LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion.

LORD ADAM was absent when the case was argued.

The Court dismissed the appeal as incompetent.

Counsel for the Corporation—Lees—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Subway Company—R. V. Campbell—W. Thomson. Agents—W. & J. Burness, W.S.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HAMILTON POLICE COMMISSIONERS *v.* FINLAY.

Police — Public Health — Assessment — "Special Sewer Rate"—Special Drainage District—Objections to Burgh Accounts—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *clauses* 75 *and* 96 *to* 100.

The General Police Act 1862, clause 75, enacts that accounts are to be kept by the police commissioners of all property vested in them and of money received and disbursed by them, and provides that the accounts may be inspected by persons assessed, and that in the case of any such person being dissatisfied with the accounts or items therein, he may complain by petition to the sheriff stating his objections to the accounts or items, and that the sheriff shall determine such complaint, his decision being final.

By clauses 96 to 100 of said Act the police commissioners are authorised to charge and assess rates on the owners of all lands and premises liable to contribute to rates for making new sewers, special sewer rates over and above any other assessments or rates, and such rates are to be called "the special sewer rate." Clause 99 enacts that separate and distinct accounts are to be kept of all moneys collected under such rate in each distinct district, and of all payments and disbursements in respect thereof, and that the moneys collected are to be applied so that each district shall as near as may be bear its own expenses.

An owner within a special drainage district of a police burgh who had been assessed for a special sewer rate and paid the assessment for four years, refused to pay a further assessment. The police commissioners raised an action against him for the amount of the assessment. The defender produced a copy of the accounts connected with the drainage district, and contended that if certain items were removed from the debit side of the account which the police commissioners acting *ultra vires* had inserted, and if certain sums were added to the credit side which the police commissioners acting *ultra vires* had applied to other purposes, the whole costs incurred in connection with the drainage district had been already paid by the special sewer rate formerly levied.

Held that the defence consisted of objections to items in the accounts, and was not a good defence to an action for payment of rates.

Opinions by the Lord Justice-Clerk, Lord Young, and Lord Trayner that objections by persons assessed to items in all accounts kept by the police commissioners, including the accounts kept in connection with a special drainage district, must be made in the mode laid down in section 75 of the General Police Act 1862.

By clause 75 of the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101) it is enacted—"Accounts of all property, heritable and moveable, vested in the commissioners, showing the nature of such property and of all money received and disbursed, shall be kept in books by the treasurer or collector as the commissioners may appoint, and all such books of accounts may at seasonable times be inspected and perused without fee or reward by any person assessed, and also by any person entitled to any money due and owing on the credit of such assessment, and such persons may take copies of or extracts from any such books and accounts without fee or reward, . . . and in case any person who shall be assessed shall be dissatisfied with any accounts which shall have been made up as aforesaid, or with any of the articles or items contained in such accounts, such person may complain against the same by petition to the sheriff, in which complaint shall be specified the grounds of objection to such accounts, items, or articles; and the sheriff shall proceed to hear and determine the matter of such complaint, and his decision shall be final."

By clauses 96 to 100 inclusive of said Act the police commissioners are authorised to charge and assess rates on the owners of all lands and premises liable to contribute to rates for making new sewers, special sewer rates over and above any other assessments or rates, and such rates were to be called the "special sewer rate." Clause 99 enacts—"The commissioners . . . shall cause separate and distinct accounts to be kept of all moneys collected under any rate in each distinct district, and of all payments and disbursements in respect thereof, and they shall apply the moneys to be collected and received from each distinct district under any such rate as aforesaid for the several purposes to which the same may be lawfully applied under the

authority of this Act, but so nevertheless that each district shall as near as may be bear its own expenses; and in case any such expenses shall apply to or be incurred in respect of two or more districts, the same shall be apportioned and divided between such districts in such manner as the commissioners shall consider fair and equitable." Clause 106 enacts—"The said rates or assessments may be imposed and levied half-yearly, or at such other periods as the commissioners may think fit, and shall be payable at such times as they appoint; and at the meeting imposing the same, the commissioners shall appoint a day on which such rates or assessments shall be payable, and another day on which appeals by any parties complaining that they have been improperly rated or assessed may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or assessments shall be heard by the commissioners, and notice to each party intended to be so rated or assessed, stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the commissioners as aforesaid, shall be sent by the clerk or collector through the Post Office at least two weeks preceding the day which may be fixed for hearing the appeal of such party, and the decision of the commissioners in all such appeals shall be final, but the commissioners may rectify such rate or assessment so appealed against."

