March 6, 1818.

FRAUD.—CONSIDERATION, &c.

"claiming under the lessee as volunteers, to be de-
"livered up and cancelled: but it being repre-
"sented to the Lords that the Court of Chancery
"in Ireland, having dismissed the bill, did not pro-
"ceed to take into consideration whether the relief
"or any and what part of the relief prayed by the
"bill, in case the lease was to be considered as in-
"valid as between the lessor and lessee, and such
"volunteers ought to be granted as against Eliza-
"beth Chadwick, now Elizabeth Armstrong, and
"her trustees, or any other points arising in the
"said cause in such cases as aforesaid: it is there-
"fore ordered that the cause be remitted back to
"the Court of Chancery in Ireland to proceed
"therein as may be just, and as is consistent with
"this Judgment."

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CAMPBELL AND ANOTHER—*Appellants.*
ANDERSON AND CO.—*Respondents.*

Feb. 9, March 16, 1818.

JURISDICTION OF THE COURT OF SESSION, &c.—IRREGULARITY.—PLEADING.

DECREET in October, 1807, by justices of peace against Anderson and Co. tanners, finding them liable in a penalty, and condemning stock on their premises seized in August or September, 1807, by an excise officer, made without evidence, on complaint of a collector of excise that Anderson and Co. carried on the trade of curriers as well as tanners at the same time, contrary to law. The goods sold under the decreet, and purchased up by Anderson and Co. who brought their action in

1809, in the Court of Session, against the excise officers, for reduction of the decreet for reasons specified (the decreets being against Anderson and Co. not being one of the reasons specified), and other reasons, and for repetition of their money, and for damages. Preliminary defences founded on want of jurisdiction in the Court, because the decreet rested on revenue statutes, on want of a month's previous notice to the officer, and on the alleged expiration of the time for bringing the action (three months), repelled: and interlocutor of the Lord Ordinary on the merits reducing the decreet, and finding the pursuers entitled to repetition of their money, but assoilzieing the defenders from the conclusion for damages. The interlocutor acquiesced in by the pursuers, who dropped their claim for damages, and the interlocutor adhered to by the Court. Difficulties in the Dom. Proc. because the summons contained a conclusion for damages, though not insisted upon after the Lord Ordinary's interlocutor; and because the reason that the decreet was against Anderson and Co. was not specified in the summons, and question whether it could be taken advantage of under the words "*other reasons:*" but the judgment AFFIRMED.

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THIS was an action by Anderson and Co. tanners in Beith, in Ayrshire, against Iver Campbell, collector, and Archibald Douglas, supervisor of excise, to reduce a decreet of justices, made on complaint of the collector, condemning the whole stock in the drying-sheds of the pursuers, consisting of uncurried skins, which had been seized by Douglas, the excise officer, on the alleged ground that the pursuers were in partnership with a currier in Beith, contrary to law; and for repetition of the money paid by the pursuers for their own skins when sold by roup under the decreet; and also for damages.

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The complaint was founded on the statute 1 Jac. 1. cap. 22. sect. 6. which enacts—" that no " person or persons using the mystery of tanning " leather shall occupy or use the craft or mystery " of a shoe-maker, currier, butcher, or of any " other artificer, using or exercising the cutting or " working of leather :" and on the statutes 9 Anne, cap. 11. and 24 Geo. 3. cap. 19. referring to the first mentioned act, and reciting—" the due execu- " tion whereof hath been and is of great import- " ance to the public good and service of this realm, " and will very much contribute to the ascertaining " and collection of the duties by this act intended " to be granted :" from which last words it was contended that the acts were all revenue statutes.

