COURT OF SESSION.

Thursday, July 14.

SECOND DIVISION.

MACLEOD OF CADBOLL *v.* POLICE COMMISSIONERS OF TAIN.

General Police and Improvement (Scotland) Act 1862—30 *and* 31 *Vict., cap.* 101, *sect.* 75—*Police Commissioners — Operations — Interdict.* Interdict granted against Police Commissioners who had entered A's ground and executed certain operations for the purpose of discharging sewage, the authority of the Sheriff not having been previously obtained under the General Police Act or the Public Health Act.

This was a suspension and interdict brought by Mr Macleod of Cadboll for the purpose of interdicting the Police Commissioners of Tain from making a drain through a portion of the complainer's property known as the "Hangman's Rigg," for the purpose of discharging sewage into a ditch running along a road claimed by the complainer as a private road leading to the farm of Kirksheaf. The contention of the complainer was, that the ditch in question was an ordinary roadside ditch and his private property, and that therefore the Police Commissioners had no power under their Acts to introduce sewage into it. But the complainer further contended that, in any view, the respondents were not entitled to execute the works complained of at their own hand and without going before the Sheriff under the General Police Act or the Public Health Act, or in some other way obtaining competent judicial authority. Respondents maintained in the answers that the proceedings complained of were warranted by the Public Health Act; and they disputed the complainer's right to the ditch in question, maintaining that the same was truly one of the public sewers of Tain, and had been used as such from time immemorial.

After a proof, chiefly in regard to the character of the ditch, the Lord Ordinary (MURE) pronounced the following interlocutor:—

"*Edinburgh, 24th March* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, productions, and whole process—Finds that, in the month of July 1868, the respondent Mr Cameron made an application to the other respondents, as Commissioners of Police for the town of Tain, for authority to connect the drains of his house to the east of the said town with the sewers under the charge of the respondents as the local authority for the town: Finds that, after appointing a committee to inquire into the matter, the respondents, on the 12th of March 1869, but without having made any communication to the complainers, authorised 'Mr Cameron to make the necessary communication between the drain from his premises to the common sewer along the road from Tain by Kirksheaf to Tarbet, at sight of Mr Maitland:' Finds that, upon this resolution coming to the knowledge of the complainer Mr M'Leod, he directed a letter to be written to the respondents, remonstrating against the resolution authorising the drain to be made through his property for the purpose of discharging the sewage in question, and requesting the respondents to take steps to remove the cause of the complaint: Finds that, notwithstanding this remonstrance, the respondents took no steps to suspend or recal their resolution of the 12th of March 1869, or to consider the letter of the complainer's agent, until the 12th of April 1869, when they resolved 'that they had no alternative under the statute but to authorise the construction of the drain complained of:' Finds that, at or about the date of the said meeting of 12th April 1869, the respondent Mr Cameron, professing to act under the authority so granted, proceeded, but not at sight of Mr Maitland, and without giving any notice to the complainers, to lay a tiled drain through the lands called 'Hangman's Rigg,' which are the property of the complainer Mr M'Leod, for the purpose of running off the sewage and other matters collected in the cesspool on his property through the said drain, and discharging the same into a ditch along the side of the road leading from Tain to the farm of Kirksheaf, belonging to the complainer: Finds that the sewage and other matters so discharged were of a very offensive description, and calculated to render the water in the said ditch, which runs into a pond on the complainer's farm, unfit for the purposes for which it had for many years been used: Finds that, upon the complainer being made aware of these proceedings of the respondent Cameron, and of the refusal of the other respondents to take any steps to remove the cause of the complaint, he authorised the other complainer to take up the drain which had thus, without his consent, been laid through his property, which was accordingly done: Finds that between the 12th of April 1869, when the respondents declined to take any steps to recal the authority granted by them to the other respondent, and the date when the present application for interdict was presented, no application had been made to the Sheriff by the respondents under section 75 of the statute 30 and 31 Vict., cap. 101, for warrant to enter the complainer's lands and make the drain in question, and that no such application has since then been made: Finds, in these circumstances, in point of law, that the proceedings complained of, and in particular the laying of the tiled drain through the property of the complainer, were *ultra vires* and unwarranted by the statutes under which alone the respondents are authorised to act: Recals the interdict formerly granted, and of new interdicts, prohibits, and discharges the respondents, or any of them, from carrying into execution the warrant of the 12th of March 1869, by entering upon, or laying pipes, or making drains through the portion of the farm of Kirksheaf known as the 'Hangman's Rigg,' forming part of the property of the complainer, or from otherwise interfering with the said portion of the complainer's property, until warrant and authority to do so shall have been duly obtained, under and in terms of the provisions of the General Police and Improvement (Scotland) Act 1862, and of the 30th and 31st Vict., cap. 101, or other statutes under which the respondents are authorised to act as Police Commissioners or local authority for the town of Tain, and decerns: Finds the complainer entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

