

Argument for Mr. Fall.

No. 1.

After the proposed alteration, the Winterfield road will remain in general as it is, and ever has been, viz. *one* and only *one* communication between Belhaven and the harbour; and all that is proposed is, for a very insignificant space, (less than two gun shots,) where it absurdly branches out into two narrow dirty alleys, to reduce these two into one good new paved road of a proper width; or, in other words, to continue the Winterfield road uniformly from the out-setting forward to the harbour, as it is already at the beginning and the end, viz. one commodious road of 21 feet breadth, instead of being composed, for a space, of two dirty branches, both in disrepair and almost impassible, and in many places the one not exceeding 12, the other 17 feet in breadth.

The case of Turner has no resemblance to the present question. There a *high way was suppressed*. Here no alteration is proposed, except in regard to a dirty narrow lane in the suburbs of a burgh, only 17 feet broad, not 20 feet, which is the narrowest characteristic breadth of a high way.

The case of Miller against Swinton and the Magistrates of North Berwick is equally inapplicable. There the Magistrates had feued a part of the High Street, 53 feet in length and $10\frac{1}{2}$ in breadth, for a distillery. This was justly complained of, not only as being *ultra vires*, but as a nuisance. In the present case, the Magistrates of Dunbar have authorised a transaction highly beneficial to the community.

In the case of Scot against Magistrates of Montrose, an attempt was made to erect a building not only upon a public street of the town, but in such a manner as to come within nine feet of the complainer's windows, so as to darken them. Nothing resembling this is attempted in the present instance.

The following was the interlocutor of the Court: "Find that the Magistrates of Dunbar, as administrators for the burgh of Dunbar, had power, for the benefit of the burgh, to shut up the Backraw, the road in question, therefore adhere to the Lord Ordinary's interlocutor, finding the letters orderly proceeded. Find the suspenders conjunctly and severally liable in expenses, &c. but find that the charger is bound to widen and repair the road to the south of his house as mentioned in the minute, before he shall be at liberty to shut up the Backraw, and decern accordingly."

A second petition for the burgesses was refused without answers.

Lord Ordinary, Gardenston.

For Fall, R. Sinclair.

For the Burgesses, J. M'Laurin.

W. M. M.

1776. June 14.—JOHN BEUGO and JAMES BRYCE, Chargers, against DAVID M'CLEIRY, Suspenders.

THE suspender David M'Cleiry was a dealer in cow hides and calf skins. In July 1774, he informed the chargers that he had 200 dozen of dry calf

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Whether a Judge-Admiral-Depute

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has jurisdiction in causes merely mercantile?

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skins, of which they agreed to take 150 dozen, at the usual commission and charges. These skins were expected to arrive in a short time from Dundalk in Ireland, whether M'Cleiry went, in order, as was understood, to take care of and transmit them. The skins, however, never arrived: Upon which Beugo and Bryce brought an action against the defender, before the Judge Admiral Depute for the district of the river and Frith of Clyde, concluding for damages on account of being disappointed in their bargain, and also to relieve them of two bills for £154. 16s. 10d. Sterling, for which they had got no value, but which he had drawn upon them as the price of the skins.

In this process a pretty long litigation was maintained by the several parties; and the bills were in the mean time retired by M'Cleiry. The result of the process was, that the chargers obtained from the Judge Admiral, a decree discerning against M'Cleiry for payment of £87. 10s. Sterling, in name of damages sustained by the chargers. Of this decree M'Cleiry brought a suspension, which came to be discussed before Lord Ordinary Covington; in which he contended that the decree charged on was *funditus* void, as being pronounced by a Judge Admiral for an inferior district in a cause not maritime. The chargers, on the other hand, maintained, that not only had the Admiral Depute jurisdiction, but supposing he had not, his jurisdiction had here been prorogated.

Mutual memorials were ordered to be given in upon the point of jurisdiction, and the cause was afterward brought before the whole Lords in informations.

For the chargers it was argued; *1st*, That the present case was not wholly a mercantile question, but of a mixed nature, partly maritime, partly mercantile; *2d*, That even supposing it to be purely mercantile, it was not incompetent for the Admiral-Depute to take cognizance of it.

