built. Now, my Lords, it is not necessary, in the view which I take of this case, to decide the question, but if there had been no fence at all upon the northern side of this road, and if the question were now to be raised for the first time upon a simple demand by the Master of Works that a riparian proprietor like the respondents should interject a fence parallel with the river Clyde, separating between the Clyde and the heritage of that riparian proprietor, I own that I should require very much consideration and very considerable argument to satisfy me that that was within the power of the Master of Works under this Act. There is no doubt that there is a great similarity between the case of a water highway, a public navigable river, and a road. I can see, however, in this Act the most careful and elaborate provisions with regard to roads, with regard to their repair, their protection, their making, their maintaining, their fencing, and their government in every way, but I can see not one word in this Act from beginning to end with regard to the river Clyde—that is to say, as subjecting it to the jurisdiction of the municipality having powers under this Act. Therefore I should be very slow to come to the conclusion that powers were indirectly to be evolved out of this Act, the result of which would be that you might imagine that the Master of Works, with no control over him but that of the Dean of Guild, might require the erection by the riparian proprietors along the Clyde of a continuous fence, which, according to his discretion, might be more or less large and substantial, between the riparian tenements and the river itself. My Lords, I only desire to say that I should wish that point to be kept under consideration, and that it should not be supposed that it has been overlooked in the present case. I do not think it necessary to say more than that I entertain very great doubts whether in any case such a power is under this Act to be deduced in favour of the Master of Works.

My Lords, upon the other grounds which I have endeavoured to explain, it appears to me that the decision of the majority of the Court below is correct, and I move your Lordships that the interlocutor should be affirmed and the appeal dismissed, with costs.

Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Lang (Appellant)—Kay, Q.C.—Nicholson. Agents—Simson, Wakeford, & Simson, Solicitors.

Counsel for Kerr, Anderson, & Company (Respondents)—Lord Advocate (Watson)—Benjamin, Q.C. Agent—W. A. Loch, Solicitor.

COURT OF SESSION.

Tuesday, February 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'CALLUM (COLLECTOR FOR BURGH OF MOTHERWELL) *v.* BARRIE.

Public Burdens—General Police and Improvement (Scotland) Act 1862, *sec.* 190—*Sewerage Rate—Assessment.*

Under the provisions of the General Police and Improvement (Scotland) Act 1862, and specially under the 190th section of that Act, which empowers the municipal authorities to exact from certain subjects therein specified "a reasonable sum of money for the use of the sewers," the Police Commissioners of a burgh imposed a uniform rate per £ on all properties not previously assessed for sewerage purposes. *Held* that it was not competent to levy a general sewer rate under that section of the Act, and that in order to fixing a "reasonable" sum the Commissioners must apply their minds to each individual case with a view to assessment.

James M'Callum, C.E., Motherwell, as collector for the Commissioners of Police of that burgh, presented a petition to the Sheriff-Substitute of Lanarkshire at Hamilton (Birnie) to have Dr John Tennant Barrie, as owner of property in Brandon Street, Motherwell, worth £1012 per annum, ordained to pay £126, 10s. That sum represented 2s. 6d. per £ of special sewer rate, the amount of assessment claimed in virtue of a resolution of the Police Commissioners dated 9th March 1875—"That the owners of all properties in the burgh not hitherto assessed for drainage purposes, and not charged for the use of sewers, assessed at the rate of 2s. 6d. per £ of the rental of the properties using the sewers."

In October 1866 the burgh had been divided into seven drainage districts, and thereafter the Commissioners, in virtue of their statutory powers, resolved to make a new sewer for No. 2 district, which the petitioner alleged was being used by Dr Barrie for his own property in Brandon street. Dr Barrie denied the right to assess under the Act, and further, that the sum proposed to be exacted was, under the 190th section, a "reasonable sum of money for the use of the sewer," and refused to pay. He also, *inter alia*, alleged that the total value of the sewer in question—about £163—had been paid in 1866, and that his buildings were erected many years later. He further denied that the sewer drained his property at all.

The defender pleaded, *inter alia*—"(2) The sewer constructed by the Commissioners in the district in question, being incapable of draining the premises belonging to the defender, he is not liable to pay the sum in question, or any part thereof. (3) The entire cost of the sewer in question having been levied and paid by the owners of the lands and premises situated within district No. 2, prior to the erection of the defender's pre-

mises, the Commissioners are not entitled to levy any additional assessment or rate in respect thereof. (5) *Esto* that the Commissioners are entitled to exact payment from the defender in respect of said sewer, the sum claimed is grossly unreasonable and unjust."

