

[28th February, 1842.]

The RIGHT HONOURABLE JOHN ARCHIBALD MURRAY, Lord Advocate of Scotland, in name and behalf of her Majesty, and of the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings; Appellant.

The HONOURABLE COSPATRICK ALEXANDER HORNE, commonly called LORD DUNGLAS, and CAPTAIN ROBERT CUNNINGHAM, Respondents.

Expenses. — The Lord Advocate, suing on behalf of the Crown, or of any officers in whom the revenue of the Crown is vested, is not liable for costs of the action, whether competently or incompetently brought in its form, or otherwise.

Appeal. — The Lord Advocate, suing on behalf of the Crown, or of officers in whom the revenue of the Crown is vested, is not bound to enter into recognizances.

Appeal. — Where the liability of the Crown for costs was in dispute, the competency of an appeal on that subject was sustained.

THE appellant brought action against the respondents for reducing a commission under the Great Seal of Scotland, whereby the respondent, Lord Dunglas, had been appointed chamberlain, or collector, for life, of the rents and casualties arising out of the lordship of Ettrick Forest, and a deputation or factory, whereby his Lordship had appointed the respondent, Cunningham, to be his deputy. The grounds of reduction being, that his Majesty King George the Fourth, by whom the commission had been granted, had no power to make the grant for a period exceeding his own life.

The first, among a variety of defences, pleaded by the respondents to this action was, that the action was not competent at

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the instance of the Commissioners of Woods and Forests, and could only be instituted by the Officers of State.

A record was made up upon the summons, and defences, and condescence, and answers, and thereafter, cases, and revised cases, were given in for the parties, and ultimately, a hearing in presence was ordered by the Court. In the written pleadings it was insisted on behalf of the appellant, that the action was at the instance of the Crown, as well as the Commissioners of Woods and Forests. This was denied by the respondents, and was farther met by the objection, that the Lord Advocate had no power, *virtute officii*, to sue on behalf of the Crown, and could only do so under a special warrant applicable to the particular action. To meet this objection there was produced a warrant from the Crown, “ratifying and confirming the whole proceedings in the
“said action, prior to the date hereof, and authorizing the action
“to be proceeded in.”

On December, 1836, the Court pronounced the following interlocutor, “The Lords having resumed consideration of this
“process, with the cases for the parties, and heard counsel
“thereon, sustain the objection to the title of the pursuers to
“insist in these actions, dismiss the same accordingly, and
“decerns. — Find the Commissioners of Woods and Forests
“liable to the defenders in the expenses of process, allows the
“accounts to be given in, and thereafter remit to the auditor to
“tax the same and to report.”

On a subsequent day, 10th February, 1837, the Court pronounced this other interlocutor, “The Lords having advised this
“account with the report of the auditor thereon, approve of the
“same, and decern for payment to the defenders of L.284, 14s. 8d.
“of expenses of process, together with the dues of extract, and
“allow this decree to go out and be extracted in the name of
“Gibson and Horne, W.S., agents for the defenders.”

A new action was then brought at the instance of the Officers

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of State, and in that action the Court below ultimately decerned in terms of the libel. After this decree had been made an appeal was taken against the interlocutors in the original action. The respondents objected before the appeal committee, that the appeal could not be entertained, because recognizances had not been entered into within the time required. The committee reserved consideration of the objection until the hearing of the appeal. Subsequently the respondents carried the decree pronounced in the second action to appeal. The second appeal in the second action was heard on the 20th February last, and stands over for judgment. The first appeal in the original action was heard this day (28th February.)

Mr Attorney General and *Mr Anderson*, for the appellant. — The merits of this action have been already heard in the appeal taken by the present respondents. The only questions, therefore, with which we shall trouble your lordships, will be two, 1st, The liability of the Crown to pay costs; and 2d, The title of the Lord Advocate to sue in the form which was adopted. The question as to the recognizances reserved by the appeal committee is dependent on the liability for costs, we will therefore consider these two questions together, leaving the question of title for subsequent argument.

[*Lord Chancellor*. — If the Lord Advocate be not liable to pay costs, whether he succeed or fail, it will not be necessary to enter into the question of title.]

