

Wednesday, November 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GLASGOW DISTRICT SUBWAY COMPANY *v.* THE CORPORATION OF GLASGOW.

Appeal—Competency—Sheriff Acting in Administrative Capacity—Nomination of Arbitrator.

The Sheriff of Lanarkshire was by Act of Parliament charged with the duty in certain circumstances of nominating an arbitrator to settle differences between two parties. Upon the application of one of the parties he named an arbitrator, and against the interlocutor making the nomination the other party appealed to the Court of Session.

Held that the appeal was incompetent, as the Sheriff had acted not in a judicial but in an administrative capacity.

The Glasgow District Subway Company, incorporated by Act 53 and 54 Vict. c. 162, were authorised to make and maintain two subways and relative works in the City of Glasgow, &c. By that Act certain provisions were made for the protection of the Corporation of Glasgow with respect to gas-pipes, drains, roads, &c., which might be interfered with in the execution of the works, and it was provided by sec. 56 that if the company and the Corporation should differ, "Every such difference shall, on the application of the company or of the Corporation, be referred to the determination of an arbitrator, to be mutually agreed upon before the construction of the subways and works thereby authorised is commenced, and failing such agreement, as may be appointed on the requisition of any of the parties named in said section by the Sheriff of the county of Lanark." No arbitrator was mutually agreed upon before the construction of the works was commenced.

Upon 14th July 1893 the Corporation presented a petition to the Sheriff of Lanarkshire stating that certain differences were on the eve of arising between the Corporation and the company, rendering it necessary that an arbitrator should be appointed, and concluding with the following prayer—"May it therefore please your Lordship, upon considering this application, to appoint an arbitrator in terms of the said Act, for the purpose of determining all and any differences which may arise between the Corporation and the company under the same."

The Sheriff (BERRY) on 8th August 1893 pronounced the following interlocutor:—"Having heard the agents for the Corporation of Glasgow and the Glasgow District Subway Company, and considered the foregoing petition—Appoints Professor Archibald Barr, of the University, Glasgow, as

arbitrator, in terms of the Act referred to in the petition."

Against this interlocutor the company appealed to the First Division of the Court of Session.

Counsel for the Corporation argued that the appeal was incompetent. This was not a judicial proceeding in the Sheriff Court of Lanarkshire—no record had been made up—but an application to the Sheriff in an administrative capacity. His deliverance so pronounced was not capable of being extracted, and could not be reviewed by way of appeal—*cf. Strain v. Strain*, June 26, 1886, 13 R. 1029. The Sheriff of Lanarkshire in naming an arbitrator had acted as any other individual, *e.g.*, the chairman of the Chamber of Commerce, nominated for that duty, would have done. The judgment could not, under the former system, have been brought here by advocacy, and accordingly appeal was incompetent. If the deliverance was *ultra vires* of the Sheriff, redress should have been sought by reduction, or by suspension and interdict.

Argued for the Company—The Legislature had nominated not an individual but the Sheriff of Lanarkshire. The interlocutor was a judgment by a Sheriff. They were prepared to show he had gone beyond the jurisdiction and powers conferred upon him by the statute in pronouncing this judgment when he did, and they were entitled to do so by appeal from the Sheriff Court in ordinary form.

At advising—

LORD PRESIDENT—In my opinion this appeal is incompetent.

The duty imposed on the Sheriff by the statute is that of nominating an arbitrator, and the question is, whether in the intention of the Legislature this was to be a judicial proceeding, to take place in the Sheriff Court, and with a consequent right of appeal to the Court of Session? In its nature the nomination of an arbitrator does not seem a piece of business requiring or suitable to such procedure. Nor does the selection of the Sheriff as the person vested with the choice at all imply that he is to act in a judicial character. The Sheriff is an administrator as well as a judicial officer, and there are incumbent upon him numerous duties which are not performed in his Court. It seems to me that the matter now in question is not a piece of Sheriff Court business, and the mere circumstance that the party asking the Sheriff to name an arbitrator approached him in a petition, and that his nomination is expressed in the style of an interlocutor, cannot invest with a judicial character an act which has not that legal quality.