1st, That the cause was not wholly mercantile, appeared from this circumstance, that the chargers purchased skins from the suspender then situate in Ireland, and these skins were to be delivered not in Ireland but in Glasgow. The bargain thus fell to be performed within the Admiral's jurisdiction, Ireland being situate beyond seas, and it being impossible to be implemented without putting the goods on ship board. Now, the conclusion for damages is founded upon the original bargain, is an accessory to that bargain, and a consequence following from it; if, therefore, an action for implement of the bargain, as being a maritime cause, would be competent before the Admiral-Depute, the present action for damages brought in consequence of the bargain, is for the same reasons competent before that Court.

2d, On the second point, it was contended, that if the High Court of Admiralty be competent to causes purely mercantile, it is equally competent for the Inferior Courts to take cognizance of such causes.

With regard to the jurisdiction of the High Court of Admiralty, it appears that parties were in use, as far back as records go, of bringing all kinds of mercantile questions before that Court. And hence, besides the privative jurisdiction in causes maritime, the Admiral acquired a cumulative jurisdiction

with the Judge-Ordinary in causes purely mercantile. This jurisdiction of the High Court of Admiralty was supported by many authorities from our Law Books and Decisions; and the chargers next proceeded to show, that the same must be the jurisdiction of the Inferior Judges.

The act 1681, C. 16. confers the privative jurisdiction upon the Inferior Courts, equally with the High Court of Admiralty; and the Inferior Judges are no more prohibited to judge in mercantile matters than the High Admiral himself. So far then as regards this statute, the Supreme and Inferior Courts are on the same footing, the only difference being that the one is a Court of review, and the other the Court to be reviewed. The practice also with regard to Courts, both supreme and subordinate, was the same, and there were numberless instances, it was said, of causes purely mercantile being tried before Admirals Depute, and particularly in that Inferior Admiralty Court before which this cause was brought. In these cases, no objection was made to the competency either by the parties or by the Court of Session, which it would have been *pars-judicis* to have done, had the jurisdiction been incompetent. The same principles, then, which have led this Court to confirm the cumulative jurisdiction of the high Admiral in mercantile causes, must lead them to sustain the jurisdiction of the Judge-Depute in the present question.

It was also contended for the chargers, that supposing there was here any defect of jurisdiction in the Judge, this defect was removed and supplied by prorogation; which is said to arise from consent; and this in the present case had been given most completely. The suspender at first made no objection to the jurisdiction; he stated his defences *in causa*; a great deal of procedure followed; several interlocutors were pronounced; a proof led; and during all that time no objection was made. The objection has been, for the first time, started in this Court. This plea alone was, therefore, of itself sufficient to establish the jurisdiction of the Admiral-Depute in the present case.

For the suspender, it was argued, that the Admiral-Depute's jurisdiction was manifestly null on two several grounds; 1st, *Ratione loci*; and 2d, *Ratione cause*.

1st, The statute 1681 specially limits the territory even of the High Admiral to the sea ports and navigable rivers within the flood mark; but the city of Glasgow, within which both parties reside, and where the contract was concluded, on which the action is now laid, does not lie within any of these boundaries; and the Judge-Admiral thus could have no jurisdiction over the parties in this matter.

2d, But passing this, it was maintained that the cause itself is in no degree maritime, but a common action of debt or damages, and hence, from the nature of the cause, the Judge Admiral could have no authority with regard to it. The Judge of the High Court of Admiralty is no doubt competent to mercantile as well as maritime causes; and that too without prorogation or con-

