GLASGOW.

Friday, April 29.

KIRKPATRICK *v.* POLICE COMMISSIONERS OF DUMBARTON.

(Before Lord Neaves.)

(*Ante*, p. 285.)

Appeal—Conviction—General Police Act (25 *and* 26 *Vict., sec.* 130)*—Order of Commissioners.* By section 130 of the above recited Act the owner of a private court in a burgh which has adopted the Act must, "within seven days after service of an order for that purpose, make provisions for lighting such court in a suitable manner," "and in default of compliance with any such order, such owner or owners shall be liable to a penalty," &c. Kirkpatrick received an intimation by letter from the Superintendent of Police that unless he lighted a certain private court to the satisfaction of the commissioners he would be summoned before the Police Court. A conviction following upon this intimation, before the police magistrate, of a contravention of sec. 130 of the statute, *quashed*, on the ground that there was no "such service of an order" as was ordained by the statute.

John Kirkpatrick appealed against a sentence, dated 25th October 1869, whereby the magistrate presiding in the Police Court of Dumbarton found him guilty of a contravention of the 130th clause of the General Police and Improvement (Scotland) Act 1862, and fined him £6, 10s., with the alternative of thirty days' imprisonment.

The following circumstances gave rise to the conviction:—

The Act above recited was adopted in Dumbarton in 1862. The appellant is local factor for certain subjects known as Dennystown, consisting of houses laid out in streets and squares, and inhabited by about 3000 persons, which were erected by the late William Denny, shipbuilder, Dumbarton, and now belong to his son William Denny, who resides at Woodyard House there. The present proprietor is a minor, and the appellant is local factor for him and his curators. The subjects lie within the burgh of Dumbarton, and embrace what are known as (1) the Upper Square, (2) Levenhaugh Street, (3) the Lower West Square, (4) Levenbank Street, (5) William Street, and (6) the East Lower Square. On the first erection of the buildings at Dennystown, and until the adoption of the General Police Act, the proprietor lighted the streets and squares at his own expense. After the adoption of the Act the subjects were assessed and rated for police purposes, and the proprietor and tenants paid rates for these purposes, and, *inter alia*, for lighting and cleansing the subjects. The lighting and cleansing were, after the adoption of the Act, carried out by an arrangement between the proprietor and the Police Commissioners, whereby the Commissioners paid annually the sum of £15 to Mr Denny and his curators, and they, in consideration thereof, cleansed and lighted all the streets and squares of Dennystown. Mr Denny and his curators, under the arrangement, collected and sold all the fulzie, and expended the price thereof in lighting and cleansing the streets and squares. This arrangement was terminated on the 17th October 1866, when the appellant received from the clerk of the Commissioners a notice informing him that the Commissioners had resolved to take the lighting and cleansing of Dennystown under their own charge, and requesting to know the sum which the proprietor would be willing to accept for the gas-lamps and fittings-up connected therewith belonging to him in Dennystown. The curators of the minor proprietor were advised that there were doubts as to their being entitled to dispose of the gas-lamps and fittings, but they informed the Police Commissioners that they sanctioned their using them meanwhile, and matters could be arranged when Mr Denny attained his majority. The Police Commissioners, availing themselves of this permission, have, since October 1866 down to the present time, lighted the three streets of Dennystown; but they have not lighted the three squares—though they have conducted the cleansing of both streets and squares. On the 22d September 1869, the complainer, as factor of the subjects, received an intimation from the respondent, Adam Mackay, Superintendent of Police, stating that the Commissioners of Police had instructed him to require the complainer, within seven days from date, to make provision for lighting "the undermentioned private courts"—these being the three courts already referred to. On the following day an answer was returned, stating that in 1866 the Police Commissioners had taken over the lighting and cleansing of Dennystown; and that in consequence no part of Dennystown could be held to be "private" under the 130th clause of the General Police Act, but all fell to be dealt with as public under the 126th clause. No notice was taken of this answer; but, on the 30th September, the complainer received a notice from the respondent that unless he made arrangements for lighting the courts he would be summoned to attend the Police Court on the following Monday. On the 13th October the respondent's threat was carried out, the complainer being summoned on a charge of committing a breach of the 130th section of the General Police Act by not lighting the three squares in question. On the 18th October the complainer appeared and pleaded not guilty, and the diet was adjourned for a week. On the 20th October a petition was presented to the Sheriff by the complainer's landlord, Mr Wm. Denny, with consent of his curators, craving that the Police Commissioners should be ordained to make provision for lighting Dennystown, and particularly the three courts already referred to. On the 25th the complainer appeared in the Police Court, and besides adhering to his former plea of not guilty, moved the Court, in respect of the dependence of the action before the Sheriff, not to proceed with the complaint against him. The magistrate (Bailie Callen) resolved, however, to proceed, and the case was gone into. The result was that the magistrate found the complainer guilty, and fined him, as already stated, in the sum of £6, 10s., with the alternative of thirty days imprisonment; accordingly, Mr Kirkpatrick appealed under section 430 of the Act to the Circuit Court of Justiciary.