The decreet proceeding merely on the statement of the complainer, without any evidence, was in these terms :—

" *At Saltcoats, the 5th of Oct.* 1807 *years.*

Decreet. " Upon a complaint at the instance of Iver " Campbell, Esq. collector of excise, to the Honour- " able his Majesty's Justices of the Peace for the " county of Ayr, *against William Anderson and* " *Company* in Beith, for exercising the trade of a " tanner along with the trade of a currier, or other " cutter of leather, contrary to law, and having " in their possession 90 hides, 104 calf-skins, " 52 hog-skins, and 5 sheep-skins, all seized by " Archibald Douglas, supervisor of excise at Kil- " marnock, the said justices, consisting of, &c. &c. " having considered the above complaint, and the " laws of excise made in that behalf, and having

" heard parties at full length, condemn the seizure " therein mentioned, as craved; and appointed the " tanned leather specified to be rouped and sold " for behoof of his Majesty and seizure-maker; " and decerned, and thereby decern, the said " William Anderson and Company in 3*l.* sterling, " to which, on account of favourable circumstances, " they mitigate the statutary penalty, and ordain " them to make payment thereof to the complainer, " together with the expense of recovery, if need- " ful; and further, ordain this their sentence to " be put into due and lawful execution by officers " of excise, constables of the peace, and decern."

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The seizure was made in the end of August, or beginning of September, 1807; and on the 6th October, 1807, the day after the date of the decreet, the goods were sold under it, and purchased up by the pursuers for 120*l.* for which sum, with the 3*l.* penalty, they brought their action, as above-mentioned, in the Court of Session, in Jan. 1809.

Dates.

The defenders gave in preliminary defences, founded on certain statutes limiting actions against revenue officers, for matters done by them in that character, in certain cases, to three months, and requiring a month's notice to be given to the officer of the revenue before the action is brought. They further stated, as a preliminary defence, that the Court of Session had no jurisdiction in the matter.

23 Geo. 3 cap. 70. 28 Geo. 3. cap. 37.

The preliminary defences were repelled by Lord Woodhouslee, Ordinary, and by the Court.

May 12, 1810.

The cause then came on to be heard on the 28th Nov. 1812, before Lord Gillies, Ordinary, who pro-

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Lord Ordinary's interlocutor, Nov. 28, 1812.

nounced the following interlocutor:—"sustains the "reasons of reduction, reduces, decerns, and declares, "conform to the conclusions libelled: finds the "defenders also liable to the pursuers in repetition "of the sum of 123*l.* sterling, libelled as having "been illegally extorted from them by the de- "fenders, and interest thereof from 11th Nov. "1807, until payment, and decerns: assoilzies the "defenders from the claim of damages concluded "for, and decerns: but finds them liable to the "pursuers in expenses," &c.

The pursuers acquiesced in this interlocutor, and, in the subsequent proceedings before the Court, claimed only the money extorted from them, and the reduction of the decreet. The Court, on advising a petition and answers, adhered to the Lord Ordinary's interlocutor; and, afterwards, on a second petition, and after having directed the argument to be stated in memorials, they adhered to their former judgment. From this judgment the defenders appealed.

Judgment of the Court, June 14, 1814.

The following cases, respecting the jurisdiction of the Court of Session, with reference to revenue questions, decided before and since the Union, were stated in the printed case for the Respondents:

Cases decided before the Union:—*Keith against Murray*, 10th Dec. 1675—*The Tacksmen of the Impost of Edinburgh against Young and Others*, 2d Feb. 1681—*Duke of Hamilton v. Laird of Clackmannan*, 14th Dec. 1665—*Lord Colville v. Feuars of Kinross*, 15th December, 1666—*Duke Hamilton v. Laird of Allardyne*, 6th Dec. 1667—*Stewart v. Aitchison*, 17th Jan. 1668—*Duke*

Hamilton v. Maxwell, 29th Feb. 1688—*Inglis v. Laird of Balfour*, 25th June, 1668—*Collector General of Taxations v. the Director of the Chancellary*, 22d Jan. 1669—*Collector of Taxes v. Masters and Servants of the Mint-house, eodem die. Duke of Hamilton v. Feuars of the King's Property*, 14th July, 1660—*Pearson v. Town of Montrose*, 23d June, 1669.

