is, immemorial usage as traced backwards from the present time, and the pleas in law for the pursuers are precisely in accordance with these conclusions of the summons. On the other hand, the defenders do not pretend or assert any right except that which is at least consistent with immemorial usage. They plead that, as representing the burgh of Dumfries, they are, in virtue of the charters and Act of 1681, and immemorial usage, entitled to exact and levy the customs in question. And again, in the 2d, the 4th, and the 5th pleas, which are really the important pleas upon record for the defenders, everything is made to rest upon the allegation of immemorial usage of exaction. Now it rather appears to me that the natural conclusion from all this is, that with the rule of law so well established, and with the pleas of parties so clearly consistent with the general rule of law, it is quite impossible to decide this case, or to come to any practical conclusion as to what the rule of exaction is to be in time to come, without not merely ascertaining what the immemorial usage is, but making the judgment of the Court and any table of fees that is to be constructed quadrate precisely with that immemorial usage. But we are told on the one hand, and it does not seem to be seriously disputed on the other, that the table which has been framed and reported by the accountant is not consistent in all respects with this immemorial usage, but that, on the contrary, it is in some respects a table of rates higher than that which has been for sometime exacted by the Magistrates of Dumfries. That is a practical result which it is quite impossible to sustain consistently either with the true principles of law applicable to this case, or with the pleadings of parties on record. That of itself is sufficient to convince me that the proceedings before the accountant, recently at least, must have been upon some mistaken basis altogether. And when we look back to the series of interlocutors and instructions which the accountant received, and to what he himself reports that he has done, we see plainly enough that he has been desired to construe, and has construed, the interlocutor of 30 June 1865 in such a way as to make a table of duties that is not conformable in all respects with immemorial usage. Now that must be rectified, and in what way that is to be done is the only remaining question. I agree with your Lordship's suggestion that there must be a fresh remit to this gentleman, with different instructions from these which he has hitherto received. Perhaps, strictly speaking, it may be the duty of the Court to ascertain with respect to every single item proposed to be levied for the future in any new table to be now constructed whether it is consistent with immemorial usage as disclosed to us by this proof; but I need hardly say that for the Court itself to perform that duty directly would be a mere waste of judicial time, and probably it may be not only more expeditiously, but fully as efficiently discharged under the directions of the Court by a professional man, such as Mr Ogilvy. Not that I would leave to his unaided consideration of the proof the fixing of what is the immemorial usage with reference to every one of the items of the proposed table, but I think he may, with the aid of the parties, and with concessions upon their side which may be most legitimately taken into account by the Reporter, be enabled to extract the true import and effect of the proof, and to apply it to the construction of the table. I don't in the least doubt that if instructions to that effect are given to him in the interlocutor of Court we shall have a result that will be quite satisfactory to both parties, and at the same time consistent with the rights and interests of the public. I therefore concur with your Lordships in the proposition which has been made for this new remit.

The following interlocutor was pronounced:—

"The Lords having considered the reclaiming note for Wellwood Herries Maxwell and others, No. 153 of process, and heard counsel,—Recal the interlocutor of the Lord Ordinary submitted to review. Find that in framing the table of bridge customs to be levied by the defenders in time coming, no item or charge can be admitted that was not at the date of raising this action in use to be levied for forty years or time immemorial; remit of new to the accountant to frame a table in conformity with this finding, and for this purpose to examine the proof, and with the assistance of the parties to ascertain what items in the table of 1772 have been in use to be levied for forty years, or time immemorial, upon what kind of goods, and and at what rates, and to report. Find the pursuers entitled to expenses since the date of the Lord Ordinary's interlocutor, and remit the account when lodged to the auditor to tax and to report."

Agents for Pursuers—Scott, Bruce, & Glover, W.S.

Agent for Defenders—Wm. Kennedy, W.S.

## *Friday, December* 18.

### LEDGERWOOD *v.* M'KENNA.

*Nuisances Removal Act* 1856—*General Police Act* 1862—*Adoption of General Act—Expenses—Justice of Peace—Small Debt Decree—Decree-conform—Jurisdiction.* Part 7 of the General Police Act 1852, amending the Nuisances Removal Act 1856, applies wherever the latter Act is called into operation, and is not dependent for its efficacy on adoption of the Act of 1862.

It is incompetent to sue in a Small Debt Court for the expenses found due in proceedings under the Nuisances Removal Act.