The Sheriff-Substitute (BIRNIE), after a proof and various other procedure, pronounced the following interlocutor:—

"*Hamilton, 30th November* 1877.—Having heard parties' procurators on the concluded proof, finds, in fact, that the premises of the defender do not drain directly into the sewers of the pursuers; finds, in law, that he does not use said sewers within the meaning of the 190th sec. of the General Police and Improvement (Scotland) Act 1862; assoilzies the defender, &c.

"*Note.*—By the General Police Act of 1862 the Commissioners are entitled to make sewers; by the 98th section they are entitled to assess for the cost the owners of lands or premises within the burgh or district; and by the 190th section to exact for lands or premises not assessed or built, enlarged or altered, after the assessment was imposed or levied, 'a reasonable sum of money for the use of the sewers.' In this action the pursuer, as representing the Commissioners, sues the defender for this reasonable sum of money. The sewerage of the defender's property reaches the sewers of the Commissioners, but through a private drain, known as the Watsonville drain; and the defender pleads that as his property is not directly connected with the sewers of the Commissioners he is not liable within the meaning of the 190th section. I have come to be of opinion that this contention must be sustained. There is a distinction between the 98th and the 190th section. All lands or premises may be assessed for the making of a sewer, whether they use it or not; but the reasonable sum can only be exacted if the premises do use it. It may no doubt be argued that the word 'use' in the 190th section is not limited, and that there is no reason why one proprietor more than another should get the benefit of the Commissioners' sewers without paying for them; but the sum asked is a slump sum—not an annual payment. The owner of the private drain may prevent the defender from using it the day after he has paid this slump sum, and I am aware of no case where a statutory payment can be exacted with the risk of a claim for repetition—*Bell* v. *Thomson*, Nov. 30, 1867, Macph. 64. It is to be observed that the Commissioners have the remedy in their own hands. They may either purchase the Watsonville drain or interdict the defender from using their sewers through that drain. If they do the former, the defender's property will be directly connected with their sewers; and if the latter, they will be in a position to compel him either so to connect it or to drain it otherwise to their satisfaction. The pursuer argued, that as the property could be connected with the Brandon Street sewer within 100 yards (the distance specified in the 199th section), the defender was liable; but the 190th section must be interpreted without reference to this speciality." . . . .

The Sheriff (CLARK) on appeal adhered, adding this note:—

"*Note.*—The whole question here is—Is the present case covered by the provisions of the 190th section of the Act? Now, it will be observed that that section refers simply to the case where owners of lands or premises make a drain from their said lands and premises into the Commissioners' sewer, not to all persons whose sewage may happen to flow indirectly, or without any act on their part, into the Commissioners' sewer. In the present case it is plain on the evidence that the defender did not make a drain into the Commissioners' sewer, and therefore, as I read the section, is not liable under its provisions."

The pursuer appealed to the Court of Session.

At advising—

LORD GIFFORD—The assessment sued for in this case is imposed under the resolution of the Police Commissioners of Motherwell, dated 9th March 1875. That resolution proceeded upon a motion "that the owners of all properties in the burgh not hitherto assessed for drainage purposes and not charged for the use of sewers, be assessed at the rate of 2s. 6d. per £ of the rental of the properties using the sewers." From this it is evident that the Commissioners resolved to levy the assessment upon all properties. They made no distinction; they entered upon no inquiry; it was sufficient if a property had not been taxed for drainage purposes. The action concludes against Dr Barrie for payment of this assessment.

Now, it has not been shown to us, and I do not think that any power exists by which these Commissioners are entitled to levy a general sewer rate in this way. Accordingly, the form of the assessment is not so put; but the matter is referred to section 190 of the Act, and it is sought to be shown that the amount thus to be raised is a "reasonable" charge for the use of the sewer. Now, I wish to say that I do not think section 190 ever contemplated a general sewer rate. I am disposed to read the whole clause together. In the present case we are bound to consider what benefit Dr Barrie has gained from the sewer in No. 2 district, and it seems to me that the Commissioners should in each case apply their minds to this point with a view to assessment; but in the present instance they have not done so, because it cannot be contended that, had the particular circumstances of each case been considered, the same—precisely the same—result would in every instance have been attained.

To the views advanced by the Commissioners I do not give any countenance, and I am for dismissing the appeal, reserving to the appellants all their remedies under the statute.

LORD YOUNG (who had been called into the Division in the absence of the Lord Justice-Clerk)—I concur. This is a petition to recover a special sewer rate. No case to sustain such a contention has been established. When the case came to be argued it was found that the Commissioners relied on section 190, which relates to the levy of a "reasonable" sum upon those using a sewer who did not contribute to the expense of making it, this being in lieu of the assessments levied at the time of making the sewer. I entirely agree with your Lordship, and I think that although the grounds of the Sheriff's judgment are not sound, the result is right.

