

Tuesday, December 7.

THE LORD ADVOCATE *v.* POLICE COMMISSIONERS OF PERTH.

General Police and Improvement (Scotland) Act 1862—Illegal Operations—Appeal to Sheriff—Section 396—Suspension. Held that a suspension of certain operations under the General Police and Improvement (Scotland) Act 1862, alleged to be in violation of one of the provisions of the statute, was not excluded by the terms of the 396th section, which gives an appeal to the Sheriff in matters of administration falling within the scope of the Act.

This was a suspension and interdict brought by the Lord Advocate, acting under the Statute 20 and 21 Vict., c. 44, on Her Majesty's behalf, and as representing the Board of Works, for the purpose of preventing certain threatened operations of the Police Commissioners of Perth for constructing a drain or sewer. The complainer makes the following statements:—(1) The buildings known by the name of the General Prison at Perth, and the ground upon which the same are built, are held by the Commissioners of Her Majesty's Works and Public Buildings in behalf of the Crown, and used as the General Prison for Scotland, under the direction of a Board of Managers. (2) The said buildings, which were formerly used for the accommodation of prisoners taken during the French war, are situated near the river Tay, from whence the water supply for the use of the inmates was then, and continues to be, derived. The quantity of water at present so used is very large, amounting to about 30,000 gallons daily. (3) The water supply for the inmates of the said prison has been for many years and is now taken from the said river Tay, by means of wells sunk for the purpose, within the ground used as a shipbuilding yard, and about 450 feet east of the eastmost wall of the said prison. (4) The respondents, the Commissioners of Police of the burgh of Perth, under the powers conferred on them by 'The General Police and Improvement (Scotland) Act 1862,' are in course of executing a system of drainage of that burgh, under which the sewerage is to be discharged into the river Tay. In the month of May 1867 the said Commissioners of Her Majesty's Works and Public Buildings were made aware that it was the intention of the respondents to run a catch drain or sewer along the edge of the river Tay, which should empty itself into the river about 500 yards above the said point from which the water supply for the prison is drawn. (5) Being advised that, in the event of the said work being carried into effect, the water of the river would be materially injured, and rendered unfit for drinking and other domestic purposes in the prison, Mr Andrew Murray, W.S., the solicitor for said Commissioners of Her Majesty's Works, &c., wrote to the respondent John Thomas, with reference to the intended works, that if they were to be proceeded with, steps would be taken to prevent the injury to the water which would be thereby occasioned. Mr Thomas, in reply, sent to the said solicitor of Her Majesty's Works, &c., a notice dated 20th May 1867, which had been issued by the respondents on that day, and which is in the following terms:—

“ ‘Notice.

“ ‘The Magistrates and Council of the royal burgh of Perth, as Commissioners under ‘The

General Police and Improvement (Scotland) Act 1862,' for said burgh, hereby give notice of their intention to make a new sewer from the High Street sewer at the east end of that street, along in front of the Post Office, and thereafter through the properties of William S. Turnbull, Esquire of Huntingtower, Miss Murray, and others, and the vennels, and in front of the County Buildings and coal shore, on to the wooden jetty, part of the harbour works, opposite to the east division of the South Inch, about 200 yards south of the east end of Marshall Place. The work will be begun at the south end, and end at the High Street. The plans and specifications of the said intended work may be seen in the hands of John Young, Esq., C.E., 20 South Street, Perth, local surveyor of drainage works to the Commissioners; and the Commissioners will meet in the Council Room, Perth, on Thursday, the 20th day of June next, at seven o'clock evening, when all persons interested in such intended work may be heard thereupon.—By order,

JOHN THOMAS,

“ ‘Clerk of Commissioners.’

“ (6) The said Commissioners of Her Majesty's Works and Public Buildings have been recently informed, and have cause to believe, that the respondents intend to extend the said main or catch sewer, so that it shall discharge the said sewage within 100 yards, or thereby, of the said point from which the water supply of the said prison is drawn, which will render the said supply still more unfit for domestic purposes than it would be made by the operations of which notice was given as above mentioned. (7) Notwithstanding that the respondents are aware of the objection of the Commissioners of Her Majesty's Works and Public Buildings to the discharge of the said sewage into the river Tay at the point above set forth, or at any other point between that and the Lineyhaugh fishing station on the left bank, or the corresponding point opposite the said station on the right bank of said river, and the grounds upon which that objection is founded and insisted in, they have now commenced to execute, or are about to commence to execute, the works of which they so gave notice. If the scheme is carried out as proposed in the manner set forth in the notice quoted in article 5, the whole sewage of the western drainage district of the burgh of Perth will be discharged into the river at a point above the General Prison, about 500 yards above the said point where the water for the use of the inmates of the prison is taken from. The complainer avers that, should the work be completed in either of the manners set forth in the two immediately preceding articles by the respondents, or if the said main or catch sewer, or any other similar sewer or drain, is allowed to discharge its sewage into the said river Tay at any place between the said wooden jetty and the Lineyhaugh station before mentioned on the left bank, or the corresponding point foresaid on the right bank of said river, the water of the river will be adulterated to such a degree that the inmates of the prison will incur serious danger, and that the water will become unfit for drinking and domestic purposes in the prison, or at least will be injuriously affected; and likewise that the effluvia from the river, in consequence of the large concentrated discharge of sewage into it between the said two points, will be injurious to the health and condition of the prison inmates. (8) It is not necessary for completing the drainage works authorized by said Act of Parliament that the sewage of the