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Since the Union, the following cases have been decided:—Case of *Wm. Reid*, 19th July, 1765, in which the matter of jurisdiction was particularly considered by the Court—competition between *Commissioners of Excise and Creditors of Earl of Northesk*, January, 1724. (Dictionary, vol. 1, p. 25, *voce* King). *Hamilton v. Legrand*, 4th Dec. 1733—*Ogilvie v. Wingate*, 1st Feb. 1791—*The Creditors of Burnet v. Murray and his Majesty's Advocate*, 7th July, 1754, affirmed in the House of Lords, on 24th Feb. 1755—*Locke v. Tweedie*, 3d Dec. 1703—*Robertson v. Jardine*, 6th July, 1802—also the case of *Guthrie v. Cowan*, 10th Dec. 1807.

Fac. Col. p. 41.

The Court of Session has an undoubted jurisdiction over justices of peace and other inferior courts, where they have exceeded their powers:—*Countess of Loudon v. Trustees of Ayrshire*, 28th May, 1793—*Patillo v. Maxwell*, 25th June, 1779.

Respondents' 2d answer.

Lord Advocate and *Solicitor General* (for the Appellants). 1st, Whether the Court of Session has jurisdiction.—2d, Whether the action ought not to have been brought within the three months limited by the statute.—3d, Whether a month's

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previous notice ought not to have been given to the officer.

1st, That depends on whether these are revenue statutes. If they are statutes merely for the regulation of trade, the Court of Session has jurisdiction. If they are revenue statutes, the Court of Exchequer alone has the jurisdiction by stat. 6 Anne cap. 25. The stat. 1 Jac. 1. cap. 22. if originally intended for the mere regulation of the trade, was made a revenue stat. by the act of 9 Anne, cap. 11; and the stat. 24 Geo. 3. cap. 19. declared that these extended to Scotland. They did so extend by the act of Union; but doubts had been entertained; the purpose of removing the doubts was the better collection of the revenue, so that this was equal to a positive declaration that these were revenue statutes. The Court of Exchequer was instituted by the 6th of Anne, cap. 26. which enacts,

Sect. 6. "that all and every the revenues and duties, &c. "and all informations, actions, &c. touching or "concerning the before-mentioned matters; and "all prosecutions, remedies, and accounts, for or "concerning the same, &c. shall be within the "jurisdiction and authority of the said Court of "Exchequer in Scotland, and hereby are *annexed* "to the said Court." There is no statute giving any such jurisdiction to the Court of Session, and the only alteration has been with respect to the powers given to the justices. The cases of *Ramsay v. Adderton*, Kilk. 308; and *Duke of Queensberry v. Officers of State*, Fac. Coll. Dec. 15, 1807, were decided upon this view of the jurisdiction. (*Lord Eldon*, C. The question in this country in

such a case would be, not whether the Court of King's Bench could try whether the penalty had been incurred, but whether it might not say that the decreet of the justices was bad on the face of it.) There was nothing in the summons respecting the irregularity, and no such question was argued, except that it was said that the justices had proceeded without evidence; and if so, the party had his remedy by appeal to the Quarter Sessions, or the Exchequer. But here he calls on the Court of Session to decide, not on the irregularity, but on the merits: and the Court, having sustained its own competency, then reduced the decreet on the merits, and not on the form.—2dly, If these were revenue statutes, the action should have been brought within three months. This is made necessary by the statute 28 Geo. 3. cap. 37. which extends to Scotland, as was held by the Court of Session in *Grant v. Harper*, Feb. 1810. But fifteen months elapsed before the commencement of this action.—3dly, The pursuers did not give the month's previous notice required by the statutes to be given to the officer, if the act, whether wrong, or beyond his duty or not, was done in his character of excise officer. This was done in his character of excise-man.

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23 Geo. 3. cap. 70. 28 Geo. 3. cap. 37.

. With respect to the argument that the statutes did not extend to Scotland, because the proceedings there mentioned were unknown in Scotland, the case of *Surtees v. Allan*, decided in this House, was an answer. This personal action is a nullity, because the money was paid into the Exchequer

Surtees v. Allan, ante. 2 vol. 254.

