

been opposed, on the ground, inter alia, of an alleged want of the legal concurrence of nine-tenths of the creditors present, as required by statute, the Court, after some procedure, (7th March 1828), refused the petition in so far as concerned the individual estates of the said George Brown, but, in respect of no opposition being made, granted the prayer thereof quoad ultra in so far as regarded the Company estates, reserving all claim on the individual estate of the said George Brown.* George Brown appealed; but the Counsel for the respondents stated at the bar of the House of Lords, that he was not instructed to support the judgment complained of, or resist the appeal. April 8. 1830.

‘ The House of Lords ordered and adjudged, that the interlocutor or judgment complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, with instructions to grant a scrutiny in case the same should be required by any of the objecting creditors, and then to proceed further to determine the cause: And it is declared, that if no such scrutiny is demanded by such objecting creditors, the prayer of the original application by the appellant for his discharge ought to be granted.’

ALEXANDER DOBIE—CALDWELL and THOMSON,—Solicitors.

ALEXANDER CAMPBELL, Appellant.
Brougham—James Campbell.

No. 20.

WILLIAM M'FARLANE, Respondent.—*Lushington—
John Campbell.*

Public Officer—Title to Pursue.—Circumstances under which the Court of Session, having suspended a depute-clerk of the peace, and prohibited him from exercising the duties or drawing the emoluments of the office for twelve months, found him liable in expenses, and ordained the deliverance to be inserted in the Books of Sederunt,—the House of Lords remitted to the Court to recall the interlocutor, except as to payment of the expenses; and ordered the party to pay the costs of appeal, declaring that the House awarded such costs in lieu of such suspension.

ALEXANDER CAMPBELL, joint depute-clerk to the Justices of the Peace for the county of Dumbarton, was also clerk to the trustees for that district of the same county within which part of the Cumbernauld turnpike road passes. Being informed that April 8. 1830.
2D DIVISION.

* 6. Shaw and Dunlop, 739.

April 8. 1830. James M'Farlane, and William M'Farlane, had been guilty of evasion of the tolls of Condorrat, (one of the turnpikes on that part of the Cumbernauld road which lies in Dumbartonshire), he presented, as clerk to the road trustees of the district, an application to the Justices of Peace of the same district, and within which he acted as their clerk, praying for statutory penalties, (to one-half of which Campbell had right), for a fine, and for damages to James Ruchead the toll-keeper, his wife and sister-in-law, who, it was alleged, had been severely maltreated on the occasion of the evasion. The customary warrant of apprehension was written for the signature of the Justices by M'Donald, one of the clerks of Campbell and Barlas, writers in Glasgow, of which firm Campbell was a partner. It was directed against both the M'Farlanes, but was only executed against William, who was accordingly apprehended, and brought before the Justices at Kirkintulloch for examination. He was attended throughout the proceedings which followed by a procurator. Campbell did not attend at all, but M'Donald conducted the prosecution.

The conclusion for damages was not pressed, but no dismissal of it was entered on record; and on the toll-keeper, his wife, and sister-in-law, being adduced as witnesses, William M'Farlane's procurator objected to their admissibility; but the objection was repelled, and their evidence taken cum nota. It appeared also, (although the relationship was not known to Campbell's clerk or to M'Farlane), that one of the sitting Justices was maternal uncle to the toll-keeper.

In the meanwhile James M'Farlane, who had been beat and cut by the toll-keeper on the occasion when the evasion was alleged to have been practised, had raised an action against him, and obtained a judgment from the Sheriff of Dumbartonshire, awarding L. 14 of damages, and L. 2 to the prosecutor as damages and fine for the assault, which, on appeal to the High Court of Justiciary, was increased to L. 100 of damages, and L. 5 to the procurator-fiscal, with expenses.

When the Justices met to pronounce judgment, William MacFarlane's procurator protested against the legality of the action, because, among other reasons, the pursuer of it, Campbell, was the clerk of Court. The Justices, however, sustained the action, found that William M'Farlane did attempt to evade the toll at Condorrat, fined him in the mitigated penalty of L. 2, and found him liable in L. 3 of expenses.

James and William M'Farlane then presented a petition and complaint to the Court of Session, charging Alexander Campbell

with a violation of the Act of Sederunt, 6th March 1783, on the ground that he was clerk of the Court in which he had raised the above action against them, and praying that he might be found liable in penalties for malversation in office, be deprived of, or suspended from his office of depute justice of peace clerk, and found liable in expenses. April 8. 1830.

