

action has been brought. Suppose an action for trespass was brought before the Sheriff, and it was clear that the real point at issue was the right to the property, then it is manifest that the Sheriff would not set himself to decide such a thing. But that is not a question of jurisdiction; it is only the question of the propriety of exercising it under circumstances which would seem first to call for another action. I think that the Sheriff has power (and it is right that he should have it) where the defence is of the character I have indicated, to delay, or even decline, to hear the case till the other matter is settled. In the present case I entirely concur in your Lordship's observations.

LORD CRAIGHILL concurred.

Appeal dismissed.

Counsel for Appellant—Rhind.

Counsel for Respondent—W. A. Brown.

COURT OF SESSION.

Thursday, June 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DUBS AND OTHERS *v.* POLICE COMMISSIONERS OF CROSSHILL AND OTHERS.

Burghs Extension Act 1857 (20 and 21 Vict. c. 70)
—*Sheriff—Appeal—Competency.*

By sec. 1 of Act 20 and 21 Vict. c. 70, it is enacted—“(1) Any ratepayers to the number of twelve or more, in respect of lands and heritages situated beyond the existing boundaries of any royal or parliamentary burgh in Scotland, may present a petition to the Sheriff of the county in which such burgh or part of a burgh is situated, praying him to take the steps provided by this Act for extending the boundaries of the burgh to the extent to be specified in such petition; and the Sheriff shall, within three weeks from the date of the presentation thereof, define and specify in a written deliverance on the petition such boundaries, which shall include an area two-thirds of which is wholly or partially built on or laid out for building, as in his opinion would be suitable for the extended boundaries of the burgh, and the same shall be thereafter published by advertisement in such manner as the Sheriff shall direct; and it shall be lawful for the proprietor of any unbuilt-on land within the proposed extended boundaries, or to the Police Committee of the county to be appointed in terms of any Act passed during the present session of Parliament, within one month after the last advertisement so appointed to appeal by Note of Appeal to any one of the Lords Ordinary of the Court of Session, who shall have power in a summary way to dispose of such appeal after such inquiry as to him shall seem fit; and the judgment of such Lord Ordinary dismissing such appeal, or sustaining the same in whole or in part, shall be final and con-

clusive.” In a petition presented by certain ratepayers to the Sheriff for the purpose of extending the boundaries of a burgh, the Sheriff found that the boundaries described in the petition, or any others which might be within its scope, did not contain an area two-thirds of which was wholly or partially built on or laid out for building, and also that the boundaries were not such as would be suitable for the extended boundaries of the burgh. The petitioners, and also the magistrates and town-council of the burgh, on whom intimation of the petition had been made, and who had complained, appealed to the Court of Session.—*Held* that the appeal was incompetent, there being no review of the Sheriff's judgment except what was expressly provided by the Act.

Counsel for Dubs—Pearson. Agents—Rhind & Lindsay, W.S.

Counsel for Town Council of Glasgow—Dean of Faculty (Watson)—Balfour. Agents—Campbell & Smith, S.S.C.

Counsel for Police Commissioners of Crosshill—Scott. Agent—John Gellatly, S.S.C.

Friday, June 2.

FIRST DIVISION.

[Sheriff of Forfarshire.

DUNDEE POLICE COMMISSIONERS *v.*

ROBERT HARDY MITCHELL.

Jurisdiction—Sheriff—Statute 13 and 14 Vict. cap. 33, secs. 73, 213, 285, 286, 307-310—19 and 20 Vict. cap. 103, sec. 64—Police Commissioners.

Held that proceedings for recovery of expenses under section 64 of the Nuisances Removal Act, 19 and 20 Vict. cap. 103, are regulated by sections 307-310 of the Police Act, 13 and 14 Vict. cap. 33, and that sections 285-6 of the Police Act, whereby the Sheriff's jurisdiction is in certain matters declared final, do not apply.

This was an action brought by the Dundee Police Commissioners against the defender, who was alleged to be a house proprietor on Ann Street, Dundee, concluding for a sum of £30, 5s. 2d., “being the expenses incurred and laid out by the said Commissioners in paving the portion of Ann Street abutting on and bounding the defender's lands.” The street in question had been repaired in consequence of a petition presented to the Commissioners, signed by the defender and eighty others, praying them to repair it as they might think best. This action was brought under the 64th section of the Nuisances Removal Act (19 and 20 Vict. cap. 103) quoted in the Lord President's opinion, and was supported by averments as to the insufficiency of the street in question before the adoption of the Police Act (13 and 14 Vict. cap. 33) by the burgh of Dundee in the year 1851, service of notice as required upon the defender, and the due execution of the works.

The defender pleaded—“(1) That not being owner of any lands or heritable subjects abutting on Ann Street, or any part thereof, he is not liable for the account sued for. (2) The road or street called Ann Street, so far as relates to the

present action, having been properly formed and made good before the passing of the Act 13 and 14 Vict. cap. 33, no action lies at the instance of the Police Commissioners against the owners of the lands abutting thereon, in respect of the causewaying thereof by said Police Commissioners. . . . And (5) The Police Commissioners having, when they assumed the use of said road, taken it over as well made and in a sufficient state of repair, and having so maintained it for the period condescended on, they cannot now claim that the feuars whose lands abut on said street shall causeway it, or that they shall be made liable for the cost thereof."