THOMS, for him, argued that, even on respondent's assumption that the squares of Dennystown were private courts, there was here no order upon the appellant to make provision for lighting the said squares. No order to that effect was ever pronounced by the Commissioners, and no order by them was ever served upon the appellant. The only notice he had got was contained in two letters

by the Superintendent of Police, who had not, under the General Police Act, any power or authority in connection with orders or intimations as to lighting or the service of orders thereanent. It was only "after service of an order" by the Commissioners that jurisdiction as to penalties, under section 130 of the General Police Act, arose; *M'Millan*, 21st January 1832, 10 S. 220; *Campbell* v. *Leith Police Commissioners*, H.L., 28th Feb. 1870, 7 Scot. Law Rep., 441. If inquiry was necessary to ascertain the facts raising this plea, as well as the facts raising the question whether the squares of Dennystown were public squares or private courts, it was quite competent; *Lockie*, 15th February 1848, John Shaw, 167; *Graham* v. *Moxey*, 17th February 1849, John Shaw, 178, and authorities there quoted by Lord Justice-Clerk; *Burns*, 12th June 1850, John Shaw, 373; *Cogan or Devany* v. *Anderson*, 16th December 1854, 1 Irv., 588. But as there was here a competent process depending before the Sheriff-court of Dumbarton, in which the respondent's preliminary pleas had all been repelled by the Sheriff-Substitute and Sheriff-Depute, and the question as to the character of the squares would then be decided authoritatively, not only should the police magistrate have delayed to convict appellant, but his sentence should be recalled and a sist granted till the Sheriff's decision was obtained, as in *Neilson*, 20th November 1837, 1 Swinton 583.

R. V. CAMPBELL, for the Commissioners, answered, that they had an extensive but still statutory and exclusive jurisdiction, which had been here competently and properly exercised. The grounds of appeal stated did not fall under those on which, by section 430 of General Police Act, appeal was alone competent. It would paralyse the operation of Act if such an appeal were sustained.

At advising—

LORD NEAVES—I have no idea that Police Commissioners can in the way contended for evade a decision by a competent Court of the rights of parties. But the view I take of this case supersedes the necessity of disposing of any such considerations. There is no order here, and no service of any order by the Commissioners. Their duty was to make an order on the appellant, and cause their clerk to enter it in their records, and serve it before any jurisdiction could arise to the Police Magistrate under the Act. No inquiry is necessary as to the facts raising this point, as the facts relied on by the appellant are not denied. I therefore sustain the appeal and quash the sentence, and ordain repetition of the fine, with £7, 7s. of expenses to the appellant.

Agents for Appellant—J. L. Lang, Glasgow, and Lindsay & Paterson, W.S., Edinburgh.

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

PERTH.

Friday, May 6.

ABERDEEN *v.* WALKER.

(Before Lord Jerviswoode.)

Appeal—Want of Notice. An appeal held incompetent, in respect it was not timeously lodged, and no proof offered of notice of intention to appeal being given when decree was pronounced.

This was an appeal against a Small-Debt Court decree of the Sheriff of Cupar, decerning against the appellant (an illegitimate son) for past aliment to his mother.

YOUNG, for the respondent, objected—The appeal is incompetent, in respect that it was not lodged and served within ten days of the decree appealed against. The Small-Debt Act, in terms of which the Act of Sederunt of 10th July 1839 was prepared, provides that appeal before the Circuit shall be brought under the rules contained in the Jurisdiction Act; and the appeal ought therefore to have been taken in open Court at the time judgment was pronounced, or within ten days thereafter, by both lodging the appeal in the clerk's hands, and serving the other party or his procurator with a copy. The decree in the cause was pronounced on 7th October 1869; the appeal was not taken in open Court, was not lodged until the 25th October, and was not served until the 27th; it was therefore incompetent; *Henderson* v. *M'Aulay*, 1849, J. Shaw 219.

SCOTT, for the appellant, replied—The appeal has been taken timeously, and according to the rules prescribed by Act of Parliament and Act of Sederunt, inasmuch as at the time judgment was given the appellant notified in open Court to the clerk and the respondent his intention to appeal.

It was replied to this, that such a fact did not appear from any entry in the Sheriff-court Book, and that the lodging of the appeal on the 25th of October did not consist with the statement that the rules of procedure had been previously complied with by notice in Court.

LORD JERVISWOODE considered that the appeal itself raised a presumption against the unsupported statement of the appellant; and though the Sheriff-court Book was not produced, he would therefore hold that the statutory rules of appeal had not been observed.

The appeal was accordingly dismissed, with £3, 3s. of modified expenses.

Agent for Appellant—Party,

Agent for Respondent—Henry White, Solicitor.