

No 82. " THE LORDS refused the petition, and adhered to the Lord Ordinary's interlocutor, finding that the action was competent before the Court of Session."

For the Petitioner, *Johnston.*

B. *Fol. Dic. v. 3. p. 345. Fac. Col. No 147. p. 219.*

1756. *January 3.*

LORD PRESTONGRANGE *against* JUSTICES of the PEACE of HADDINGTON.

No 83.

It was declared, by a turnpike act, that any abuse of the powers conferred by that statute, should be cognizable only by the Justices of Peace. Found, that an exemption from payment of toll, granted by the trustees to an individual, was an abuse of their powers, and that a complaint against the trustees, for granting such exemption, was cognizable only by the Justices.

By the Turnpike Act for the shire of Haddington, 23d Geo. II. the trustees are empowered 'to compound and agree by the year, or otherways, with persons using the turnpike road, for any sums of money, to be paid quarterly.' In an after clause, the Justices of Peace of the county are empowered to appoint fit persons to enquire about the application of the tolls and duties, received in pursuance of this act; 'and in case the persons so appointed find any misapplication of the money collected, or any other abuse of the powers or authorities hereby given, they shall certify the same to the Justices of Peace, at their next General Quarter Sessions, who are hereby authorised and required to hear, examine, and finally determine the same, without further or other appeal.'

The trustees made a transaction with a neighbouring heritor, allowing those who purchased his coal and salt the use of the turnpike road, without paying any toll; but obliging him to pay L. 3 Sterling yearly, whenever he should have a going coal in a different part of his ground, particularly condescended on. This agreement, which was in reality an exemption, not a composition, was complained of as an abuse. As such, it was by the Justices of Peace declared void; and it was ordered that the toll should be levied, without regard to the agreement.

This sentence being suspended by the heritor, a hearing in presence was appointed, as in a new case. In the debate many points were started, of which the most material follow, with the reasonings of the Judges upon them at advising. One preliminary point was urged in behalf of the Justices of Peace, that, by the statute, their judgments are final, and cannot be brought under the review of any Court; and, therefore, that the suspension* was incompetent. But this, by an obvious distinction, received a satisfactory answer. The Justices of Peace, with respect to all matters trusted by this statute to their cognizance, are final. But if they exceed their bounds, and find that to be an abuse, which, in reality, is no abuse, they so far assume a jurisdiction which they have not, and their proceedings must be null, as *ultra vires*. If, then, it be contended, that the transaction made with the suspender is no abuse, the Court of Session is bound to take cognizance, in order to determine the preliminary point, with respect to the jurisdiction of the Jus-

tices. If it shall appear to the Court, that the transaction made with the suspender is no abuse, it must follow, of course, that the Justices have assumed a jurisdiction which the statute has not bestowed upon them, and that their sentence is void. But if, on the other hand, the transaction be found an abuse, the Justices are, by the statute, empowered to redress the wrong, and their sentence, in that view, is final, however iniquitous it may be in any other respect.

The Court then proceeded to consider the transaction, whether it was an abuse or not, with regard merely to determine the preliminary point of jurisdiction. The transaction was analyzed; and it was considered, *1st*, That the salt is for ever to be free, without payment of any toll; *2do*, No toll to be paid for coal raised out of the land where the present coal-work is; *3dly*, A composition of L. 3 yearly, for coal that shall happen to be dug in another part of the estate. With regard to the first two articles, the transaction is not a composition, but a total exemption from toll. Neither is the third a composition, in any proper sense. The term *composition* imports a certain sum put in place of a sum that is uncertain. The transaction here is, in reality, a conditional bargain, and not a composition. It is evidently not a composition in the sense of the statute, which requires the composition 'to be paid quarterly, from time to time, after such agreement is made.' It was further considered, that there is no necessity to empower the trustees to make conditional bargains; and, therefore, it is not presumable the legislature intended to give them such powers. To strike a bargain, in such a case, there can be no *data*; for, beforehand, it must be altogether uncertain what the toll will amount to. Upon these considerations, the Court were of opinion, that this transaction was an abuse; and, consequently, that it came under the jurisdiction bestowed upon the Justices by the statute.

The suspender, on his part, urged another preliminary point, that the sentence of the Justices, supposing their jurisdiction to be founded, was null and void; because he was not called in the process to defend himself, though the sentence affected himself alone. But this objection was not much regarded. It was considered, that here there is no personal decerniture against the suspender. The Justices went no farther than to appoint the toll-gatherer to levy the toll in question. This they were empowered to do, in pursuance of the trust reposed in them by the statute; and their proceedings within their own limits must be effectual, though such proceedings may consequentially prejudice third parties. A reduction of a vassal's right affects that of the sub-vassal, though he be not called. A donatar of forfeiture is deprived of the subject without being called, where the supposed rebel is restored *per modum justitiæ*. A decret being reduced, the horning falls of consequence, without calling the Officers of State, though the Crown has right to the escheat. These instances depend upon the following rule, that, in seeking redress of

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any wrong, I have no occasion to make any person a defender, but those who have the direct interest in opposition to me. I have no concern with those who have only a consequential interest. This is applicable to the present case. The Justices, in rectifying the abuse, had no concern but with the trustees who committed the abuse. Suppose, in going to travel, I name a commissioner to manage my affairs, who, in my absence, grants a road to a neighbour through my ground. Is it necessary that I must bring a reduction? May I not defend my property, leaving my neighbour to insist upon his grant, in terms of law? The Justices, in effect, have taken this very course. They have refused to stand to the bargain betwixt the suspender and the trustees, and denied him the use of their road, unless he pay toll. To make this step, a process was not necessary. Any man may stand upon the defensive without a process: To him only a process is necessary, who makes a demand. Considering the matter in this light, the suspender must be held as the pursuer, insisting against the Justices to have his transaction made effectual; and, in this view, his objection to the sentence of the Justices is good for nothing.

“ Upon the whole, it was found, that the transaction which the trustees made with the suspender, was an abuse, which the Justices of Peace were by the statute entitled to redress; and they having given sentence accordingly, the Court of Session has no power to review the sentence.”

Fol. Dic. v. 3. p. 344. Sel. Dec. No. 96. p. 132.

No 84.

1763. June 30. CARNEGIE of Craigo *against* SCOT of Brotherton.

IN a process, at the instance of an heritor, possessed of a salmon fishing in a river, against an inferior heritor, for regulating his cruive and cruive-dyke, particularly that he should observe the Saturday's slap, that the heels of his cruives should be three inches wide, &c. the Lord Ordinary, after finding the defender bound to observe the statutory regulations, with respect to cruives, declared, that the defender shall be obliged to observe these regulations, under the penalty of L. 50 Sterling.

In a reclaiming petition it was *urged* for the defender, That, as the law has imposed no penalty for contravening these regulations, the Court can impose none; and that the pursuer must be satisfied to sue for damages upon contravention. It was *answered*, That, though damage must follow the contravention, it is beyond the reach of art to ascertain the extent of the damage; and, therefore, there is no other method to enforce such regulations but the annexing a penalty. This, indeed, is ordinarily done by the legislature. But if this remedy be neglected, it ought to be supplied by the Sovereign Court of Equity, in order to make the law effectual; for we cannot suppose a legisla-