Mr Attorney. — Except in the view, that the question of liability should be decided against the Advocate.

[*Lord Chancellor*. — It will be convenient to have the question of costs argued first: because, in one view, the question of competency may not arise.]

It is the admitted prerogative of the Crown, suing directly by its law officers, not to pay costs, in any case. There is no dis-

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inction recognized between suits at the direct instance of the Crown, and suits by particular departments of the Government. The prerogative is not a privilege personal to the monarch, for his private benefit, but appertains to him in his public capacity, and for the public benefit. In every matter in which the Crown is concerned in England, it appears to plead by the Attorney General, but in no case is the Attorney General liable to pay costs. Even in Exchequer, where the informations are by private parties, at the suit of the Attorney General, neither the Attorney General nor the particular department of the Government which he for the time represents, has ever been made liable to pay costs. The prerogative is co-extensive in both parts of the kingdom, and the exemption is equally recognized in Scotland as in England, in all cases where the Lord Advocate sues on behalf of the Crown, or any department of the executive Government.

William the Fourth, on his accession to the throne, surrendered the hereditary revenues of the Crown in Scotland to Parliament for disposal, and by 1 Will. IV. cap. 25, they were declared to form part of the consolidated fund. By the 3d and 4th Will. IV. cap. 112, the powers of the Commissioners of Woods and Forests were extended to the management and disposition of the land revenue of the Crown in Scotland. The interest of that board is just like that of the treasury, or any other public board, for public purposes only; and this action is at their instance, in assertion of their public duty as officers of the Crown, representing the public. And the Lord Advocate is on the record merely as the public officer through whom the Crown, either directly, or by its public boards, institutes legal proceedings.

[*Lord Chancellor.* — As the summons is printed the Commissioners are not parties on the record.]

This makes the case still clearer.

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[*Lord Cottenham.* — By the interlocutor there is not any order upon the Lord Advocate.

Lord Brougham. — All the argument in the case appears to be directed against the Lord Advocate, but that question cannot arise.

Lord Chancellor. — The first reason of appeal is, “ Because the appellant, as Lord Advocate, has an undoubted title to prosecute.”]

The argument on principle is fully supported by practical considerations. If the judgment is not obeyed, it must be enforced by the ordinary diligence of the law, — by letters of horning: if these letters are not obeyed, by denunciation of the party as a rebel, and afterwards by poinding and sale; but this is to involve the matter in a palpable absurdity. If the Commissioners represent the Crown, how, by possibility, could the ordinary form of letters of horning be adopted, or denunciation of rebellion be made? or of what effects could poinding and sale be made? it must be of the Crown property, for assuredly it could not be of the private effects of the Commissioners or the Lord Advocate.

If the Commissioners or the Lord Advocate, whichever be the proper party to deal with on the state of the record, represents the Crown, and the Crown, as so represented, is never liable for costs, that disposes of the question as to the necessity of entering into recognizances. And the practice is conformable to the principle; for with the exception of a short period after 1809, while Mr Mundell held the office of Crown solicitor, there is no instance of recognizances entered into by the Lord Advocate, or for the Crown represented by its public officers. During Mr Mundell's tenure of office he appears, on some occasions, to have entered into recognizances, and on others to have omitted doing so, but on none of these occasions does the matter appear to have been at all under consideration, or made the subject of discussion. And here, again, practical considerations support the argument

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on principle, for the recognizances are taken to the Crown, and if the costs are not paid, the payment can only be enforced by estreating the recognizances, and issuing a writ of extent; but for the sale of what effects? not of the Commissioners or of the Lord Advocate, but of the Crown in this case also.

Mr Pemberton and Mr Hope, for the Respondents.

[*Lord Brougham.* — There is no order upon the Crown, it is upon the Commissioners of Woods and Forests. But what Commissioners? there is a new set, the body does not exist against whom the interlocutor is directed.

Lord Chancellor. — Suppose the interlocutor to be right. How could you proceed against the Commissioners?"]

If they acted tortiously they must be personally liable.