Campbell objected to their title, in respect they had not obtained the concurrence of the procurator-fiscal; and, separatim, that the warrant had not been executed against James. On the merits, he justified his conduct by referring to the Cumbernauld road local Act, and to the general turnpike Act; and contended, that he personally did not interfere, and was not at any rate liable for the errors, if any, of the Justices who presided.

The Court of Session pronounced this judgment: ‘ Repel the objections to the title of the complainer, William M'Farlane, to insist in the said complaint; but in respect that the original complaint was not served upon James M'Farlane, nor any procedure held therein with respect to him, find, that he has not qualified a sufficient title and interest to support its conclusions: Find, That the respondent, Alexander Campbell, junior, in respect of his having, as district clerk of the road trustees of Dumbartonshire, instituted a complaint, concluding not only for the statutory penalty on account of an alleged evasion of the toll of Condorrat, (the half of which penalty was by the statute declared to be payable to himself), but also for certain other sums as indemnification to James Ruchead, the toll-keeper, his wife and sister-in-law, who afterwards were admitted as witnesses for the complainer cum nota in that very process, although no dismissal of the process quoad them appears to have been entered on the record; and in respect of his having unnecessarily brought the said complaint before the Justices of the Peace of the Kirkintulloch district of the county of Dumbarton, in which Court the said Alexander Campbell, junior, then held the office of clerk by deputation from the principal clerk of that county; and that part of the proceedings upon this complaint, and various parts of the proof led in support thereof, appear to have been conducted and written by John M'Donald, the clerk of Campbell and Barlas, writers in Glasgow, of which copartnery the said Alexander Campbell was then a member; and during which proof it also appears, that a maternal uncle of the said James Ruchead actually sat as one of the Justices of Peace,—did act contrary to law, and in a manner subversive of the impartial administration of justice; and the Lords therefore

April 8. 1830. ' suspend the said Alexander Campbell, junior, from his office
 ' of depute-clerk of the peace of the said county of Dumbarton,
 ' for the space of twelve calendar months from and after the first
 ' day of April next, and prohibit and discharge him from either
 ' directly or indirectly exercising any of the duties, or drawing any
 ' part of the emoluments of the said office, during the foresaid
 ' period;' find him liable in expenses; ' and ordain this deliver-
 ' ance to be inserted in the books of sederunt of this Court.'
 Campbell paid L. 90. 17s. 10d. of expenses, and the entry was
 made, as ordered, in the books of the Court of Session.*

Campbell appealed.

Appellant.—1. The respondent's application is defective in form. It does not conclude for damages, but for punishment, consequently the procurator-fiscal ought to have been made a party.

2. No personal motives induced the appellant to take any share in the proceedings complained of. By the local road Act and the general road Act, he was, as clerk to the trustees, not merely authorized, but invited to institute and conduct suits against parties accused of evasion of turnpike duties. In the present instance, however, he did not act; and although the suit was conducted by a clerk who happened to be one of Campbell and Barlas's clerks, that clerk was more the servant of the Justices of Peace than any other person. The Justices may have acted improperly in admitting, even cum nota, the tollman, and his wife and sister-in-law; and it may have been very reprehensible in the Justice who was maternal uncle to one of the parties interested, to sit and entertain the case; but these were no acts of the appellant. Besides, the Act of Sederunt on which the respondent founds, applies to the party acting as agent, but not to that of a party conducting his own suit, which the appellant was authorized to do by the statute regulating the trust of the road in question.

Lord Chancellor.—I see nothing at present to satisfy me that this gentleman acted intentionally wrong. I think he acted incorrectly. What he did was inconsistent with the Act of Sederunt: still, to suspend him for a year was rather a hard measure; and I observe that three of the Judges in the Court below were inclined for a more lenient sentence, although, no doubt, the Lord Justice-Clerk considered it a very serious case.

Dr Lushington (for the respondent).—The appellant resorts to several very narrow and untenable distinctions; but he plainly was

guilty of most illegal conduct, which led to great injustice. The parties who were so barbarously used by this turnpike-keeper, and against whom they recovered heavy damages for the assault, are condemned on the evidence of that keeper, and his wife and step-sister; and the sentence proceeded from a bench of Justices, one of whom was the maternal uncle of that very keeper. April 8. 1830.

