

though probably no such express declaration was necessary. The pursuers further contended that the diligence of creditors was not excluded, and that therefore they should be allowed to do directly what the creditors might do indirectly. I think it very doubtful if the diligence of creditors is excluded. That is, however, a question which I cannot decide in this case. But assuming that the diligence of creditors is not excluded, and that they can proceed with it in ordinary form, I do not think that we can pronounce in favour of a power of sale. For creditors could not sell. They could only adjudge, and acquire the liferent as their own by obtaining a decree of expiry of the legal. If they afterwards sold, they would be selling in their own right and not in the right of the liferenters, although no doubt the right of the liferenters would be the subject of sale. It is obvious that the rights of creditors are in no degree commensurate with the power which the pursuers claim.

Nor can the pursuers obtain any aid by referring to the possibility of sequestration. There is no sequestration, and we cannot determine in this action what the powers of a trustee may be.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK—I am of the same opinion, and after the clear and elaborate judgments your Lordships have pronounced, it is not necessary for me to say much more. The proprietor of any subject can make another person the proprietor of that which he holds in fee, but a liferenter cannot make another liferenter; all that he can do is to entitle another person to demand that the produce of certain subjects, which was originally destined to be paid to the liferenter, should now be paid over to that other. In my opinion he cannot transfer his rights.

I have no hesitation in holding that the trustees cannot be in a better position than the trusters from whom they derive their right, and in this case if the trusters had desired to anticipate the liferent and capitalise their rights by means of a sale they would have been in the position foreseen by the deed, and prohibited by the clause quoted in the condescendence. On these grounds I agree with your Lordships and think that we ought to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Reclaimer—Low—C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders Mrs Hoile and Children—Law. Agent—John Rhind, S.S.C.

Counsel for the Defender Souter Robertson—MacWatt. Agents—Alexander Morison, S.S.C.

Friday, October 31.

FIRST DIVISION.

COMMISSIONERS OF POLICE OF
KIRKINTILLOCH v. M'DONALD
AND OTHERS.

Police—Sewage Works—Whether Assessment to be Levied on Owners or Occupiers—Public Health (Scotland) Act 1867 (31 and 32 Vict. c. 101), sec. 94.

Section 94 of the Public Health Act of 1867 provides, with respect to burghs having a population of less than 10,000 according to the census last taken, and not having a local Act for police purposes, that all expenses incurred by the local authority in executing the Act, for whose recovery provision is not otherwise made, may be defrayed "out of an assessment to be levied by the local authority along with but as a separate assessment from any one of the assessments" mentioned in the section—"that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers . . . as the prison assessment or police assessment, as the local authority shall resolve, where the local authority is . . . the police commissioners," and such assessments are levied.

In 1870 a burgh having a population of 8029 adopted the General Police and Improvement Act 1862, and elected commissioners of police, who became, in terms of the Public Health Act 1867, the local authority of the burgh for the purposes of that Act. In consequence of legal proceedings taken against them the commissioners of police were obliged to undertake the construction of sewage purification works, and in order to obtain the land necessary for these works they had to apply for compulsory powers under the Public Health Act of 1867. These powers having been obtained, the land was acquired and the works constructed.

There was no prison assessment leviable in the burgh, but the police commissioners levied on all occupiers of lands or premises within the burgh the police assessment provided for by sec. 84 of the Police Act of 1862.

Held that the assessment necessary to defray the expense of acquiring the lands and executing the sewage purification works was to be levied "along with" and "in like manner" as the said "police assessment," and was therefore to be imposed upon occupiers of heritable property within the burgh.

In 1870 the burgh of Kirkintilloch adopted the General Police and Improvement (Scotland) Act 1862, and elected Commissioners of Police under said Act. By the Public Health (Scotland) Act 1867 the Commissioners of Police so elected are constituted the "local authority" for the purposes of

that Act. The population of Kirkintilloch at the preceding census was 8029.

When the Acts above mentioned came into operation in Kirkintilloch in 1870 there was no system of public sewers in the burgh, and it was found necessary to provide such a system. The Commissioners of Police accordingly provided and laid them throughout the burgh at a cost of £4070, the whole procedure in connection with the construction of these sewers being taken under the General Police Act of 1862. To provide for the cost of constructing and maintaining said sewers the Police Commissioners levied an annual assessment under the Act of 1862 upon owners of heritable property within the burgh from the year 1878-79.

