendent.*

A laundress sued her employer for damages for injury sustained by falling through a trap-door which afforded the only communication between the upper and lower flats of the laundry.

The pursuer alleged that she had carried clothes from the wash-house below to the drying flat above. "The door was shut when she began hanging up the clothes to dry, but when her back was turned towards it, and she was so engaged, someone left the trap-door open. After she had put up some of the clothes to dry, she stepped backwards while still in ignorance of the door being open, and fell down through the open trap-door to the door beneath, a distance of about 10 feet. It is explained that the defender's forewoman was present in the drying-room when the door was left open, and the pursuer fell through in the manner described; and it was either left open by her, or through her negligence in failing to see that it was kept shut while pursuer was engaged at her occupation. The pursuer has thus been injured through the fault of the defender in allowing a trap of a dangerous construction to be used as the usual and ordinary means of communication between the two apartments aforesaid, and also through her failure to have it so constructed that it would shut automatically. The defender was also at fault in failing to have a guard of some description provided which would have prevented the pursuer or any of her fellow-workers from falling down the trap-door as above described. The defender's forewoman was also guilty of negligence in failing to see that the trap-door was kept shut while pursuer was hanging up clothes within a few feet of it."

Held that there was no relevant averment of defective machinery or plant; that the pursuer's averments showed knowledge on her part of the care required to avoid the risks of the trap-door; that the record did not disclose that the defender's forewoman was a "superintendent" in the sense of the Employers Liability Act; and the action *dismissed* as incompetent.

Mrs Agnes Moore, laundress, sued her employer Mrs Ross, laundry-keeper, Kent Road, Glasgow, for £200 as damages for personal injury.

She averred—"At defender's establishment at 121 Kent Road the wash-house is in the lower flat, while the drying-room is