

the seizure, with a sum for expenses, the cause was advocated ; and the LORDS found, that the justices had no jurisdiction in this case, that it was incompetent before the Court of Session, and only cognizable in the Court of Exchequer.

No 320.

Fol. Dic. v. 3. p. 359. Kilkerran.

* * * This case is No 307. p. 7590.

1747. *June 26. & July 30.*

CALDWAL *against* M'DOUAL and M'CULLOCH for his interest.

AN information being laid at the instance of William Caldwell, supervisor of Excise, before the Justices of the Peace of the stewardry of Kirkcudbright, against James M'Doual, for the clandestine running of brandy and rum ; and he not appearing, though personally cited, the Justices proceeded to take trial of the fact ; and, upon advising the proof, on the 29th of August 1744, ' Found him guilty, and fined him in L. 40 Sterling in terms of the statute, whereof L. 15 was decreed to his Majesty, the like sum to the informer, and the other L. 10 in name of expenses ; and granted warrant to constables and officers of Excise, to arrest his effects wherever they could be found within the stewardry.'

No 321.

The Justices cannot grant warrant for arrestment on Excise decrees ; and forthcomings on such arrestments are void.

On this decree arrestment was used in the hands of John M'Culloch younger of Barholm, and furthcoming pursued before the said Justices, wherein M'Culloch appeared, and acknowledged, that at the date of the arrestment, he was owing to M'Doual L. 47 Sterling by a bill, which he had since that time retired, and accepted a new one for the like sum, and was content to pay, provided he could do it with safety : Upon advising which acknowledgment, the Justices found, ' That the renewing the bill was collusive, in order to avoid the effect of the arrestment ; and therefore decerned him to make payment of the L. 40, and M'Doual to give allowance thereof out of the sum contained in the bill.'

Of this decree M'Culloch obtained suspension, on these grounds, *imo*, That the principal debtor was not duly called in the furthcoming, having been out of the kingdom at the time of the citation at his dwelling house ; *2do*, That the Justices of the Peace were no ways competent to judge in furthcomings. And at discussing, the ORDINARY, in respect that the principal debtor was out of the kingdom, the time of the citation, ' turned the decree of furthcoming into a libel, and granted diligence for citing him.'

But in the mean time the act passed of the 18th of his present Majesty, ' indemnifying persons guilty of the unlawful importing or running prohibited or uncustomed goods ;' which upon a general letter of attorney from M'Doual, to pursue all processes in his name, and to defend in all actions brought against

No 321. him, was pleaded in bar of the action. But in respect of the clause of the act of indemnity, which provides, 'That in case of a subsequent offence of the like nature, prosecutions for former offences may be revived;' it was found, 'That the indemnity could not be pleaded, without a special power from the party for that effect.'

But thereafter, a special power being produced, the defender was found entitled to the benefit of the indemnity.

The pursuer then founded on the proviso in the statute, 'That the same shall not extend to acquit any judgment, in respect to such part thereof as belongs to the informer, until such person, who would take the benefit of this act, shall pay to the informer the full costs of suit, in which such judgment or judgments shall have been obtained;' and insisted for the expense of the original process, and of the furthcoming before the Justices of the Peace, and of discussing the suspension; and gave in an accompt extending to upwards of L. 40 Sterling.

Objected for the defender, That *imo*, In no event, agreeable to the letter of the foresaid proviso in the statute, could the costs of suit exceed the informer's part. *2do*, Such costs only would be due as had been truly laid out in the suit wherein the judgment inflicting the fine was given, but by no means any of the expenses laid out in the arrestment and furthcoming, as the Justices of the Peace had no power in such cases to judge in furthcomings, or even to grant warrant for arresting.

Answered for the pursuer, That wherever a jurisdiction is granted, every power is implied, which is necessary to make it effectual; to what purpose a jurisdiction, unless the Judge have power to carry his decree into execution? That accordingly, ever since the Union, it has been the practice of the Justices of the Peace, particularly of the shire of Edinburgh, to grant warrant for arrestment upon Excise decrees, of which a certificate was produced under the hand of the clerk.

Replied for the defender, That there is no such general rule, that every Judge or Court can execute their own judgments in any manner any other court can do; the Justice court can decern in great penalties, but can give no warrant to arrest; and unless it could be said that the law had given to the Justices of the Peace power to grant warrant for arrestment, the general argument might as well be pleaded to give them power to give decrees of adjudication. That how far Justices of the Peace have power to grant warrant for arrestment upon their decrees in other matters than the revenue, is to be determined upon our Scots statutes; but in matters concerning the revenue, their power is determined by the British statutes, and the Justices have no greater or other power than these statutes have given them; and how their sentences are to be put in execution, is distinctly set forth in the statutes of the 12th of Charles II. cap. 23. and 24. and of the 15th of Charles II. cap. 11. viz. by issuing warrants for levying the forfeiture by distress and sale of goods, and for want of distress by

imprisonment for three months. But as there is no such form known in the law of England as levying *nomina* (which are not comprehended under goods and chattles) by arrestment and furthcoming, the Justices have no such power by the laws of Excise; and whatever might be said for the *bona fides* of the officer to entitle him to the whole expenses, were it true that such illegal form of proceeding had crept into the practice of Scotland, as is averred; yet it is not true, that the Justices of the Peace in the shire of Edinburgh have been in use to sustain furthcomings on arrestments laid on their Excise decrees, though the clerks may have been in use in their extracts to subjoin warrants of arrestment *in communi forma*, misled by the usual form in other cases, but which is only the operation of the clerk, and not of the Judge.

THE LORDS, upon the 26th of June 1747, 'Found the pursuer entitled to the expenses of the original prosecution before the Justices of the Peace, so far as the same were really laid out by him; refused him the expenses of the arrestment and process of furthcoming, and of the suspension before the decree was turned into a libel; but found him entitled to the expense of the suspension after the decree was turned into a libel, and before the indemnity was properly pleaded; and remitted to the Ordinary to proceed accordingly;' and on the 30th July thereafter 'Adhered.'

THE LORDS were, upon the above reasoning, of opinion, that the Justices had no power to grant warrant for arrestment on Excise decrees, and that the arrestment and furthcoming were inept proceedings.

Fol. Dic. v. 3. p. 359. Kilkerran, (JURISDICTION, &c.) No 4. p. 310.

1749. June 14. THOMAS TURNER *against* The DUKE of ROXBURGH.

THOMAS TURNER'S lands of Pinaclehill lay upon the river Tweed, and were intersected by a road to a boat upon it. Another road struck off from this, before entering these lands, and led through the lands of Easterwoden to a ford lower; from which, amongst the banks of the river, run a road to the boat.

Thomas Turner obtained a sentence of the Justices of the Peace, granting warrant to him to stop the road through his grounds, and ordaining that through Easterwoden to be the high-road in time coming.

In a suspension at the instance of the Duke of Roxburgh, Park of Easterwoden and other Heritors, the LORD ORDINARY 'having considered that the road leading to the boat through Pinaclehill was a high-way, found that the Justices of the Peace had no power to suppress it; and that the confining the high-way to that which past through Easterwoden to the ford, did not fall under the powers given to the Judge Ordinary by the act 41st Parliament 1661.'

Where there are two roads to the same place, the Justices of Peace have no power to close up one of them which runs through an heritor's ground, where the other is not equally straight or near.