Saturday, June 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MUIRHEAD (CLERK TO HILLHEAD POLICE COMMISSIONERS) *v.* RENWICK.

Police—Burgh—General Police and Improvement Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 190—*Special Sewage Rate—Connecting House-Drain with Sewer—Reasonable Sum Payable for the Privilege.*

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), section 190, provides—"Every person not being employed or authorised for that purpose by the commissioners who shall make any drain from any lands or premises into any of the sewers vested in the commissioners, shall be liable to a penalty not exceeding £5; and the commissioners may cause such drain to be re-made as they think fit, and the expense incurred thereby shall be paid by the owner of the lands or premises, and that over and above a reasonable sum of money for the use of sewers which the commissioners are hereby authorised and required to exact for all lands or premises which were not assessed for the expense of making such sewers, or which shall have been built, enlarged, or altered after the assessment for making the same was imposed or levied, and the commissioners shall fix and determine the sum to be paid as they shall consider just."

The commissioners of police of a burgh, acting under the powers conferred by the statute, constructed a system of sewage, and to meet the expense thereof they had since 1870 levied on the owners of property in the burgh a special sewage rate, which had still several years to run. In 1888 an inhabitant of the burgh having connected certain newly erected property with the burgh sewers, the commissioners of police fixed a sum of £120 as a reasonable sum to be paid for the privilege, and on a failure to pay sued the owner of the property for the amount. It was admitted that this sum included a sum of £40 said to be a commutation of the special drainage rate.

Held that the defender must be assoilzied, (1) because the statute did not warrant such commutation, and (2) because no decree could pass for the balance of £80, as there was no resolution of the police commissioners for that sum.

Opinion (*per* Lord Rutherfurd Clark) (1) that the 190th section of the statute was not confined to the case of a house-drain which had been connected with a sewer without the authority of the commissioners, but that it was intended to be of general application so as to settle the burdens on all lands and premises which were not assessed for the use of the sewer, or which had been built, enlarged, or altered after the assessment was imposed; (2) That this section was not limited in its operation to lands connected with the sewer after the special rate had come to an end, but that the words "imposed or levied" must be construed as equivalent to "imposed, or in the course of being imposed," and that in all cases where a drain leading from premises such as described were connected with a sewer a reasonable sum might be exacted.

The Commissioners of Police of the burgh of Hillhead constructed at considerable expense a complete system of sewage for the whole of the burgh under the General Police and Improvement (Scotland) Act 1862, for the cost of which a special sewer rate had been levied since 1870 on the owners of property in the burgh. The total amount of the expense was £9868, of which sum £6791 had been collected from the special sewer rate up to Whitsunday 1887. The balance of £3077 fell to be paid from future assessments. John Renwick, a builder in Hillhead, erected buildings upon property within the burgh. These were erected since the month of November 1887, and the gross rental was £1077, 15s. The ground upon which these buildings stood had not been previously assessed for the special sewer rate. In February 1888 the Commissioners intimated to Renwick that in terms of the 190th section of the above Act "a charge equal to 1s. 7¼d. on the estimated rental of all properties to be in future connected with the sewage system of the burgh will be made on the owners of such lands in respect of the use of the sewers and of that portion of the cost of constructing them which has not been in the past defrayed from assessments. In addition to this, these properties will continue liable along with the other properties in the burgh to assessment for the special sewer rate still required for providing for the balance of the cost of the sewers already constructed, and for the completion of the system." Payment was demanded before connection was made between the property and the sewers. Renwick paid no attention to the intimation.

In September 1888 Renwick made connections between his property and the burgh sewers without any intimation to the Police Commissioners. Upon 10th September the Commissioners resolved "that proceedings should be taken against Mr Renwick for the enforcement of the penalty" provided by the 190th section of the statute. They also determined that a sum of £80 was "a reasonable sum to be paid by Mr Renwick for the use of the sewers in respect of the above property, and that on the understanding that the property would still remain liable for any special sewer rate to be imposed in the future in respect of the portion of the cost of the burgh sewage system which has not yet been provided for by taxation." Intimation of this resolution was duly made to Renwick, but he failed to make payment of the sums claimed, and continued to discharge sewage from the said property into the said sewers. There-

upon the Commissioners raised an action in the Sheriff Court at Glasgow against him concluding, *inter alia*, for payment of the sum of £80, to which various defences were stated, and on the 30th of January 1889 the Sheriff-Substitute (Mr ERSKINE MURRAY) issued an interlocutor in which he repelled the pleas of the defender in so far as directed against the payment of a "reasonable sum" under the said section, but found that the said Commissioners were not entitled to annex the condition as to an understanding stated in their said resolution, and that therefore the payment of the said reasonable sum by the defender must be held to be free from such understanding.