In October 1866 the defender, inspector of poor for the parish of Girvan, and prosecutor appointed by the Parochial Board under the Nuisances Removal Act 1866, obtained a decree under that Act from the Justices of Ayrshire against the pursuer, ordaining him to remove a certain nuisance from his premises, and finding him liable in expenses. A Small Debt action was raised for these expenses, the account sued for being in these terms, "1866, Oct. 31.—To sum of expenses due by the defender to the pursuer and contained in a finding or decree of the Justice of Peace Court at Girvan, pronounced of this date, in a petition and complaint at the instance of the pursuer against the defender, dated tenth October 1866, proceeding and founded upon The Nuisances Removal (Scotland) Act 1856, conform to said petition and complaint and finding or decree annexed thereto, herewith produced, £2, 18s. 5d;" and a decree of the Justices was obtained therefor. The pursuer now sought to reduce these decrees. He maintained that the Justices had no power under the Nuisances Removal Act to award expenses, and that it was *ultra vires* of the Justices in the Small Debt Court to entertain a claim for expenses incurred in another suit. The defender

maintained that all Judges possessing civil jurisdiction had power to award expenses; that the Nuisances Removal Act conferred such power on the Justices as it did on the Sheriff; and that at least the 447th section of the General Police Act, amending the Nuisances Removal Act, gave the power. In reply, the pursuer denied that any part of the General Police Act applied unless adopted, and the Act had not been adopted in Girvan.

The Lord Ordinary (KINLOCH) dismissed the action as incompetent, adding this note:—"On 31st October 1866 the defender, Mr M'Kenna, Inspector of Poor for the Parish of Girvan, obtained a decree under the Nuisances Removal (Scotland) Act from the Justices of Peace for Ayrshire against the pursuer Alexander Ledgerwood, ordaining him to remove a certain accumulation of manure, and finding him liable in £2, 18s. 5d. of expenses.

"An extract of this decree, containing a warrant to charge was taken out, but no use was made of it. The course taken was to raise a Small Debt action before the Justice of Peace Court, and in this action to take decree for this sum of £2, 18s. 5d.

"These proceedings are now brought under reduction, but, as the Lord Ordinary thinks, incompetently so brought.

"1. It is said that under the original complaint, laid on the Nuisances Removal Act, the Justices had no power to award expenses. The Lord Ordinary thinks they had. It might be fairly held that they had, by virtue of a power inherent in all judicial tribunals. But the General Police Act (which contains at the close an amendment of the Nuisances Removal Act) directly gives the power by section 447, which places Justices of the Peace on the same footing with the Sheriff, who, under the Nuisances Act (sec. 44), was declared entitled to award expenses. This being so, the award is under the statute final.

"2. It is said that the extract of the decree was incompetently taken, the Justices having no power to enforce their judgment. This is probably true, but the extract was never used, but abandoned, and a reduction of it is unnecessary, and would serve no practical end.

"3. It is said that it was incompetent to bring an action for payment of the sum of expenses so awarded in the Small Debt Court. But this proceeding was competent, just because the Justices had, under the Nuisances Removal Act, no power of execution; and the application for the Small Debt decree was as appropriate a step as in the case of an award by an arbiter, where the submission contains no clause of execution. The application for a Small Debt decree being competent, the decree is final under the Small Debt Act.

"The incompetency of the present action may perhaps be sufficiently rested on the single circumstance of the Small Debt decree being unsusceptible of review. Because this exclusion of review prevents all inquiry into the validity of the debt decerned for. Whether there was a debt or not, that it to say, whether under the nuisance proceedings there was power to award expenses, was the question on the merits in the Small Debt Court; and it would be no good ground of reduction that the judgment was erroneous, even if this were so. But either view leads to the same result."

The pursuer reclaimed, and the case, after being heard before the First Division, was re-argued before seven judges.

WATSON and BRAND for reclaimer.

GIFFORD and MACKINTOSH for respondent.

At advising—

LORD COWAN—The application in which these proceedings originated was made to the Justices of the Peace of Ayrshire under and in terms of "The Nuisances Removal (Scotland) Act 1856." It set forth the nuisance complained of, and prayed for its removal, and for interdict against the recurrence of the same, in terms and under the penalties specified in the said Act, "and to find the party liable in expenses, and to decern therefor." No penalties were asked; and none could have been awarded under this complaint.