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27 Geo. 3. cap. s. 36.
43 Geo. 3. cap. s.
28 Geo. 3. cap. 27.
23 Geo. 3. cap. 70. s. 30.

before it was brought, *Scott v. Shearman*, 2 Black. 977.

The Court of Session may quash the order where the question is whether it is a revenue case or not; but it is clear that these are revenue statutes, and the language of the Court in *Ramsay v. Adderton*, and *Duke of Queensberry v. Officers of State*, might be quoted against their own judgment in this case. Supposing these to be revenue statutes, the action was clearly precluded by lapse of time and want of notice. The officer had no control over the justices; and he would be in a very hard situation if this personal action could be sustained against him while the decree was in force, and no sufficient ground to reduce it had been laid in their summons.

Sir S. Romilly and *Mr. Warren* (for the Respondents). This was merely an action to recover money, taken from the Respondents without lawful warrant, and therefore received to their use. And it is unnecessary to enter into the question, whether these were or were not revenue statutes; for, admitting all this, yet the decreet being a nullity, they paid the money in their own wrong, and had a right to recover it. They say there is good ground in our summons to reduce the decreet. But we did not know what the decreet was. They refused to show it; and all we knew was, that under colour of some decree, they seized our property. The single question is whether our money has not been taken from us without any authority

at all: and, even if these statutes do extend to Scotland, the limitation and notice do not apply to actions for the recovery of the money, but to actions of trespass or *tort*; *Wallace v. Smith*, 5 East. 115. 122; and the reason for the notice is stated to be, that the officer may have an opportunity to tender amends. The summons originally was for production of the decreet, repetition of the money, and damages. It was dismissed as to the damages by Lord Gillies. We submitted, and it stands as if there had been no claim for damages in the summons which relieves us from the obligation of notice. The decreet could not be sustained as it was against Anderson *and Co.* This was decided in England in *Rex v. Harrison and Co.* 8 T. R. 508. and there Lord Kenyon said that the Court was bound in duty to take care that these summary convictions were regular, whether the parties objected or not. How could they know on this conviction who was to pay the penalty? Of whom was it to be demanded? Who were Anderson and Co.? There is no information in this decreet. The penalty is 3*l.* But it might be 3000*l.* There are at least as many defects as lines in it. But it will be sufficient to mention one or two. The evidence is not mentioned; and the decreet being subject to appeal, how is the Court of Appeal to judge of it? According to their own books, this is a decisive objection. A complaint was laid before them, and what is the substance of the information received by them? Not a syllable appears. The seizure maker is Archibald Douglas, and, having heard him, they condemn the leather to be rouped

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Irving v. Wilson, 4 T. R. 485.

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and sold for behoof of his Majesty and the *seizure-maker*, he being the only witness. Interest was an objection to a witness even here, much more in Scotland. In the English law the cases required that the name of the witness should be set out, that it might be seen that the penalty was not given to the witness. But here it is stated that it is so given. Then it does not appear that the examination was on oath. There must be some form of proceeding by which they are bound in Scotland, though there may not be the same strictness as here. The decreet should also set forth the description of stock, that it might be seen that it was illegal stock. All these are fatal objections, and the conviction is a nullity, and we are entitled to a repetition of our money.—(*Lord Eldon*, C. This action is originally brought mixing *assumpsit* and *tort*. If the proceeding had been here, if you said a word about *tort*, you must have given notice. Can you, by slipping in a count for money had and received, get rid of that? Then, if this is assumpsit for 133*l.* the question arises whether the payment was, or was not voluntary. If you brought your action for damages, after getting rid of the conviction, it must be within three months.) If it had been for damages alone, that would be the case, but the claim for damages has here ceased, and the action is for recovery of our money. (*Lord Eldon*, C. It was originally for more, and the demand is reduced by sentence; and the point they argue is, that as it was brought originally for more than the money paid, you should have given a month's notice.) Our memorial below stated that all we