In consequence of legal proceedings at the instance of riparian proprietors, who complained of the pollution of streams through their lands by the outflow from these public sewers, the Commissioners of Police were compelled to undertake the construction of a system of sewage purification and disposal works at considerable cost. To enable them to acquire compulsorily the land required for these works, it became necessary to apply for a Provisional Order and a Provisional Order Confirmation Act, and these were accordingly applied for and obtained in the year 1884 under the provisions of the Public Health Act of 1867, and thereafter the land was acquired and the works constructed. The cost of procuring the said Provisional Order and Confirmation Act, and of purchasing land and constructing the purification works, and laying about nine miles of main intercepting and outfall sewers, &c., amounted to £19,575, and the expense incurred in constructing the public sewers under the General Police Act, as already mentioned, was £4070, making altogether the sum of £23,645. This sum was made up of the following items:—

1. Legal expenses in connection with procuring said Act	£2047	0	0
2. Price of land acquired in virtue of said Act, including wayleaves and damages, severance damage and several claims	5522	0	0
3. Cost of arbitration in connection with said acquisition, including legal expenses	1334	0	0
4. Purification works	4642	0	0
5. Cost of intercepting sewers in other parts of the burgh to connect with acquired land	5487	0	0
6. Charge of engineers applicable to execution of whole works as aforesaid	543	0	0
7. Cost of former public sewers as already mentioned	4070	0	0
In all,	£23,645	0	0

Down to the year 1889 the Police Commissioners assessed only owners of heritable property within the burgh for sewage purposes under the Act of 1862. This mode of assessment having been objected to by certain owners, the present case (from which the above narrative has been taken) was presented in order to obtain the judgment

of the Court on the question, whether the assessment necessary to defray the above expenditure should be levied on owners or occupiers?

The parties to the case were (1) the Commissioners of Police of the burgh of Kirkintilloch under the General Police Act 1862, who as such were the "local authority" of the burgh under the Public Health Act of 1867; (2) John M'Donald and others, owners of heritable property within the burgh; and (3) George Brown and others, occupiers of heritable property within the burgh.

The provisions as to assessments for sewers under the General Police Act of 1862 are contained in clauses 96 to 100 thereof inclusive. Under that Act the said assessments fall to be paid by the owners of heritable property. No assessment whatever, either for construction or maintenance of sewers, is leviable under said Act upon the occupiers of heritable property. The said Act contains no provision under which application can be made for the compulsory acquisition of land.

Sec. 94 of the Public Health Act 1867 provides—"With respect to burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes, and with respect to parishes exclusive of any parts of such parishes as are situated within the district of any local authority other than the parochial boards of such parishes. . . . (2) All charges and expenses incurred by the local authority in executing this Act or any of the Acts hereby repealed, and not recovered as hereinbefore or after provided may be defrayed out of an assessment to be levied by the local authority along with but as a separate assessment from any one of the assessments hereinafter mentioned in this section—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers (which powers are hereby given and are declared to extend over the whole and every part of the district of the local authority) as 'the prison assessment or police assessment, as the local authority shall resolve, where the local authority is a town council or police commissioners, or trustees acting as police commissioners; or if there be no prison or police assessment, an assessment levied in like manner as is hereinafter authorised where the local authority is a parochial board; the assessment for the relief of the poor, where the local authority is a parochial board, or where there is no such assessment, by an assessment levied in such manner as an assessment might have been levied for the relief of the poor."

The case, *inter alia*, set forth—In the burgh of Kirkintilloch there is no prison assessment leviable. Kirkintilloch is not a burgh as defined by sec. 4 of the Prisons (Scotland) Administration Act (23 and 24 Vict. cap. 105), but fell to be and was in fact assessed by the Commissioners of Supply as a landward part of the county of Dumbarton, and the prison assessment was levied upon proprietors from the passing of said Act until the passing of the Prisons

Act 1877. Under section 84 of the General Police and Improvement (Scotland) Act 1862, the first parties assess all occupiers of lands or premises within the burgh in the sums necessary to be levied for the "police purposes" of that Act. By that section it is provided that the assessment just mentioned shall, for the purposes of that Act, be called the "police assessment." The burgh of Kirkintilloch is a special police district of the county of Dumbarton, under the County Police Act (20 and 21 Vict. c. 72), and by virtue of that Act there is a police assessment leviable by the Commissioners of Supply within the burgh upon owners of property.