By the Hamilton Burgh Act, passed on 4th July 1878, it was enacted (section 136) that the burgh should after 1st January 1879 be divided into two drainage districts, of which one should consist of the district annexed to the burgh by the Act, and that the police commissioners should take the necessary steps for the efficient drainage of the annexed district, and for carrying out therein the provisions of clauses 96 to 100, both inclusive, and of section 7 of part 4 of the General Police Act of 1862.

The Police Commissioners constructed a drainage system for the annexed district of the burgh, being drainage district No. 2 as defined by section 136 of the Hamilton Burgh Act 1878, and thereafter assessed and charged a special sewer rate of 1s. per pound on rental on the owners of lands and premises within the said annexed district, or drainage district No. 2 of the burgh.

The said special sewer rate was first imposed in 1886, and was paid by all assessed down to 1891, but in that year John Finlay, who as factor drew the rents of certain properties within the said drainage district No. 2, and was owner of these properties within the meaning of the General Police Act, refused to pay the special sewer rate imposed on these properties for the year 1891-92.

The amount of the assessments which John Finlay refused to pay was £54, 15s., and for this sum the Police Commissioners of Hamilton raised an action against him in the Sheriff Court at Hamilton.

The defender lodged defences, in which he averred that the drainage of district No. 2 had not been executed in conformity with the provisions of the Burgh Act and the General Police Act. He further averred—"(Stat. 9) Assuming the drainage of the district annexed (No. 2 drainage district) to have been executed in conformity with the provisions of the Burgh Act and the General Police Act, the whole costs and charges of and connected with the same have already been paid and discharged by the special sewer rates levied on and recovered from the owners of lands and premises within said district (including the defender) prior to the period to which the rate or assessment now sued for is applicable. (Stat. 10) A considerable portion of the moneys entered and charged by the Police Commissioners as applicable to drainage district No. 2 does not apply to that district at all, but has been expended on drainage and other works executed by them outwith the bounds of that district, and for the expense of which the owners of lands and premises in said district (including the defender) are not liable. . . . (Stat. 13) Numerous other sums for payment of which the Commissioners have no authority under the Burgh Act or the General Police Act to impose special sewer rates on owners of lands or premises in district No. 2 have been entered and charged by them in the general drainage account applicable to said drainage district. A copy of said 'No. 2 Drainage Account' (annexed district) is herewith produced. (Stat. 14) Further, since the Commissioners constructed the new sewer or sewers in district No. 2, a large number of houses and other buildings have been erected in said district, and the Commissioners have exacted and recovered from the owners thereof a very considerable amount in name of 'a reasonable sum of money for the use of the sewers,' in conformity with section 190 of the General Police Act. These sums of money ought to have been credited to the drainage account of said district, thereby reducing the amount of the special sewer rates, but instead of so doing the Commissioners have applied the same to other purposes, contrary to the meaning and intent of the said General Police Act. (Stat. 15) In addition to the 'reasonable sums' already recovered by the Commissioners, a further sum of a similar description is now due, and others will shortly be due and exigible for houses recently built and for others now in course of construction. Such sums fall to be credited to the expenditure account for drainage works in district No. 2, and would more than extinguish any balance thereon if such existed. (Stat. 16) On a fair and equitable application of the sewer rates, and the reasonable sums above mentioned paid by the owners of lands or premises within the district in question, the defender avers that the whole expense of making and constructing new sewers in said district has not only been fully paid and extinguished by the special sewer rates or assessments levied on them prior to the year 1889-1890, but that a considerable sum has been exacted from such owners, including the defender, in excess

of the amount which the Commissioners were entitled by the statute to recover from them for that purpose."