On the day on which this judgment was pronounced the defender paid the assessment which the pursuers had imposed of the 1d. in the £ special sewer rate.

In February 1889 the Commissioners resolved that the slump sum to be paid should be £120, and abandoned their previous action, and as a condition paid the defender's expenses. They then sued Renwick in the Sheriff Court at Glasgow for £120, and called as defenders the tenants of houses in the property under John Renwick, but only for their interest.

The defender averred—"The pursuers have never hitherto exacted payment from any proprietor of premises which have been built, enlarged, or altered since they began to impose the said special rate in 1870, of a special sum of money for the use of the sewers such as they now demand from the said defender, although it is a fact that very many buildings have been built, enlarged, or altered since that date, the fact being that the rental of the burgh since then has been more than doubled. If the said Commissioners had all along been imposing and levying a similar assessment from the proprietors of such buildings the cost of constructing the said sewers (if it has not been already defrayed) would by this time have been defrayed, and there would have been no further need for imposing the said special sewer rate or any sum in lieu thereof."

The pursuers pleaded—"(1) The defender John Renwick having made connection between his property and the burgh sewers is liable in the sum sued for."

The defender pleaded—"(4) The assessment of £120 sued for is not warranted by the 190th section of the General Police and Improvement (Scotland) Act 1862. (8) This defender having been assessed in special sewer rate in respect of his said property, and having paid said assessment, is not liable in the sum sued for."

Upon 30th May 1889 the Sheriff-Substitute (MURRAY) decerned against the defender as craved.

"*Note.*— . . . The real and practical defence arises now on the recently added plea, No. 8, to the effect that the defender having been assessed on the special sewer rate of 1d., and having paid it, the pursuers are barred from taking the alternative course of demanding a reasonable slump sum. Now, had the pursuers after assessing the defender for a time under the small rate system suddenly turned round and demanded payment of a slump 'reasonable sum' their demand would certainly have been barred by their own conduct, for it would have been held that they had chosen the one alternative and had no right afterwards to throw it up and take to another. But the present circumstances are entirely exceptional; when the defender got notice of his assessment of the 1d. rate, he also knew from the former action that the pursuers were not imposing this assessment in lieu of asking a reasonable slump sum, but were actually accompanying it with a demand by action for the sum £80. The acceptance by pursuer's collector of payment of the little assessment made by defender on the very day the judgment of 30th January was out cannot therefore in the circumstances be held to have been an adoption by the pursuers of the alternative course of assessment instead of the imposition of a 'reasonable sum.' They are entitled, repaying the sum contained in the receipt, to insist on what they even formerly were insisting on, the payment of a slump sum, only it is to be a sum excluding the idea of an additional assessment, and not a sum coincident with an additional assessment."

The defender appealed to the Sheriff on two main grounds—(1) That the petition contained no conclusion for a penalty under section 190 of the Police Act of 1862, in respect of there having been an unauthorised use by the defender of the burgh sewers, and that without a penalty being incurred that section gave no authority for the exaction of a reasonable sum for the use of the sewers; and (2) that the payment by the defender on 30th January last of the assessment of 1d. in the £ as the amount of a special sewer rate imposed on him by the pursuers operated to bar the pursuers afterwards from a right to require him to pay a reasonable sum under section 190.

The Sheriff (BERRY) adhered.

The defender appealed to the Court of Session. It was admitted that the sum of of £120 sued for contained a sum of £40 as a commutation of the special drainage rate which had several years to run.