After some procedure, unnecesary to be mentioned, the Justices, on 31st October 1866, ordained the respondent to remove the nuisance complained of within five days, in terms and under penalties of the Act, and found him liable in expenses, modified to £2, 18s. 5d., besides dues of extract. This decree was extracted, but the extract not having been acted on its terms are not properly before the Court; from the statements in the record, however, it appears to have authorised a charge for payment within 15 days "under the pain of poinding." Thereafter, under the apprehension that the Justices in decerning for expenses had acted *ultra vires*, the inspector applied for and obtained a decree of the Justices of the Peace sitting as a Small Debt Court of date 4th February 1867. The account sued for in the small debt action was to the following effect (*reads*).

On 12th February thereafter, this action of reduction was instituted, concluding to have set aside and reduced the decree of the Justices under the original complaint and the relative extract, as also the decree of the Small Debt Court.

The first point to be considered regards the power of the Justices of the Peace to decern for expenses against the pursuer, the respondent in the application, under the Nuisances' Removal Act. No express power is conferred by that Act upon Justices of the Peace to award expenses. Such power is by the 44th section conferred upon the Sheriff, and it may therefore be doubted whether, as the jurisdiction was conferred by Statute, the Justices could give expenses under their inherent power and common law to award expenses as a judicial tribunal. My impression is, that the Lord Ordinary is right in the opinion which he indicates in his note,—that it may be fairly held that the Justices had power to act as they did; but I do not feel it necessary to rest the validity of their decree upon that ground, having formed a clear opinion that any doubt as to this is removed by section 447 of the General Police Act 1862.

This brings me to by far the more important question, as I think, involved in this discussion—viz., Whether it is to be held that the Nuisances Removal Act was conclusively amended by the General Police Act of 1862, in so far as regards those provisions which form Part 7th of the Act, under the head "Promotion of the Public Health?" It is certain that the town of Girvan has not adopted the General Police Act; and it is contended by the pursuer that without and until such adoption, no part or portion of that Act can be held operative within the town of Girvan, or in any other place which has not adopted the General Police Act. As opposed to this contention, it is maintained by the defender that there is a clear distinction in the Act of 1862 between the Parts of the Act for regulating the police of towns and populous places, and for light-

ing, cleansing, paving, draining, and supplying water to and improving the same, and that part of the Act, being Part 7th, which in express terms is declared to relate to the promotion of the public health, and to be 'An Amendment of the Act' for the removal of nuisances 1856. The opinion I have formed, on repeated perusal and consideration of the clauses forming Part 7th, and in particular of section 447, is that the Nuisances Removal Act has been thereby amended, irrespective of the adoption by towns or populous places of the General Police Act. The Nuisances Removal Act has a universal application; and I cannot hold its provisions to have been amended merely as regards those burghs or towns that may think fit to adopt in whole or in part the police part of it, or the provisions as to cleansing or supplying with water, and as to other matters for the improvement of such places. The amendment of the Act must have a general application, and must control and enlarge its provisions within the whole scope of its operation. It would, indeed, be very anomalous to have a Nuisance Removal Act in operation, with one set of provisions in an amended form for certain places, and a different set of provisions for other places. Once amended by the Legislature, the Act must stand in the Statute Book thenceforward as amended. There is in truth no longer a Nuisance Act in force except as amended.

This point, however, is not new to those of us who are Justiciary Judges. The case of *Kennedy* v. *Cadenhead* brought the matter distinctly under our view; and, for myself, I observe from the report of the case, that I expressly put my concurrence in the judgment proposed by the Lord Justice-General, on the ground that § 447 conferred upon Magistrates and Justices of the Peace the same powers in regard to proceedings under the Nuisances Act which it conferred on the Sheriff. Nor can it be said that this recognition of the effect of the Police Act, in amending the Nuisances Removal Act in the decision I have mentioned, arose from the City of Aberdeen having adopted the Police Act. The report is entirely silent as to that point, and the fact is, as I have ascertained by inquiry, that Aberdeen has a Police Act of its own, and has not adopted the General Police Act. But however this may be, my renewed consideration of the question has confirmed me in the opinion which led me to concur in the judgment to which I have referred.