The second parties at first objected *in toto* to the mode of assessment proposed by the first parties, and maintained that the whole of the sewage expenses should be defrayed by an assessment on occupiers. They subsequently modified their contention, and admitted that £4070—the expense of providing the former public sewers which had been incurred under the Act of 1862—should be levied on owners, but maintained that the expenses set forth in the first six items of the detailed statement above quoted, amounting to £19,575, was leviable on occupiers only in terms of the Act of 1867. The third parties maintained that the course adopted by the first parties was correct.

Argued for the second parties—The debt of £19,575 incurred in connection with the sewage purification and disposal works was incurred under the Act of 1867, under which the application for compulsory powers to acquire the land necessary for the scheme had been made. The mode of assessment prescribed by sec. 94 of that Act in respect of such burghs as Kirkintilloch must therefore be followed. That clause provided for an assessment to be levied by the local authority along with either the prison assessment or the police assessment. When both these assessments were leviable by the local authority they had an option with which to levy the new assessment, but where only one of these assessments was leviable then the local authority were bound to levy the new assessment along with that assessment. In Kirkintilloch there was no prison assessment leviable by the Commissioners of Police (who were the local authority for the burgh under the Act of 1867), but there was a police assessment leviable by them, and therefore the new assessment must be levied along with this police assessment. As the police assessment was leviable on occupiers, the new assessment, which was to be levied in like manner, must also be levied on occupiers—Act of 1862, sec. 84.

Argued for the first and third parties—It was true that the power to acquire lands compulsorily could only be obtained under the Act of 1867, but it did not follow that when such power was obtained the assessment necessary to defray the expense of acquiring the land and constructing the sewage works was to be levied under that Act. If the necessary land could have been obtained by consent there would have been no need to proceed under the Act of 1867,

and the fact of such an application having been necessary should not be held sufficient to alter the incidence of the taxation, which it appeared to be the policy of the Legislature to levy on owners—Act of 1862, sections 96, 97, 196. Under the Act of 1862 pavement-rates as well as sewer-rates were laid on owners, the apparent reason being in both cases that these works were looked upon as heritages attached to houses. The effect of the 94th section of the Act of 1867 was not to interfere with the incidence of the taxation, but to provide like powers for its levying and recovery as those under which the prison and police assessment were levied. Even assuming that section 94 of the 1867 Act was to regulate the incidence of the rate, it did not follow that the second parties' contention was sound. The term "police assessment," which was an equivocal term, should in the Act of 1867 be construed in its strict sense as meaning an assessment for the maintenance of the police force. If that view were correct the Commissioners of Police of the burgh of Kirkintilloch levied neither a "prison" nor a "police assessment" in the sense of section 94 of the Act of 1867, and the new rate would fall to be levied under the third alternative provided in that section in the same way as the poor-rate, viz., half on owners and half on occupiers.

At advising—

LORD ADAM—The parties to this case are first, the Commissioners of Police of the burgh of Kirkintilloch under the Police and Improvement Act of 1862, and as such the local authority of the burgh under the Public Health Act of 1867; second, certain owners of heritable property within the burgh; and third, certain occupiers of heritable property within the burgh.

We find from the case that the burgh of Kirkintilloch adopted the Police Act of 1862 in 1870, and elected Commissioners of Police under that Act, who under the Public Health Act of 1867 became the local authority of the burgh. When these two Acts came into operation in Kirkintilloch there was no system of public sewers in the burgh, and the Police Commissioners had to provide such a system, and did so at a cost of £4070, the whole proceedings being taken under the Act of 1862. To discharge the expense of these operations the Police Commissioners levied an annual assessment upon the owners of heritable property within the burgh under the Act of 1862.

In consequence of legal proceedings instituted by certain riparian proprietors who complained of the pollution of streams passing through their lands by the outflow of these public sewers, the Police Commissioners of the burgh were compelled to undertake the construction of a system of sewage purification and disposal works. To enable them to acquire the land necessary for that purpose they had to apply for a Provisional Order Confirmation Act under the Act of 1867, which they accordingly did. The land was acquired and the works constructed, and the cost of the scheme to date

including the cost of constructing the original sewers, is £23,645.