Argued for the defender and appellant—The Commissioners could exact money for the construction and maintenance of the sewers under this Act in three ways. Under the 96th section they could levy a special sewer rate for the purpose of providing funds to make a new sewer. Under the 9th section they might impose the "general sewer rate" for the maintenance and cleaning the sewers. The defender made no objection to paying this rate. Under the 190th section the Commissioners could impose a "reasonable sum of money for the use of the sewers." It was a demand for this sum which the defender now resisted. The reasonable sum could not be exacted unless the whole special rate had ceased to be levied. That had been decided by the Sheriff in the former action and acquiesced in by the pursuers, who abandoned their action. Further, it

could not be exacted from anyone who had first been assessed for the special sewer rate—*M'Callum* v. *Barrie*, February 26, 1878, 5 R. 683. Under section 384 the term for which the special rate could run was 20 years. The defender had been assessed in special sewer rates and had paid them, so that he was not now liable for the reasonable sum—*Guthrie* v. *Miller*, May 25, 1827, 5 S. 711. There was no warrant in the statute for the commutation of special sewer rate which to the extent of £40 was included in the sum sued for. If so, the pursuers could not sue for the difference of £80 because there was no resolution of the Police Commissioners under which it could be demanded.

Argued for the respondent—The appellant's premises fell under the terms of section 190. They were not assessed for the making of the sewers. No doubt the lands were within the burgh and assessable, but they were of such small value when unbuilt upon that no assessment was imposed. Further, they had been built upon after the assessment was imposed. The Commissioners were therefore entitled to impose a reasonable sum for the use of the sewers. The sum imposed was such as to place upon these premises a fair share, along with the other properties in the burgh, of the expense of making the sewers. The Sheriff had held in the former action that these premises were not liable in future to special sewer rate, and therefore the reasonable sum imposed was calculated on that basis. If the premises were held to be liable in future to special sewer rate the reasonahle sum would no doubt be proportionally decreased—*Macknight* v. *Macgregors*, December 23, 1871, 10 Macph. 289.

At advising—

LORD RUTHERFURD CLARK—I think it is impossible that the pursuers can obtain the decree which they ask. The sum sued for admittedly contains a sum of £40, said to be a commutation of the special drainage rate which has several years to run. I can find no warrant in the Act for such commutation. Nor do I think that we are entitled to give our decree for £80 on the simple ground that there is no existing resolution of the Police Commissioners under which that sum can be exacted.

These considerations are sufficient for the decision of this case, and I doubt if we can decide anything else. But it may save further litigation if I express the opinion which I have formed on the questions which have been argued before us.

Two views have been presented of the meaning of the 190th section. The first is, that it applies only to the case of a drain which has been connected with a sewer without the authority of the Commissioners. The second is, that it has no operation so long as the special rate imposed for the making of the sewer is current, and that the "reasonable sum" is only to be levied in aid of the general rate or the rate for the maintenance of the sewer.

1. I do not think that the first of these views is well founded, and it is opposed to the opinions expressed by the Judges in the case of *M'Callum*. The section is very awkwardly expressed. It begins with the case of a drain being connected with a sewer without lawful authority. It imposes a penalty for the offence, and it speaks of the reasonable sum which the Commissioners are authorised to fix as being over and above the penalty, implying as it is said that both must be due or neither. It seems to me that this is too strict a reading of the clause. It is the only section which deals with the case of lands and premises which were not assessed for the expense of making the sewer, or which have been built, enlarged, or altered after the assessment was imposed, and in consequence I think that it was intended to be of general application so as to settle the burdens on all such lands and premises when the drains therefrom came to be connected with the sewer. The Commissioners are expressly authorised to exact a reasonable sum for all lands and premises, and I construe the words "over and above" as meaning that the payment of the penalty imposed for connecting a drain with a sewer without due authority does not exempt the offender from the payment of what is due if the connection be legally made.

2. The second view depends on the consideration that the reasonable sum is payable for the use of the sewer; that it does not come in lieu of the special rate for which all lands within burgh are liable; that to pay the sum claimed under the 190th section as well as special rate would be to pay twice over for the making of the sewer, and that in consequence the words "after the assessment has been made or levied" must be construed as meaning after the special rate has come to an end, so that those lands only are liable under the section which are connected with the sewer after that time. The case of the appellant turns on his power to give to the words "imposed or levied" the meaning for which he contends. For inasmuch as he does not maintain that the sum exigible under the 190th section can be in lieu of the special rate, he can only escape liability under that section by showing that it does not come into operation till the special rate has ceased.

