

[25th June 1838.]

JOHN MORRISON and others, Appellants.—*Stuart*.JAMES MITCHELL, Respondent.—*Russell*.

Road.—Held, that under the Stirlingshire road acts (34 Geo. III. c. 138. and 50 Geo. III. c. 16.) persons who use carriages for travelling on the tracking paths or roads on the banks of the canal may be considered guilty of evading the tolls, notwithstanding they do not travel one hundred yards on the turnpike road.

Process—Jurisdiction.—Penalties being imposed by a road act for evasion of tolls on conviction “before one or more “justices of the peace,” with leave to persons considering themselves aggrieved to apply by summary complaint to the Court of Session,—Questions, 1, Whether an advocacy be a competent form of complaint? 2, Whether that Court has jurisdiction to convict and find offenders liable in the penalties? and, 3, Whether there must be a conviction by the justices?

THIS case originated in an action by the respondent Mitchell, tacksman of the Kerse toll-bar, raised before the justices of Stirlingshire, against the appellants, founding on the statutes 34 Geo. III. c. 138. and 50 Geo. III. c. 16. and the general road act (4 Geo. IV. c. 49.), for payment of penalties in respect of an evasion of the toll bar by using carriages in travelling on the tracking paths or roads upon the banks of the Forth and Clyde canal. The justices having assoilzied the appellants, Mitchell brought the case under review of the Court of Session by bill of advocacy, on advising which Lord Eldin pronounced the following interlocutor:—“Remits to the justices of Stirlingshire, with “instructions to recal their interlocutors against the “complainers (appellant); to find that all persons who

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“ use coaches or other carriages for the purpose of
 “ travelling upon the tracking paths or roads upon the
 “ banks of the canal must be considered as evading
 “ the tolls in the true meaning of the statute, and liable
 “ to the penalties therein contained; to allow the com-
 “ plainers a proof of their allegations, and thereafter to
 “ decide according to the rules of justice, and to find
 “ the respondents liable in all the expenses hitherto
 “ incurred by the complainer,” &c. This interlocutor
 having been brought under review of the Inner House,
 their Lordships recalled it, and passed the bill; and a
 great deal of procedure took place, which resulted in a
 judgment by the Court (7th July 1827), finding the
 appellants “ guilty of evading the Kerse toll-bar by
 “ driving their coaches and carts along the banks of the
 “ canal, and therefore liable to the advocator in the for-
 “ feiture and penalties imposed by the statutes libelled
 “ on;” and remitting to the Lord Ordinary “ to ascer-
 “ tain the amount, and decern for the same,” which was
 accordingly done on the 20th November thereafter.¹

The appellants having appealed, the following judg-
 ment was pronounced:—“ Inasmuch as a question has
 “ been raised at the bar of this House respecting the juris-
 “ diction exercised by the Court of Session in this matter,
 “ which does not appear to have been discussed or con-
 “ sidered in that Court, it is ordered and adjudged by
 “ the Lords Spiritual and Temporal, in parliament
 “ assembled, that the cause be remitted back to the
 “ Second Division of the Court of Session to consider and
 “ state their opinion whether the Court has, by the law
 “ of Scotland, any jurisdiction, upon a bill of advocacy,
 “ to find a defender liable in penalties under the acts in

¹ 5 S. D. 909 (new ed. 843).

“ the pleadings in the cause mentioned, or either of them,
 “ such defender not being convicted before a justice or
 “ justices of the peace ; and the said Second Division of
 “ the Court is hereby required to take the opinion of
 “ the Judges of the other Division of the Court, and of
 “ the permanent Lord Ordinaries, upon this question.”¹