claimed was a repetition of our money. They rely on stat. 28 Geo. 3. cap. 37. But that could apply only if the action were brought in the Exchequer, which had jurisdiction, but not exclusively. All the terms of it were applicable to a court where the trial must be by jury. It never could apply to proceedings in the Court of Session. If the action had been brought in the Exchequer, they would have had the advantage of the statute. But it is brought in the Court of Session, to whose proceedings the statute cannot apply. (*Lord Eldon*, C. You bring your action fifteen months after the seizure, upon this state of facts. They purchased their own goods; and I do not find that you then questioned their right to retain the money; and the money is paid into his Majesty's Exchequer. Can you then, in an action against the individual who made the seizure, recover that money which, before he had notice of your purpose, he paid into the Exchequer? It has been decided in this country that the courts are to take notice of the time when the officer is called upon to pay the money into the Exchequer.) He paid it in his own wrong. (*Lord Eldon*, C. He could not help paying it.) They protested, and he might have stated that circumstance, and that it was alleged that the seizure and conviction were illegal. The delay was in consequence of applications to the Excise Office to settle the matter. The next objection was, that we ought to have appealed to the Quarter Sessions. But it has been decided in Scotland that the jurisdiction of the superior court is not taken away, unless by express words, or neces-

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Vid. Cates, q. t. v. Knight.—Cates v. Mellish, 3 T. R. 442.

sary implication; *Guthrie v. Cowan*, Fac. Coll. 1807; and also in England, *Rex v. Jukes*, 8 T. R. 542, 544—*Rex v. Sparrow*, 2 Bur. 1042. 1st, Then we say that this decreet was a nullity.—2d, That the statutes requiring notice and commencement of the action within three months cannot apply to a proceeding in the Court of Session.—3dly, That the jurisdiction of the Court of Session cannot be taken away by general words. But there is another objection, that the action is exclusively triable in the Court of Exchequer. It is clear that the Court of Session has jurisdiction over the proceedings of magistrates, as the Court of King's Bench has here; and, if a decreet is appealed from, though an excise officer is connected with it, the Court of Exchequer has no more power to remove the cause than the Court of Exchequer has here to remove a cause from King's Bench, where the question is whether the powers given to magistrates have been properly executed. And by stat. 6 Anne, cap. 26. the Court of Exchequer is put on the same footing as the Court of Exchequer here. Suppose then an action of trespass brought against an officer of excise in the King's Bench, or Common Pleas, it was never argued that the officer could plead that he was an excise officer, and not bound to answer. A special application must be made to the Court of Exchequer, which might, if they thought proper, remove the cause by a proceeding in the nature of an injunction; not that the Court of King's Bench could not entertain the cause at all, but that the officer has the privilege of being sued in the Exchequer. That is the principle; *Crispe v.*

Campbell, 1 Anst. 205. N. If it be the privilege of the officer, as Eyre, ch. B. there states it, the officer ought to apply for it. If he does not, he waives it. In this case they did not apply to the Exchequer, and waived the privilege; and there was one part of the case here so definitely belonging to the Court of Session, that the Court of Exchequer could not remove it: *viz.* the authority to quash or reduce the decreet. (*Lord Eldon*, C. The summons claims two things, a repetition of the money, and damages. The Court has negatived the damages, and given you a repetition of the money and the whole of the expenses. You admit that the claim for damages cannot be supported; but then that demand occasioned almost all the other questions. But how could one part be removed, and not the other?) The Court of Session has clearly the jurisdiction over the principal matter, viz. whether the magistrates have properly executed their powers, and the incident follows the principal matter. (*Lord Eldon*, C. How could the whole have been removed?)