"*Note.*—I. It appears to the Lord Ordinary to be clear, upon the evidence, that the 'Hangman's Rigg' must, for the purposes of the statutes under which the respondents act as Police Commissioners,

be held to be the property of the complainer, for it has been let or otherwise dealt with for many years as part of the Cadboll estate, and although the titles founded on do not mention it by name, the Lord Ordinary is disposed to think that the description in those titles, when taken in connection with the proof of possession, is sufficient, in the absence of all evidence or even specific averment to the contrary, to warrant him in holding, even apart from the interpretation clause of the statute, that this piece of ground is the property of the complainer. But, having regard to the interpretation clause, it cannot, it is thought, admit of doubt that the complainer Mr M'Leod is an 'owner' of that property in the sense of the statute, who has withheld his permission to the respondents' proposed operations. So standing the fact as to the ownership of the ground, it further appears to the Lord Ordinary that, as the respondents the Police Commissioners declined, notwithstanding the objection of the complainer, to recal the authority given to the other respondents, and never applied to the Sheriff in terms of the 75th section of the statute, they have been and are acting illegally, and without the statute, more especially in keeping up the warrant of the 12th of March 1869, and that the complainer was entitled, when this suspension was presented, to apply to the Court for redress. And the Lord Ordinary does not think that there is in these circumstances anything in the provisions of the statute to exclude the jurisdiction of the Court to deal with the question.

"The case of *Smeaton*, May 17, 1865, relied on by the respondents, is in several essential respects different from the present. The Commissioners were there proceeding strictly in terms of the statute. They had given notice of their intention to hold the statutory meeting, with a view to hear parties who might have any objection to make to their proposed operations, and from the decision which might then be come to a power of appeal to the Sheriff was open to any party aggrieved, while the decision of the Sheriff in the matter was declared to be final. But instead of attending the statutory meeting with a view to obtain an alteration of the order, the complainer in that case made an application directly to the Court of Session to stop the proceedings by interdict, when it was held that this Court had not jurisdiction to entertain the case, as the Commissioners were proceeding in strict conformity with the statute, and that it was the duty of the complainer in such circumstances to have recourse to the statutory remedy. But in the present case the respondents, the Commissioners of Police, have, in the opinion of the Lord Ordinary, exceeded their powers, by authorising the other respondent to enter upon the property of the complainer without first complying with the regulations of the statute in that respect. The proceedings of the respondents do not therefore come within the provisions of sect. 108 of the statute, which excludes review in those cases only where the matters complained of are done 'in execution of the Act.'

"II. The Lord Ordinary has dealt with the case on the assumption that it is proved as matter of fact that the ground through which the connecting drain is authorised to be made is the property of the complainer, which is, in his opinion, sufficient for its decision. But there is another ground on which he is disposed to think that the proceedings are open to objection under the statute, viz., that the ditch into which the drain was led is the private property of the complainer, and not therefore a sewer which can be held to have been, by force of the statute, vested in the respondents. It is a ditch along a road, the property on both sides of which belongs to the complainer. That road, which was once a public highway, appears to have been shut up in 1837 by order of the Road Trustees, after a new public road had been made, and it has ever since been kept in repair, not by the trustees, but by the complainer, as an access to his farm. But even if this had not taken place, the property of the *solum* of the ditch, and even of the road itself, must, it is thought, be held to belong to the complainer; *Galbraith*, 11th July 1845, 4 S., Bell, p. 374. There is accordingly no evidence to show that the ditch has ever been considered to be a sewer under the charge of the respondents.

"It is stated on the record that there have been Police Commissioners in Tain since 1854, and it is in evidence that up to the date of the present dispute no steps were ever taken by the respondents or their predecessors in office to clean the ditch or ascertain that it was kept in a fit state to carry off any sewage that might be run into it. There is abundance of evidence, on the other hand, to show that during all that time it was dealt with by the complainer and his tenant as any ordinary ditch upon the property, and that they were allowed without objection to deepen or widen or contract it at their convenience. The mere fact, therefore, that the sewage from certain houses in the town has for some years run into this ditch, cannot, as the Lord Ordinary conceives, be held to constitute it a public sewer in the sense of the statute. It may be that the parties who have so used it, if they have done so for forty years, may be able, under the authority of *Ewart* v. *Cochran*, March 22, 1861 (4 Macqueen, p. 117), to establish a right to continue that use. But that will not, in the opinion of the Lord Ordinary, deprive the complainer of his right of property in the ditch; and if the Lord Ordinary is right in this view, the respondents appear to him to have exceeded their powers in this respect also, by authorising the respondent Mr Cameron to connect his drain with a ditch or run of water which is the private property of the complainer."

The respondents reclaimed.

FRASER and WATSON for them.

SOLICITOR-GENERAL and MACKINTOSH in answer.

The Court adhered in substance, interdicting the operations until judicial authority should be obtained. The Lord Justice-Clerk and Lord Cowan were further of opinion that the complainer had made it his case in regard to the character and ownership of the ditch. Lord Neaves and Lord Benholme expressed no opinion on that point. The complainer was found entitled to expenses.

Agents for Complainer—Mackenzie & Black, W.S.

Agents for Respondents—Murray, Beath & Murray, W.S.

Monday, July 18.

TEIND COURT.

THE EARL OF MANSFIELD *v.* THE OFFICERS OF STATE AND THE REV. W. S. HAMILTON.

Teinds—Sub-Valuation — Approbation — Identification of Lands—Process—Expenses. It is com-