On 4th April 1893 the Sheriff-Substitute (DAVIDSON) pronounced the following interlocutor—"(1) Finds that the defender is the owner of certain lands within that portion of the burgh of Hamilton defined by the Hamilton Burgh Act 1878 as No. 2 drainage district; (2) that acting under the said Act, and the General Police Act 1862, the pursuers have assessed him by means of a special sewer-rate for the purpose of draining the said No. 2 district; (3) that the defender is barred from taking objection to the want of proper notice and of statutory plans and estimates, he having failed at the proper time to make use of the right of appeal provided by the said General Police Act; (4) *quoad ultra* Finds that the charges made by the pursuers are proper, and within the powers conferred upon them by the said statutes: Therefore finds them entitled to the sums sued for in the prayer of the petition."

The defender appealed to the Sheriff, but on the 10th July the Sheriff (BERRY) adhered.

The defender appealed to the Second Division of the Court of Session, and argued—Inquiry should be allowed. The Commissioners had acted *ultra vires* in charging in the special sewer-rate account sums for works outside the district, and in neglecting to credit to the account the amounts exacted as "a reasonable sum of money for the use of sewers." This appeared on the face of the accounts which were produced. Their action should therefore fail—*M'Callum* v. *Barrie*, February 26, 1878, 5 R. 683; *Hillhead Police Commissioners* v. *Renwick*, June 21, 1890, 17 R. 1042; *Kirkintilloch Police Commissioners* v. *M'Donald*, October 31, 1890, 18 R. 67. In district No. 2 the special sewer-rate should have been imposed on occupiers in terms of the Public Health Act 1867, that district being outside the police burgh.

Argued for pursuers—The rate here had been regularly laid on. Section 75 of the Act provided the mode in which objection to the accounts of the police commissioners may be taken, and section 106 provided for the appeal against assessments imposed. The defence was simply an objection to the accounts, and to the assessment imposed, and therefore was unmaintainable. Even if it were not too late for the defender to object to the accounts or assessments, such objections were not a good defence to an action for recovery of rates.

At advising—

LORD JUSTICE-CLERK—These rates must be dealt with on the same footing as in the Court below, and on the record as stated there. What might be the rights of a ratepayer as regards an assessment laid on without the authority of the Act of Parliament or laid on the wrong people, we are not called on to decide. It may be that such an assessment can be set aside by reduction or otherwise. But there is no such case on record. Going over the defender's statements step by step I find that all contained in them are certain objections to accounts relating to the use made of the assessments collected. It appears on the face of the Act of Parliament that as regards all the revenue of the burgh accounts are kept which are open to the inspection of the ratepayers, and he may state objections to them in the manner provided in the statute.

Mr Campbell attempted to draw a distinction between the present assessment and general revenue of the burgh, saying that this rate fell under section 106, but he had to admit that there was no special provision excluding the application of clause 75 from the assessments collected under clause 106. These assessments are just part of the revenue of the burgh, and the accounts dealing with them are in the same position as other accounts.

I therefore think the Sheriff is right, and that his judgment should be adhered to.

LORD YOUNG—I am of opinion there is no ground for interfering with the judgment of the Sheriff. The case relates to the special sewer rate imposed by the Police Commissioners upon district No. 2. That rate has been imposed by the Commissioners since 1886, and the last rate which the defender refused payment of was payable in December 1891. The defender is a house factor, and represents several ratepayers who have property in the district, and objects on their account to pay this last instalment. He paid for five or six years, and now objects to the last instalment upon the grounds that if the accounts were properly made up, showing the works upon which the produce of the rates was expended on the one side and also giving credit for some other special rates upon houses newly erected, it would be found that there was no balance due with regard to which the Commissioners were empowered under the statute to impose a rate. I do not think, in answer to an action for recovery of a rate imposed in December 1891, that this defence can be allowed. It is clear enough that a rate-raising and spending body like the Commissioners of Police in Hamilton may be called upon to account for the employment of money they may raise by assessment, or for applying that money to improper purposes, or for giving credit in their accounts for sums which ought to have been credited to the benefit of a particular district, or any other errors, and so far as the Act of Parliament does not contain special provisions with a view to such rectification, I do not doubt that the common law provides means for doing so. I rather think that section 75 of the General Police Act of 1872 does provide special means by which a person who has any objection to the accounts can appeal to the Sheriff, whose decision will be final. That is a very reasonable and expedient provision, because it is certainly undesirable to have actions concerning such a matter brought into the Supreme Court. Now, the accounts of the Commission are kept as required by statute, and are open to the