The remaining question regards the legality of the Small Debt decree,—and on this point I cannot concur in the view expressed by the Lord Ordinary in the note to his interlocutor. It was quite incompetent for Justices of the Peace sitting as a Small-Debt Court, to entertain the claim made in the account sued for as set forth in the complaint before them. That claim was expressly stated to be for expenses already found due by decree of the Justice of Peace Court. The fact of such decree having been pronounced excluded their jurisdiction in the matter. The claim was not for constitution of a debt, but for a decree-conform which they had no power to pronounce. It was not within their province as a Small-Debt Court to interfere. Even if the party had obtained a decree from the Justices of the Peace, which they could not enforce by the usual executorials of the law, resort must, in that case, have been had to a different course of proceeding. But I apprehend that, there being power in the Justices to award expenses, there was power in their clerk to issue the usual precept or warrant for making the decree effectual by diligence of arrestment and poinding.

In conclusion, I have only further to observe that, having regard to the terms and prayer of the original petition and complaint,—no penalties being concluded for, but only expenses,—I regard the original proceeding as civil process, and not as partaking of a criminal nature. Nor do I think that this conclusion is at all affected by § 28 of the Summary Procedure Act. Where no penalties are concluded for and only expenses awarded, I cannot hold that there was power, either in the Sheriff or the Justices of the Peace, to substitute imprisonment for a limited period in the event of the expenses not being paid, as § 446 of the Police Act gives to the Sheriffs power to do, where penalties as well as expenses are awarded. This point, however, it may not be necessary to determine, as both parties concur in assuming the proceedings to be civil and not criminal in their nature.

LORDS BENHOLME, NEAVES, and ARDMILLAN concurred.

LORD KINLOCH—I have carefully re-considered this case, with the benefit of the able argument presented to us. And on one point I have now come to a different conclusion from that which, as Lord Ordinary, I arrived at. I am now of opinion that it was incompetent for the defender M'Kenna to apply to the Small Debt Court for what has been called a decree-conform in supplement of that obtained by him in the Nuisance Removal Process. I am satisfied that the case cannot be rightly likened to that in which an arbiter gives forth a decree which requires for its enforcement the aid of a court of law. The Justices were not acting as arbiters in the Nuisance Removal Process; they were exercising the functions of a proper court. Their judgment was a judicial decree. Now I cannot find sufficient principle or authority for holding that one inferior court in Scotland is entitled to interpone a decree-conform to the judgment of another. There are instances in which applications to this effect have been held competently made to the Supreme Court. But I do not think that the Justices of Peace in the Small Debt Court are entitled to give a decree-conform in supplement of the judgment of the Justices in a Nuisance Removal Process. And on this point I now think it does not matter whether the latter Justices had power to enforce their decree by diligence or not. If they had such power, the application to the Small Debt Court was unnecessary, as well as incompetent. If they had not, it was still an incompetent manner of remedying the legal defect.

I am of opinion that the incompetency of the application to the Small Debt Court appeared on the face of the proceedings, and, therefore, we are entitled to reduce the Small Debt decree. The complaint to the Small Debt Court bore on its face to form a demand for the "sum or expenses due by the defender to the pursuer; and contained in a finding or decree of the Justice of Peace Court at Girvan, pronounced in a petition and complaint at the instance of the pursuer against the defender, proceeding and founded on the Nuisance Removal (Scotland) Act 1856." This clear enunciation of the claim ought to have shown the Justices in the Small Debt Court that the matter was beyond their jurisdiction; and should now enable us, without any difficulty, to set aside their decree, incompetently pronounced.

It remains, however, to inquire whether the decree

pronounced for expenses by the Justices of Peace in the Nuisance Removal Process is itself susceptible of reduction. I am of opinion that it is not. I think the Justices had power under that process to pronounce an award of expenses, and that their judgment to that effect is unsusceptible of challenge.