No. 2. sent of parties. No proposition, however, is generally understood to be more fixed in the law and practice of this country, than that inferior Judge-Admirals have no jurisdiction in mercantile causes, nor in any which are not strictly maritime. For this distinction betwixt the High Admiral and the Inferior Judges there are very good reasons. The High Court is a sovereign one, is in the statute 1681 called supreme, and entitled to all the prerogatives which belong to that superior dignity. But the Inferior Admirals are subordinate personages; being in fact no more than chamberlains or factors employed by the High Admiral to collect his duties, or take care of his usual obventions. Their office is in short merely ministerial, and has not properly any judicative power. Few greater grievances, it was said, can befall an unhappy country, than unnecessary inferior jurisdictions, by means of which a spirit of litigiousness is considerably inflamed among the inferior ranks of people, dissensions fomented among neighbours, and much money and time wasted in idle and oppressive law suits. In our neighbouring kingdom, accordingly, a simple system of magistracy is established, and most causes are brought directly into the supreme Courts of Westminster-hall. A similar system has been in part extended to Scotland, by the abolition of multitudes of those inferior cumulative jurisdictions which had distracted North Britain in former ages. And it cannot be doubted, that had inferior Admirals been imagined to possess any pretension to jurisdiction in mercantile causes, all over Scotland, concurrent with that of the Sheriffs-depute, an express statute or regulation would certainly have been directed towards that particular object. But this was unnecessary, because these inferior Admirals, as has been said, are merely the factors or agents of the Vice-Admiral, and what judicative power they have is confined to matters strictly maritime.

So standing the case, the argument from prorogation, it was said, could prove nothing. For in order to render prorogation possible, a jurisdiction is absolutely necessary. Thus suppose a person should bring an action for payment of a bond before a Presbytery, the defender to appear in that Court, either personally, by advocates, or both, and parties or their counsel to concur in contesting the suit to the length of a final decree; still such decree, notwithstanding the litigation, would be *funditus* void.

The same is the case of an action brought before a civil court at the instance of a proper party for deposing a minister; of a person prosecuted criminally in the Court of session for a murder; and of an action in the Court of Justiciary for declaring a man's right to a landed estate; in all which cases the decree must be altogether void, on account of want of jurisdiction in the the Judge. As the inferior Judge Admiral, then, had absolutely no jurisdiction, it is impossible that there could be any prorogation of it.

The following interlocutor was pronounced (16th December 1775): "The
 " Lords sustain the reason of suspension of *incompetency*, suspend the letters and
 " decern, reserving to the chargers to insist before any competent Court as they

shall be advised, but in respect the objection of incompetency was never pleaded for the suspender till he applied for a suspension, Find him liable to the charges in the expenses incurred by them before the inferior court, and remit to the Lord Ordinary to proceed accordingly." And to this judgment they (14th June 1776) unanimously adhered.

Lord Reporter, *Covington.*

Act. *G. Wallace.*

Alt. *W. Craig.*

J. W.

1776. August 10.

DUKE OF GORDON against SIR JAMES GRANT.

THE Duke of Gordon brought an action against Sir James Grant, heritor of a superior part of the river Spey, for contravention of the regulations enacted in the statutes regarding salmon fishing, and craving that the court should ordain observance of them under penalties.

The defender contended, that as the law has imposed no penalty for contravening these regulations, the Court can impose none, and that it is only competent to sue for damages: That although the Court had interfered to enact penalties in former instances, yet in the case of *Carnegie against Scott*, 30th June 1768, No. 84. p. 735, the decision of the Court of Session had been reversed.

The Court held, that the reversal of their judgment in the case of *Scott* had proceeded in consequence of a compromise, and that it was proper and necessary to enforce the regulations by penalties, which they accordingly did.

W. M. M.

1777. February 5.

WILLIAM MOWAT of Garth, against JOHN BRUCE STEWART of Sembister.

THE lands of Garth in Shetland are about 20 miles distant from some islands or rocks on the east side of Shetland, called the Skerries. Near these islands is a considerable fishery, on account of which their shores and beaches are frequented by the fishermen. The fishers land their boats, erect huts within sea-mark, and cure and dry their fish. This they consider to be in conformity with the privileges of general fishery conferred by statute 29th Geo. 2d, Cap. 23.

The tenants and fishermen belonging to the estate of Garth had been in use, past the memory of man, of exercising this privilege.

The greatest part of these isles or rocks belonged to the sequestrated estate of *Girlista*, held in tack by Mr. Bruce Stewart.

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The Court enacted penalties to enforce the statutable regulations respecting salmon fishing.

See No. 98. p. 7384.

No. 4.

Competent to sue in the Court of Session, declarator of the right of fishery conferred by the statute 29. Geo. 2. Cap. 23. and action of damages for infringing that right.