LORD ORMIDALE—I concur, with the observation that, as the case is put, we cannot get at the

merits at all. Further, I do not think the ground of the Sheriff's decision can be maintained.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff appealed against, and dismiss the action as irrelevant, under reservation to the appellant (pursuer), as representing the Commissioners of Police for the burgh of Motherwell, to proceed *de novo*, if so advised: Find the respondent (defender) entitled to expenses in both Courts, so far as not already disposed of, and remit to the Auditor to tax the same and to report; and decern."

Counsel for Petitioner (Appellant)—Trayner—Strachan. Agent—Alexander Gordon, S.S.C.

Counsel for Respondent—Asher—Moncreiff. Agent—Alexander Morison, S.S.C.

Wednesday, February 27.

FIRST DIVISION.

[Bill Chamber, Lord Adam.

HENDRY *v.* MARSHALL.

Lease—Diligence—Decree of Registration—Personal Diligence Act 1838 (1 *and* 2 *Vict. cap.* 114).

A charge with an inducise of six days given upon the warrant inserted in an extract registered lease requiring an agricultural tenant "to implement and perform the haill obligations" of the lease, "having reference to the proper cultivation and management" of his farm, *suspended* as incompetent.

Question whether a charge upon such a general warrant requiring the tenant to implement some specific obligation contained in the lease would have been competent.

By lease dated 12th and 17th September 1874 the respondent Marshall let to the complainer Hendry the farm of Flemington on a nineteen years' lease. This lease contained various obligations, such as are usual in similar contracts, as to proper cultivation, rent, &c., in terms of the Personal Diligence Act (1 and 2 Vic. cap. 114) and relative Act of Sederunt. The respondent, finding that the farm was not properly cultivated, on 21st February 1877 got the lease registered in the Books of Council and Session, in virtue of the clause of registration contained in it. An extract of the lease was thereupon obtained by the respondent, containing a warrant in these terms:—"The Lords grant warrant to messengers-at-arms in Her Majesty's name and authority to charge the said Alexander Hendry, defender, personally, or at his dwelling-place if within Scotland, and if furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the foresaid sum or sums of money—principal, interest, and expenses—and to implement and perform the haill foresaid obligations, all in terms and to the effect contained in the decree and extract above written and here referred to, and held as repeated *brevitatis causa;* and that to the said John Marshall within six days if within Scotland, and if furth thereof within fourteen days next after he is charged to that effect, under the pain of poinding and imprisonment, the terms of payment being always first come and bygone; and also grant warrant to arrest the said Alexander Hendry's readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sum or sums of money—principal, interest, and expenses; and if the said Alexander Hendry fail to obey the said charge, then to poind the said Alexander Hendry's readiest goods, gear, and other effects; and if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs."

The respondent was thereafter, on 13th March 1877, charged to perform the obligations of his lease in conformity with the terms of the warrant. The charge was as follows:—"I . . . . lawfully charge you, the said Alexander Hendry, to cultivate and manage the lands let by the said John Marshall to you, the said Alexander Hendry, by and under the lease after mentioned, according to the most approved rules of good husbandry, and to implement and perform the haill obligations having reference to the proper cultivation and management of the said farm of Flemington, and as specified and described in the lease thereof entered into between the said John Marshall on the one part, and you, the said Alexander Hendry, and James Hendry, farmer, Cairntown, by Fordyce, Banffshire, on the other part, dated the twelfth and seventeenth days of September Eighteen hundred and seventy-four, all in terms and to the effect specified and described in said extract and warrant, and that to the said John Marshall within six days next after the date of this my charge, under the pain of poinding and imprisonment."

On expiry of that charge the respondent obtained a fiat of imprisonment, in terms of the Act 1 and 2 Vic. c. 114, sec. 6, and caused the complainer to be incarcerated in the prison of Inverness on 26th March 1877.

The complainer presented a note of suspension and liberation on 14th April 1877. Lord Ormidale, Ordinary officiating on the Bills, passed the note and granted warrant for the immediate liberation of the complainer, adding this note to his interlocutor:—

"*Note.* — The charger appears to the Lord Ordinary to have been entirely wrong in incarcerating the complainer. He does not say that the complainer is owing him any rent, or any sum of money whatever; and there is nothing to show that the provisions of the lease in question have been violated or disregarded in any respect. There is nothing but the charger's statement to that effect; but the complainer denies the truth of that statement, and, on the contrary, avers that, 'except in so far as prevented by the state of the weather, and by the proceedings of the respondent (charger) now complained of, the said farm has always been laboured and cultivated in the usual way, and in conformity with the provisions of the lease.' Be that, however, as it may, the charger was not entitled to incarcerate the complainer without inquiry into and ascertainment of how matters really stood. He has mistaken his remedy; for obviously incarceration was not the appropriate one in the circumstances, and the charger's counsel admitted that he could