western district of the burgh of Perth should be discharged into the Tay at any point above the said General Prison; and, in point of fact, a different point of discharge is recommended in a report by Mr John Young, C.E., the respondents' engineer, dated in 1862. A copy of that report is produced. (9) By the 198th clause of the said 'General Police and Improvement (Scotland) Act 1862,' it is provided, 'That it shall not be lawful to the Commissioners to authorize the construction of any sewer, the sewage from which will be discharged into any river or stream from which water is taken for domestic purposes, so as to injure or affect such supply.'"

The respondents pleaded, in bar of the suspension, that the note of suspension was incompetent, in respect that the jurisdiction of the Court of Session was excluded by the jurisdiction conferred upon the Sheriff in the 396th section of the General Police Act; and further, that, in any view, the complainers were not entitled to neglect the appeal to the Sheriff provided by the Act, and come to the Court of Session for suspension and interdict. By section 396 of the General Police Act (1862) it is provided that "any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the Commissioners relating thereto, may at any time, within seven days next after the making of any such order, give notice in writing to the Commissioners that he intends to appeal against such order to the Sheriff, and along with such notice he shall give a statement in writing of the grounds of the appeal; and if within four days next after giving such notice, the party grant bond to the Sheriff, with two sufficient cautioners, to the satisfaction of the Sheriff, to abide the order of the Sheriff, and pay such costs as shall be awarded by the Sheriff thereupon, the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal; and the Sheriff, upon due proof of such notice, and upon such caution being found, shall hear and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, or varying the same, and shall award such costs to either of the parties as the Sheriff in his discretion thinks fit, provided always that the appellants shall not be heard in support of such appeal unless such notice and statement have been given, and such caution found as aforesaid; nor on the hearing of such appeal shall he go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the respondents' first two pleas in law, and having considered the argument and proceedings,—Repels the first of said pleas, and also repels the second in so far as it was or could be urged as a preliminary bar to the present note of suspension and interdict being entertained in this Court, to the effect of its being ascertained how far the suspender's ground of complaint is well founded, and, if well founded, of the redress to which he is entitled being given; *quoad ultra*, and under a reservation in the meantime of all questions of expenses, appoints the case to be enrolled with a view to further procedure.

"*Note*.—What the suspenders complain of are certain threatened operations of the respondents for constructing a drain or sewer, by which they

say the sewage of the burgh of Perth, or a portion of it, would be discharged into the river Tay at such a point as to pollute and render the water of that river, which has hitherto been taken for the domestic purposes of the General Prison at Perth, unfit for these purposes. If this complaint be well founded, it follows that the respondents are proposing to carry into effect operations which they by section 198 of the General Police Act are declared to be unlawful and beyond their authority; for by that section it is declared not to be lawful for the respondents to authorise the construction of any sewer the sewage from which will be discharged 'into any river or stream from which water is taken for domestic purposes.' As the suspenders undertake to show that the operations complained of are of this unlawful and unauthorised character, and supposing it were to turn out, after due inquiry, that this were so, then clearly the operations in question would be in excess of the respondents' powers, and the pursuers' note of suspension would not be incompetent. On the other hand, if after the necessary inquiry it turned out that the operations complained of are not unlawful or unauthorised by the statute, then the respondents would be entitled to prevail, and to have this note of suspension and interdict refused.

"As very little was said at the debate in regard to the mode of inquiry to be gone into, parties will have a further opportunity of being heard on that point. The Lord Ordinary, however, may say that such a remit as that which was proposed in the Bill Chamber to Doctors Christison and MacLagan, appears to him at present to be the most expedient course. But in the event of the interlocutor now pronounced being taken to review and affirmed, it would be very desirable, as calculated to save subsequent needless litigation, were the opinion of the Court at the same time elicited on the mode of inquiry that should be adopted."

The respondents reclaimed.

FRASER and SCOTT for them.

SOLICITOR-GENERAL and T. IVORY in answer.

The Court held that, according to the allegations of the complainers, the operations threatened were outwith the statute and unlawful; and that being so, the case could not be said to be, on the face of it, one of those in which the Sheriff had exclusive jurisdiction. The object of the appeal to the Sheriff provided by the Act was to have questions determined which arose in the administration of the statute and within its admitted scope. On these matters the Sheriff was the sole judge, and he was final; but in this case, if the facts alleged were true, the Sheriff would have gone beyond his powers if he had sanctioned the operations of the respondents.

Agent for the Complainers—The Solicitor of Her Majesty's Works.

Agents for the Respondents—Hill, Reid & Drummond, W.S.

Wednesday, December 8.

FIRST DIVISION.

LEITCH v. MUNRO.

Tenant—Agreement—Evidence—Parole—Stock—Valuation. In the improbativ lease of a public-house, the landlord was bound to take over the tenant's stock on his leaving at a