I should have some difficulty in holding that, at common law, and irrespectively of statutory power, the Justices in the Nuisance Removal Process had power to award expenses. At the same time, there appear to me strong grounds for maintaining that whenever any proceeding takes the form of a judicial inquiry—as by the leading a proof, the hearing of parties, and the like—there must be held to be inherent in every court the power of awarding costs against the unsuccessful party. In the present case, however, I think all difficulty is removed by the existence of what I think undoubted statutory power to award expenses. Under the Nuisance Removal (Scotland) Act 1856 the judicial power of enforcing the Act is given to the Sheriff, or to any resident Magistrate or Justice of the Peace; and on being satisfied of the existence of the nuisance, such official is, by section 10, authorized to "decern for the removal or remedy or discontinuance of the nuisance, or interdict of the nuisance, as hereinafter mentioned." There is thereafter prescribed a form of procedure, and power to award expenses is conferred; but, by what appears a manifest oversight, it is only the sheriff, and not the other magistrates previously mentioned, who is alluded to. It has been argued that by the previous reference the same power must be held conferred on these and on the sheriff. There is difficulty in this construction, though it may not be absolutely inadmissible. But again, all difficulty seems to me removed by the 447th section of the General Police and Improvement (Scotland) Act 1862, declaring that "all the provisions of the last recited Act, and all the procedure therein prescribed in regard to proceedings before, and to appeals from any judgment or order of the sheriff, shall apply to proceedings before, and to any judgment or order of any magistrate or justice of the peace under the said Act." I am of opinion that this clause of the General Police Act in no way depends for its efficacy on the adoption of this statute, made optional in a previous part of it. The Act is generally, as its title bears, "An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for lighting, cleaning, paving, draining, supplying water to, and improving the same, and also for promoting the public health thereof." As such Police Act, it is made optional to the Burghs to adopt its provisions in whole or in part. But in the seventh part of the Act there is introduced a succession of clauses, which appear to me manifestly inserted for the totally different purpose of amending the Nuisance Removal Act; a general statute, applicable, without the option of adoption, in every part of Scotland. I conceive that these clauses cannot be held dependent for their efficacy on the adoption by the Burghs of the police provisions. The clauses are applicable as amendments of the Nuisance Removal Act, wherever that Act is called into operation; which it may be in any parish, whether that parish be in a position to adopt the police provisions or not. I cannot come to the conclusion that if no burgh whatever should adopt the police provisions the amendments of the Nuisance Act should on that account remain a dead letter over all Scotland. Nor can I think that the application of these amendments can be held to depend on an adoption which is only applicable to burghs or populous places called by that name, and has no room in ordinary rural parishes; any supposed necessity of which must therefore at once exclude the possibility of applying the amendments of the Nuisance Act in nine-tenths of the country. By virtue of the Nuisance Removal Act thus, as I conceive, amended, I think the Justices had in the present case power to award expenses; and if this is to be held it makes it unnecessary to inquire whether such power was possessed by them on any other ground.

The result is, that whilst the Small Debt decree falls, in my opinion, to be reduced, the defender should be assoilzied from the other conclusions of this action of reduction, applicable to the decree for expenses pronounced in the Nuisance Removal Process. I am disposed to think it beyond the limits of the present case to determine what amount of execution is competent on this judgment for expenses, or to direct the holder of that decree as to the steps of diligence he should follow out. I only think it necessary to say, that if the Justices of Peace are, in respect of awarding expenses, put on the same footing with the sheriff, I find it difficult to conceive that their judgment should not receive exactly the same measure of execution. The execution must, however, in any event, be that applicable to a decree for expenses in a civil suit, and cannot comprehend the penal imprisonment proper to a combined infliction of penalties and expenses. I entirely agree in holding that the proceedings in question were civil not criminal; and that therefore our jurisdiction is not excluded.

LORD DEAS concurred, but doubted whether the jurisdiction was not criminal.

The LORD PRESIDENT agreed with LORD COWAN.

Agent for Pursuer—D. F. Bridgeford, S.S.C.

Agent for Defender—L. M. Macara, W.S.

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*Saturday, December* 19.

SCOTT *v.* MUIR AND ANNAN.

*Jurisdiction—Civil and Criminal*—1631, *c.* 23—*Gaming—Reduction.* Action to reduce certain warrants of Justice of Peace Court *dismissed* for want of jurisdiction, the proceedings having been criminal. *Question*, can the "superplus" in the Act 1621, c. 23, be recovered by a civil suit?

*Summary Procedure—Acts—Limitation of Action—Reparation.* Action for recovery of bail-money, forfeited in proceedings under the Summary Procedure Act, *dismissed* under the 35th section of the Act, the action not having been begun within two months after the cause of action arose.

Muir, Procurator-Fiscal in Lanark presented a complaint, under the Summary Procedure Act, against Scott and three others, charging them with an offence against the Act 1621, c. 23, "anent playing at cardes, and dyce, and horse races," by playing at cards at a bridge on the Caledonian Railway near Lanark Mains farm-steading, and winning a sum of £85, whereby the parties were liable to consign the surplus beyond 100 merks in the hands of the kirk-session of Lanark for behoof of the poor of the parish. The parties were appre-