Lord Lyndhurst.—That cannot be palliated certainly. Still this is a very severe infliction upon a professional man.

Dr Lushington.—The extent of punishment must be measured, in some cases, by the necessity of putting an end to improper practices. The appellant's conduct has put the respondent to very heavy expense.

Lord Chancellor.—I do not know how you are injured if all those expenses are paid by the appellant. I mean the expenses arising out of this irregularity. I observe one of the Judges proposes a fine of L. 100, and expenses; and it would be better for the appellant that the sum he pays should be in the shape of expenses rather than that of a fine. I understand he has paid the expenses in the Court below. There has certainly been an irregularity, without alluding to the other matters; but this suspension is a reflection on character.

Campbell (for the respondent).—It is by no means the wish of those I represent to press any thing hardly, beyond what may be considered the recommendation of your Lordship.

Lord Chancellor.—If this gentleman pays all the costs incurred, and no fine, I should think that will be a sufficient infliction. The costs will be a warning against a repetition of offences of this kind, and will indemnify the party complaining. Let there be no suspension; but it must be understood that these costs are considered by this House in the nature of a penalty, for the irregularity of which this gentleman has been guilty. The Court of Session will understand, that we do not reverse the judgment in point of law, but substitute one punishment for the too severe one inflicted.

On the motion of his Lordship, ' the House of Lords ordered
' and adjudged, that the cause be remitted back to the Court of
' Session, with instructions to recall so much of the interlocutor
' of the 6th of March 1827, complained of in the said appeal, as
' suspends the said Alexander Campbell from the office of depute-
' clerk of the peace of the county of Dumbarton, and prohibits
' and discharges him from exercising any of the duties, or drawing
' any part of the emoluments of the said office; and ordains the
' deliverance to be inserted in the books of sederunt: And it is

April 8. 1830. 'further' ordered, that the appellant do pay to the respondent the 'sum of L.269 for costs; and it is declared, that this House 'awards such costs in lieu of such suspension.'

Appellant's Authorities.—44. Geo. III. (Local Act); 4. Geo. IV. c. 49. Darby, Feb. 10. 1786, (F. C.) M'Intosh, Nov. 18. 1815, (F. C.); affirmed in House of Lords, March 9. 1819; (1. Bligh, 272.) Murray, Dec. 15. 1824; (3. S. & D. 401.)

Respondent's Authorities.—A. S. March 6. 1783. A. S. Feb. 4. 1786. Seller and Thomson, Feb. 11. 1809, (F. C.) Campbell, July 10. 1824, (3. S. & D. 245.) Adam, July 5. 1824, (S. & D.'s Justiciary Reports, p. 119.) M'Millan, Dec. 10. 1825, (4. S. & D. 297.) Erston, (ibid. 299.)

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL,—Solicitors.

No. 21.

SIR ALEXANDER INGLIS COCHRANE, Appellant.
Lushington—Brown.

DR DAVID RAMSAY, Respondent.—*Murray—Keay.*

Service.—Held, (reversing the judgment of the Court of Session), that a general service to an ancestor, where there has been a prior general service by another party to the same ancestor, is incompetent.

April 29. 1830.

2D DIVISION.
Lord Mackenzie.

ALEXANDER INGLIS of Murdieston, in 1719, executed a deed of entail of that estate in favour of Alexander Hamilton; whom failing, to certain substitutes nominatim; whom failing, 'to the 'eldest lawful son of William Inglis, son to the deceased Nathaniel Inglis, chyrurgeon in Kirkaldy, my brother, and the heirs-' 'male of his body; which failing, to his other lawful sons, and the 'heirs-male of their bodies successive, one after another;' whom failing, the heirs-female of the institute, and of the first substitute; 'which failing, to the heirs-male procreate, or to be procreate, 'lawful, betwixt William Sheoch, shore-grieve at Clackmannan, 'and Catherine Inglis, his spouse, daughter to the said umquhill 'Nathaniel Inglis; which all failing, to my own nearest and law-' 'ful heirs and assignees whatsoever: and failing of heirs-male, 'I hereby declare that it shall be leisome or lawful for the eldest 'daughter or heir-female to succeed without division.' Alexander Hamilton, the institute, succeeded, and made up titles under the deed of 1719. His sons, Alexander, Gavin, Walter, and James, successively succeeded. The two former made up titles under the entail; but James executed, in 1802, a new deed of entail in