When the case was heard before the Sheriff-Substitute (CHEYNE) the pursuers pleaded that the defender not having availed himself of the power of appeal to the Sheriff, provided by sec. 285-6 of the Police Act, against the notice served on him by the Commissioners within seven days, he was now barred from making any objection to the pursuers' account.

The Sheriff-Substitute allowed a proof before answer, and after evidence had been led as to the state of the road prior to the adoption of the Police Act by the burgh of Dundee, pronounced the following interlocutor:—

"The Sheriff-Substitute having advised the process, Finds, in point of fact, that in 1871 the Police Commissioners for the burgh of Dundee served notices under section 64 of the Nuisances Removal, &c. (Scotland) Act, 1856, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, requiring them to pave the carriage-way of said street opposite their respective properties, in manner therein specified, and on the owners failing to comply with the said requisition, had the work executed under a contract: Finds, however, also in point of fact, that the carriage-way of said street was made good prior to the adoption in the burgh of Dundee of the General Police and Improvement (Scotland) Act 1850: Finds, in point of law, that the owners of property abutting on said street are not liable for the expense of the foresaid works, but that the same must be defrayed out of the general police rates: Therefore assolizies the defender from the conclusions of the action.

"*Note.*—After full consideration I am satisfied that the defender is not precluded by his non-appeal against the Commissioners' order from objecting in this process to the power of the Commissioners to issue that order. In all that regards the execution of works, the necessity of them, their style, &c.—in other words, in all matters of detail involving the exercise of discretion—I fully concede that, subject only to a summary appeal to the Sheriff, the Commissioners are final, but in my humble opinion the finality clause is no answer when it is offered to be proved either that the works are not authorised by the statute, or, which is the case here, that the party upon whom it is sought to lay the expense of them is not legally liable (see *Lord Advocate v. Perth Police Commissioners*, 7th Dec. 1869, 8 Macph. 244, and *Miller's Trustees v. Leith Police Commissioners*, 19th July 1873, 11 Macph. 932). It is said, however, that *esto* these allegations would form a relevant subject of inquiry in a suspension (which would necessarily be in the Supreme Court) of a charge for payment; they cannot re-

levantly be inquired into in an action like the present, in which it is argued the Sheriff's duties are merely ministerial. In the absence of any decision of the Court of Session to that effect, I must refuse to give my assent to such a proposition, or to take such a limited view of my functions. The action is in form an action for debt, and I can find nothing in the statutes which precludes me from considering any objections to the claim which the Court of Session could consider in a suspension. I am not asked to undo anything that the Commissioners have done, or to find that the work was unlawful. All that I am called upon to determine is on whom the expense is to fall, or rather, whether it can lawfully be laid on the abutting owners. That depends on its being shewn that the procedure has been regular, and that the clause of the statute applies to the street in question. The pursuer has very properly undertaken to satisfy me on both points, and he must prove his case."

There were some further remarks in his note as to the state of the street prior to 1851, and its management since that time.

The pursuer appealed to the Sheriff (HEBIOT), who on 8th December 1875 pronounced the following interlocutor:—

"Having heard parties' procurators on the pursuer's appeal against the interlocutors of 29th September, 11th and 26th October last, and made avizandum, and having considered the record, proof, and whole process, Sustains the said appeal: Recals the interlocutor of 26th October: Repels the defender's pleas so far as preliminary: Finds in fact—(1) That the Police Act, 13 and 14 Vict. c. 33, was, except the clauses as to the supply of water, adopted in the burgh of Dundee in the year 1851, and is in force within the said burgh; (2) That in the year 1871 the Police Commissioners for the said burgh served statutory notices under the 64th section of the 'Nuisance Removal, &c. (Scotland) Act, 1856,' which comes in lieu of the 213th section of the said Police Act, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, containing requisitions to pave, within one month from the service of the said notices, the carriage-way of the said portion of said street in manner therein specified, and intimations that if they refused, neglected, or delayed to execute the said work in terms of the said requisitions, the Police Commissioners would cause the work to be executed, and that for the expense incurred by the said Police Commissioners in respect thereof proceedings would be taken against the said owners as the law directs; (3) That the said statutory notice, containing the said requisition and intimation, was served upon the defender on the 15th day of June 1871; (4) That the defender did not, as required by the said notice, execute the said work, or any part of it; (5) That the defender did not, in terms of the 285th and 286th sections of the said Police Act, make the said statutory notice, containing the said requisition and the said intimation, the subject of appeal to the Sheriff, nor did the defender take any proceedings in any Court for having the said statutory notice, containing said requisition and intimation, set aside or superseded, nor for having the said Police Commissioners prevented from proceeding to execute the said work on the faith and in terms of the said