It is hardly necessary to say that if the Sheriff, as the donee of this power of nomination, has acted *ultra vires* the parties have the same remedies as if nomination had lain with any other public officer or any individual. All that we have now to decide is whether the challenge of the nomination can be made by appeal; and in my judgment it cannot.

LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion.

LORD ADAM was absent when the case was argued.

The Court dismissed the appeal as incompetent.

Counsel for the Corporation—Lees—Ure.
Agents—Campbell & Smith, S.S.C.

Counsel for the Subway Company—R. V. Campbell—W. Thomson. Agents—W. & J. Burness, W.S.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HAMILTON POLICE COMMISSIONERS
v. FINLAY.

Police — Public Health — Assessment — “Special Sewer Rate” — Special Drainage District — Objections to Burgh Accounts — General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), clauses 75 and 96 to 100.

The General Police Act 1862, clause 75, enacts that accounts are to be kept by the police commissioners of all property vested in them and of money received and disbursed by them, and provides that the accounts may be inspected by persons assessed, and that in the case of any such person being dissatisfied with the accounts or items therein, he may complain by petition to the sheriff stating his objections to the accounts or items, and that the sheriff shall determine such complaint, his decision being final.

By clauses 96 to 100 of said Act the police commissioners are authorised to charge and assess rates on the owners of all lands and premises liable to contribute to rates for making new sewers, special sewer rates over and above any other assessments or rates, and such rates are to be called “the special sewer rate.” Clause 99 enacts that separate and distinct accounts are to be kept of all moneys collected under such rate in each distinct district, and of all payments and disbursements in respect thereof, and that the moneys collected are to be applied so that each district shall as near as may be bear its own expenses.

An owner within a special drainage district of a police burgh who had been assessed for a special sewer rate and paid the assessment for four years, refused to pay a further assessment. The police commissioners raised an action against him for the amount of the assessment. The defender pro-

duced a copy of the accounts connected with the drainage district, and contended that if certain items were removed from the debit side of the account which the police commissioners acting *ultra vires* had inserted, and if certain sums were added to the credit side which the police commissioners acting *ultra vires* had applied to other purposes, the whole costs incurred in connection with the drainage district had been already paid by the special sewer rate formerly levied.

Held that the defence consisted of objections to items in the accounts, and was not a good defence to an action for payment of rates.

Opinions by the Lord Justice-Clerk, Lord Young, and Lord Trayner that objections by persons assessed to items in all accounts kept by the police commissioners, including the accounts kept in connection with a special drainage district, must be made in the mode laid down in section 75 of the General Police Act 1862.

By clause 75 of the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101) it is enacted—“Accounts of all property, heritable and moveable, vested in the commissioners, showing the nature of such property and of all money received and disbursed, shall be kept in books by the treasurer or collector as the commissioners may appoint, and all such books of accounts may at seasonable times be inspected and perused without fee or reward by any person assessed, and also by any person entitled to any money due and owing on the credit of such assessment, and such persons may take copies of or extracts from any such books and accounts without fee or reward, . . . and in case any person who shall be assessed shall be dissatisfied with any accounts which shall have been made up as aforesaid, or with any of the articles or items contained in such accounts, such person may complain against the same by petition to the sheriff, in which complaint shall be specified the grounds of objection to such accounts, items, or articles; and the sheriff shall proceed to hear and determine the matter of such complaint, and his decision shall be final.”

By clauses 96 to 100 inclusive of said Act the police commissioners are authorised to charge and assess rates on the owners of all lands and premises liable to contribute to rates for making new sewers, special sewer rates over and above any other assessments or rates, and such rates were to be called the “special sewer rate.” Clause 99 enacts—“The commissioners . . . shall cause separate and distinct accounts to be kept of all moneys collected under any rate in each distinct district, and of all payments and disbursements in respect thereof, and they shall apply the moneys to be collected and received from each distinct district under any such rate as aforesaid for the several purposes to which the same may be lawfully applied under the