I doubt if we can give a consistent meaning to the section without doing violence to some of its language. Indeed, the appellant sets the example. For I do not think that he can reach his conclusion without doing violence to the words which he seeks to construe. When a thing is spoken of as having happened after an assessment has been imposed, the natural or indeed the only meaning of the words is that the date of imposition is referred to. It seems to be impossible to hold that the reference is to the time when the assessment has ceased to be exacted. If the words "was levied" had alone been used, the argument of the appellant would have been stronger. But they are joined to the word "imposed," which cannot, I think, on any admissible construction be held to be the same thing as "paid in full." Reading the words to-

gether, and taking the one as explanatory of the other, I prefer to construe the phrase as equivalent to "imposed, or in the course of being levied," rather than to adopt the very strained construction of the appellant.

There is, however, another construction, but one equally fatal to the appellant. "Imposed" must, I think, be referred to the date of imposition. "Levied" may mean after the assessment has been levied and when the rate has ceased to exist. But in that case the statute contemplates two events, in both of which the sum is exigible —that is to say, during the existence of the special rate or after its termination — so that in all cases when a drain leading from premises such as are described in the Act is connected with a sewer a reasonable sum may be exacted by the Commissioners.

But we are confronted with the argument that the payment is for the use of the sewer, that this means for the future use of it, and therefore that the appellant becomes liable in a double payment for the same thing. I have to consider what is the meaning of the words "for the use of sewers" as occurring in this clause. The case contemplated by the statute is that a new benefit is obtained by lands not previously assessed, or by premises built on, enlarged, or altered. That benefit arises from the drains of such lands and premises being connected with the sewer. It is on the occurrence of this benefit that the sum becomes exigible. This was not disputed by the appellant. His point was that the connection must be subsequent to the termination of the special rate, which I have already disposed of.

But the payment is for the use of the sewer. I cannot read these words as meaning in lieu of the special rate, for there is nothing in the Act to permit of a commutation of the rate, nor to exempt any lands from an existing rate. Nor does the appellant so contend. He admits that he is liable to the special rate, and uses the words to which I am referring as aiding him in his construction of the 190th section, to the effect that nothing is due under it during the currency of the special rate, and his use of them is this—that we must adopt his construction of the words "imposed or levied," or force him to pay twice for the same thing. Yet he is not very consistent even in this argument, for in the case which he admits to fall under the section, viz., where the connection is made after the expiration of the special rate, there would be an obligation to pay for the use of sewers which had already been paid for, and to contribute a proportion of the expense of maintenance over and above the general rate.

But I think that I give consistency to the section by reading the words in question as meaning on taking the use or getting the use of sewers. The lands on which the burden is imposed are conceived of as not using the sewers, either from not being within burgh at the time when the sewers are made or from not having any or sufficient buildings to require such a use. But when the use is taken I think that there may be perfect fairness in requiring the owner to pay a reasonable sum though he is liable for the special rate as well. He takes the benefit of a sewer to the making of which he has contributed nothing or little. He has to pay the special rate in the future; but that may not fairly represent the benefit which he derives. Accordingly I think that the Legislature meant to empower the Commissioners to exact a reasonable sum as an equalising rate or payment on his taking that use. They, as charged with the interests of the burgh, and all and each of its inhabitants, are the judges of the amount, not necessarily without control, but unless their power were capriciously or oppressively exercised, it would be difficult to set aside their judgment.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the appeal, Sustain the same: Recal the judgment of the Sheriff-Substitute and Sheriff appealed against: Assoilzie the defender John Renwick from the conclusions of the action: Find him entitled to expenses," &c.

Counsel for the Appellant—Asher, Q.C.—Sym. Agent—David Turnbull, W.S.

Counsel for the Respondent—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, June 27.

SECOND DIVISION.

[Sheriff of Dumfries.

M'COWAN *v.* RODDAN.

Landlord and Tenant—Lease—Arbitration Clause—Construction.

An agricultural lease provided, "There shall be no claim by the tenant for damages done by the rabbits on the farm in any one year unless the actual damage to his white and green crops exceeds ten pounds, but when it does exceed this sum, then the question of damage shall be referred to arbitration as after specified."

In an action by the tenant against the landlord for damage to his crop from rabbits, *held* (*diss.* Lord Rutherfurd Clark) (1) that this clause did not confine arbitration to damage done to white and green crop, and (2) that the tenant was entitled to the full amount awarded by the arbiter without a deduction of £10.

By lease dated 24th and 25th February 1875 Peter Smith, of Newtonairds, Dumfriesshire, let to John Roddan, farmer, the farm of Steilston. Mr Smith died, and was succeeded by Mrs Agnes Eason or M'Cowan as