The details of that scheme are set forth in the case under seven heads, the seventh item being the cost of former public sewers . . . £4070. I may dispose of this last item at once as it is not now matter of dispute that the Commissioners of the burgh, in order to defray that expense, rightly imposed an assessment upon the owners of heritable property within the burgh. After deducting that item there are still six items of expenditure left, amounting to the sum of £19,575, and the real question we have to decide is, whether the assessment necessary to meet that charge is to be laid on owners or occupiers of heritable property within the burgh.

Before proceeding, however, to a consideration of that question, I may say that all the six items I have mentioned have been occasioned by the sewage purification and disposal works, and that it is, in my opinion, impossible to separate one of these items from the other as not being part of the same scheme, and that they must all, as regards the question of assessment, be dealt with together.

The next point to be kept in view is, that these works were constructed by the Commissioners of Police and the local authority under the powers given by the Public Health Act of 1867. In the Provisional Order Confirmation Act there are set forth by way of preamble the clauses of the Act of 1867 under which the Commissioners applied for powers, and having got these powers, they executed the works, with the result that they expended the sum already stated. The works accordingly were all executed under the Act of 1867, and the only question we have to decide is, whether, under the assessing powers of the Act of 1867, the expense is properly constituted a burden on the owners, or on the occupiers of heritable property within the burgh?

The assessing clause of the Act of 1867 is the 94th, which enacts that, "with respect to burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes"—and Kirkintilloch falls into that category— . . . (2) all charges and expenses incurred by the local authority in executing this Act or any of the Acts hereby repealed, and not recovered as hereinbefore or after provided may be defrayed out of an assessment to be levied by the local authority along with but as a separate assessment from any one of the assessments hereinafter mentioned in this section—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers (which powers are hereby given, and are declared to extend over the whole and every part of the district of the local authority) as the prison assessment or police assessment, as the local authority shall resolve, where that local authority is a town council or police commissioners, or trustees acting as police commissioners; or if there be no prison or police assessment, an assessment levied in like manner as is hereinafter authorised,

where the local authority is a parochial board." Now, this assessment is to be levied "in like manner" as the prison assessment or the police assessment, as the local authority shall resolve, and the Commissioners of Police are the local authority in this case. Therefore if there is both a prison assessment and a police assessment, they can choose either one or other along with which to levy this assessment. If there is no prison assessment they must levy it along with the police assessment, and *vice versa*, and if there is neither a prison nor a police assessment, another alternative is given to them, with which we are not here concerned.

The question then comes to be, whether there is in the burgh of Kirkintilloch a prison assessment or a police assessment, or both a prison and a police assessment which the Commissioners of Police are in use to levy, and in the case we are told that there is no prison assessment leviable in the burgh, the reason being that as regards that assessment Kirkintilloch is assessed as part of the county by the Commissioners of Supply. With regard, however, to the police assessment, we are told that "under section 84 of the General Police and Improvement (Scotland) Act 1862, the first parties assess all occupiers of lands or premises within the burgh in the sums necessary to be levied for the "police purposes" of that Act. By that section it is provided that the assessment just mentioned shall, for the purposes of that Act, be called the "police assessment," and by referring to the section we see that that is so. It is accordingly matter of admission that there is no prison assessment leviable in the burgh, but that there is a police assessment levied upon occupiers. The particular assessment with which we are dealing is therefore to be levied in the like manner and along with the police assessment, which means on the same parties as are subject to that assessment, and that being so there is an end of the case.

I think the statute is clear, and that the expenditure of £19,575 must be met by assessments laid on occupiers and not on owners.

LORD M'LAREN and the LORD PRESIDENT concurred.

The Court found and declared that the assessment, so far as it was necessary to defray the amount of £4070 mentioned in the case, was to be imposed upon the owners of heritable property within the burgh, and that the assessment, so far as it was necessary to defray the amount of £19,575 mentioned in the case, was to be imposed upon the occupiers of heritable property within the burgh.

Counsel for the First and Third Parties—M'Kechnie — Fraser. Agents — Cairns, M'Intosh, & Morton, W.S.

Counsel for the Second Parties—Ure — Younger. Agents — Webster, Will, & Ritchie, S.S.C.