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Lord Advocate.—I cannot state any process for that purpose. If the Court of Exchequer were to issue an injunction, the consequence might be a general warrant to commit the Barons. The fact is, that the Exchequer has the exclusive jurisdiction in revenue matters; the Court of Session an exclusive jurisdiction in common questions; and the Court will consider whether it has jurisdiction without attending to any application by another

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court, and such an attempt to interfere was never made. The reduction, if the grounds were that these were not revenue statutes, that they had fallen into desuetude, &c. belonged exclusively to the Exchequer: and the question is, whether the ground was the irregularity of the decreet, or that an excise officer had done wrong in that character. In the latter case the cause could be tried only in the Exchequer. With respect to the irregularity of the decreet, it was sufficient to state that what they argued upon was a mere abstract which might be subsequently filled up; and, if the action had been properly brought, a full record would have been made up. This was clearly incompetent for defect of notice. They say, the claim for damages was abandoned, but then issue was joined on that, and the expenses, perhaps the whole of them, occasioned by it; for, if repetition alone had been demanded, *non constat* but the money would have been paid. They produced no authority for this form of proceeding in any case, and the principle was against it. As to the objection that the stat. 28 Geo. 3. cap. 37. did not extend to Scotland, or to actions in the Court of Session, because the terms applied only to courts which might proceed by jury trial, the case of *Grant v. Harper* was an answer to that, and that of *Surtees v. Allen*, decided in this house, after a most able argument by the Noble Lord who moved the judgment, had set the question at rest. The summons prayed to set aside the conviction, and for damages; and the laying it so was an admission, that till the conviction was reduced the pursuer

Surtees v. Allen, ante vol. 2. 254.

could not reclaim the money paid to his Majesty. (They say, that they did not know what the decreet was till you told them.) They might have proceeded by petition or reduction. (*Lord Eldon*, C. One ground of complaint is, that the goods were sold without notice to them.) That is denied, and there is no evidence of it. The other party was entitled to a copy of the decreet if he had applied for it. In the reduction he might have called for production of the decreet; and if he then wished to proceed on the irregularity, all he had to do was to ask leave to amend his summons. (*Lord Eldon*, C. He goes on here guessing what it may be, and prays that it may be reduced for reasons set forth, and *other reasons* to be proponed on the discussion. Now this reason, that the decreet was against Anderson *and Co.* was not specifically mentioned in the summons. Could that be taken advantage of under the words *other reasons*, &c.?)

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It could not; *Newcastle Fire Company v. Mc. Morran*, where the policy was misdated in the summons. In the Queensberry cases, the summons against the Duke of Buccleuch was amended after issue, and they might have amended their summons here so as to lay the ground of irregularity. But they had not done it, and there was no issue after the decreet was produced. (*Lord Eldon*, C. What is the meaning of *illegally extorted* in the Lord Ordinary's interlocutor?) The meaning I take to be, that the justices were wrong in point of law, and that the officer had no right to make the seizure; and that the goods having been sold under

Newcastle Fire Company v. Mc. Morran, ante vol. 3. 264.

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this illegal decreet, the money paid for them was illegally extorted from the pursuers.

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Lord Eldon (C). This was a proceeding for the reduction, if I may so express it, of a conviction against Anderson and Co. under certain acts of parliament, for carrying on the business of tanning and currying leather at the same time. There were several questions in the case. 1st, Whether this was a valid conviction, as being a conviction, in a criminal proceeding against Anderson *and Co.* 2d, It was objected not only that this was a conviction in a criminal proceeding against Anderson *and Co.* by that description; and that though a description of that kind had been held good in civil proceedings, it was necessary in a criminal proceeding to know with certainty who are or are not convicted; but also that the conviction was bad for various other reasons apparent on the face of it. But the Appellants contended that, supposing they were wrong in all this, the Court of Session had not jurisdiction, however unjust the conviction in itself; and that the provisions of the statutes as to the time within which the action might be brought, and as to the month's previous notice to the officer had not been complied with. I have considered the case with a great deal of attention; and although there are difficulties in it, I am of opinion, upon the whole, that the Court below is in the right, and that there is not reason sufficient to reverse this decision.

Judgment AFFIRMED.