inspection of all persons assessed; and this particular defender could under section 75 have stated to the Sheriff any objections he thought fit. Then there is a further provision in the Act that if any person objects to the assessment, his objection should be made the subject of an appeal to the Commissioners, and that their decision should be final. There was no such appeal by the defender, and I should be disposed to hold that the objections to the accounts should not be received in this Court, and that objections to the assessment which was levied here upon this particular individual could not be objected to except in the expedient and economical manner, both in time and money, provided by the Act of Parliament.

Mr Vary Campbell stated that the Commissioners acted *ultra vires*. If a public body who are entitled to expend money on an object expend it in an improper manner by exercising an erroneous judgment, or making erroneous entries on the credit or debit side of the accounts, that is wrong, and you may say it is *ultra vires*, but if their action is wrong it is precisely of that character which is to be the subject of litigation before the Sheriff, and precisely of that character which may be made the subject of an appeal to the Commissioners. I cannot hold upon the mere use of the expression *ultra vires* that we can entertain a defence of this character to an action for payment of an assessment. The inexpediency of such a course is obvious. The defender here is in no different position from the other ratepayers within the No. 2 district who are liable for the special sewer rate, and thousands of people who are liable by using the expression *ultra vires* could become defenders to an action for recovery of assessment. Now, I do not think that could be allowed at all. If there was no special remedy provided by the statute then the common law would afford a means of calling the Commissioners to account for their expenditure, but in this case I think such special remedy exists.

LORD RUTHERFURD CLARK—As I read the record I understand that it is not maintained that the assessment in question is illegal, that is, it is not disputed that the Commissioners have power to impose it. The only ground which the appellant puts forward as exempting him from payment is that if the Commissioners had properly applied the money in their hands there would have been no need of an assessment. I think that is not a good defence to an action for payment of assessments. If the statement is true in fact it may possibly give the defender a right to repetition from the Commissioners of the sums improperly paid by him, but it is no ground for entitling the defender to refuse payment of the assessment in the first instance. I go no further than this.

LORD TRAYNER—I think the whole objections stated by the defender to the demand made upon him by the pursuers resolve themselves into an objection to the manner in which the Commissioners have stated their accounts. I have gone over the statements of the defender, and I can find no other grounds for his defence than this, that if sums improperly inserted in the debit side of the accounts were deducted, and that if sums already paid were credited to the account, the assessment has been sufficiently provided for. I think that such objections to items of or omissions from the accounts should have been stated in the mode laid down in section 75 of the General Police Act, and under that section the judgment of anybody but the Sheriff on the subject is excluded.

The Court adhered.

Counsel for Pursuers—Shaw—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for Defender—Vary Campbell—W. C. Smith. Agent—Alexander Morison, S.S.C.

Friday, November 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

AITKEN, PETITIONER.

Judicial Factor — Delivery of Bond of Caution—Audit by Accountant of Court where Judicial Discharge not Asked—Judicial Factors (Scotland) Act 1889, *secs.* 6 *and* 20.

Held that a judicial factor, although appointed before 1889, and although he does not ask for a judicial discharge, cannot demand redelivery of his bond of caution until his accounts have been passed by the Accountant of Court; but that the Accountant of Court may, if he think fit, dispense with a full and strict audit of such accounts.

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), by section 6 provides, that "in addition to the factors specified in the recited Act of 1849 (The Pupils Protection Act), the Accountant of Court shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session." . . .

Section 20 provides that "section 23 of the Pupils Protection Act (as to factories informally settled) shall be held to apply to all factories under the supervision of the Accountant by virtue of this Act. And section 23 of the Pupils Protection Act provides that any settlement made of any such factory (viz., factories constituted before the passing of the Act), though informal, shall be held as a *prima facie* discharge to the factor, and the Accountant shall not report the same as a subsisting factory, or require further proceedings therein, . . . and in any such factory in which, though there has been no settlement, it shall appear that no benefit is likely to be derived by the parties