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In compliance with the above remit the Second Division consulted the other Judges, who delivered the following opinion :—“ In answering this question we are not dis-
 “ posed to adopt the argument of the defenders on the
 “ absolute incompetency, under any circumstances, of
 “ advocacy from the judgments pronounced by the
 “ Quarter Sessions. The statute merely provides, ‘ that
 “ ‘ if any person or persons shall think himself, herself,
 “ ‘ or themselves aggrieved by the judgment of the
 “ ‘ Quarter Sessions, it shall be lawful for such person
 “ ‘ or persons to apply for redress by summary complaint
 “ ‘ to the Court of Session.’ And considering that the
 “ right of review by advocacy is one which might, at
 “ common law, have been competently exercised, we
 “ do not think that the pointing out in the statute of a
 “ summary mode of redress by complaint can, in sound
 “ construction, be held to exclude that right. But
 “ then, of course, no judgment or finding can be com-
 “ petently pronounced by the Court in such advocacy,
 “ which is inconsistent with the provisions of the statute.
 “ The express provision of the statute in regard to
 “ penalties for the evasion of toll-bars is, ‘ that any
 “ ‘ person being thereof convicted on the oath or other
 “ ‘ legal testimony of one or more credible witness or
 “ ‘ witnesses before any one or more justices of the
 “ ‘ peace for the said county of Stirling shall for every

¹ See 4 Wilson and Shaw, p. 162, 14th July 1830.

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“ ‘ such offence forfeit and pay to the said trustees, or’
 “ ‘ to their treasurer for the time being, the sum of 20l.
 “ ‘ sterling.’ In the present case there was no convic-
 “ tion before one or more justices: on the contrary, the
 “ justices, adopting a particular view of the legal effect
 “ or relevancy of the pursuer’s averments, found it
 “ unnecessary to proceed to proof, and at once assoilzied
 “ the defenders. Now, in these circumstances we do
 “ not consider an advocacy to be incompetent; and,
 “ on the supposition of the judgment of the justices
 “ being erroneous, we think that it would have been
 “ competent in such advocacy to remit the case to the
 “ justices, with instructions correcting their error, and
 “ directing them to allow the pursuer a proof, and to pro-
 “ ceed to determine the case in terms of the statute.

“ But by the interlocutor appealed from, the de-
 “ fenders are found guilty of evading the toll-bar; and
 “ a remit is made, to the Lord Ordinary to ascertain
 “ the amount of the penalties. It appears to us that
 “ this mode of procedure is not only unauthorized by,
 “ but is contrary to the provision of the statute, which
 “ requires a conviction of every such offence, ‘ on the
 “ ‘ oath or legal testimony of one or more credible
 “ ‘ witnesses before any one or more justices of the
 “ ‘ peace for the county of Stirling.’ And therefore,
 “ in answer to the question now put to us, we submit,
 “ under the above explanation, that in our opinion
 “ ‘ the Court of Session has not, by the law of Scot-
 “ ‘ land, any jurisdiction, upon a bill of advocacy, to
 “ ‘ find a defender liable in penalties, under the acts
 “ ‘ in the pleadings in the said cause mentioned, or
 “ ‘ either of them; such defender not being convicted
 “ ‘ before a justice or justices of the peace.’”

The Judges of the Second Division concurred in this

opinion, and on the 21st January 1832 found that
 “ the Court of Session has not, by the law of Scotland,
 “ any jurisdiction, upon a bill of advocation, to find
 “ a defender liable in penalties under the acts in the
 “ pleadings in the said cause mentioned, or either of
 “ them, such defender not being convicted before a
 “ justice or justices of the peace.”¹

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On this judgment, containing the opinion of the Court, being reported to the House of Lords, their Lordships resumed consideration of the appeal, and parties were heard on the merits accordingly.

LORD CHANCELLOR.—A declaration as to the course the justices should adopt will be the proper course, and meet the substantial justice of the case.

The House of Lords ordered and adjudged, That the interlocutor of the Court of Session in Scotland, of the Second Division, of the 7th (signed the 11th) of July 1827 and 20th November 1827, complained of in the said appeal, be and the same is hereby reversed; and it is hereby declared, that persons who use coaches or other carriages for the purpose of travelling upon the tracking paths or roads upon the banks of the canal may be considered guilty of evading the tolls within the true meaning of the statute, and liable to the penalties therein contained, notwithstanding that they do not travel one hundred yards on the Kerse Road: And it is further ordered, That the said cause, with this declaration, be remitted back to the said Second Division of the Court of Session, to give directions to the justices to allow the respondent a proof of the allegations, and thereafter to decide according to the rules of justice and this judgment.

D. CALDWELL—A. FRASER, Solicitors.

¹ 10 S. D. 230.