[*Lord Brougham.* — But how could you enforce that liability in England, the Commissioners not being the same?]

Against the Commissioners personally who did the act, and the heirs and representatives of such of them as may be dead.

This action was brought by the Lord Advocate originally, without any warrant for so doing, and was, therefore, in its foundation incompetent, so far as it was agreed to be an action at the instance of the Crown. Being so incompetent, the warrant subsequently produced did not remedy the matter. But, moreover, the Court below has determined, that there was no instance by the Crown; that the action was, in truth, at the instance of the Commissioners of Woods and Forests alone, and that the Commissioners had no title to sue. The Commissioners then, in raising this action, were not exercising the powers vested in them by statute, but were proceeding in excess of these powers, and in so doing, were guilty of a tortious act, for which they must be personally responsible.

But setting aside this view, immunity from costs is no part of the prerogative of the Crown. If it were so it must prevail in

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all cases, and be guarded in all courts. In England, liability for costs was not known at common law. It was introduced by the statute of Gloucester; and the immunity of the Crown, so far as it may have existed, arose from the Crown not having been mentioned in the statute. Even in England there is a diversity of practice as to this immunity, *King v. Hassell*, *M'Lell.* 110; *Attorney v. Joyce*, *Hayes Exchequer*, 205. And in Scotland the liability of public officers, suing on behalf of the Crown, to pay costs, was acknowledged in *Lords of the Treasury v. Campbell's Trustees*, 14 *D.* and *B.* 657.

[*Mr Attorney.* — In point of fact, the costs in that case were never paid.]

Lord Cottenham. — Because there was nobody against whom to recover them.]

It was also recognized in *The Advocate v. Magistrates of Kirkwall*, 10 *S.* and *D.* 328. Were it not so, public functionaries might take up any man's estate, or do any tortious act in regard to it, and under the shelter of the prerogative be exempt from all liability for the costs of redress.

[*Lord Campbell.* — Would the relief against such an improper act not be in Parliament?

Lord Chancellor. — That relief might depend in some degree on the majority or the minority — would it not?]

The rule in Scotland is, that where the Crown sues directly by the Lord Advocate, it is not liable for costs, but where it sues indirectly by a public board, then costs are given, *Lords of Treasury v. Campbell's Trustees*, *ut supra*. And the 17 sec. of 10 Geo. IV. shews, that it was not considered that immunity from costs would attach to the powers conferred upon the Commissioners of Woods and Forests, for special provision is made by it as to the fund out of which the debts of suits at law or in equity against the Commissioners, are to be provided.

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[*Lord Brougham.* — There is nothing in the act about “ proceedings,” it applies only to “ instruments,” &c.

Lord Chancellor. — As the revenue was vested in the Commissioners, it was necessary that the Commissioners should be enabled to sue, — they are just substituted for the Crown. And the 17th section is to protect persons dealing with the Commissioners by making the revenue liable for these dealings, at the same time saving the Commissioners from personal liability. What do you say, Mr Attorney, as to the case of Campbell’s Trustees?

Mr Attorney. — The judgment in that case was against the Lords of the Treasury. And the expenses never have been, and never will be paid.]

In *Monk v. Huskisson*, 4 *Russ*, 121, *n.* a suit for specific performance against the Commissioners of Woods and Forests, the Commissioners excepted to the Master’s report, and the general rule as to costs was not departed from.

[*Mr Attorney.* — In that case the Commissioners had signed the contract in their own individual names.

Lord Brougham. — That case came under the 17th sect. of 10 Geo. IV.]

Lord Chancellor. — It does not appear to me that there is any invariable practice upon this subject, the only question referred to is a question of fact; and certainly I should hesitate very much if there was a settled practice, an invariable practice, as it is said in the courts of Scotland, in cases of this kind. It does not appear to me, that that individual judgment, in that individual case, is sufficient to justify this House in coming to that conclusion.

Mr Hope. — My Lord, such a custom is urged in the other case to which I have referred, the case in the 14th volume of *Dunlop and Bell*, and is admitted by the other side.

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Lord Chancellor. — I see nothing in the case to satisfy me that there is any thing of the kind admitted by the counsel for the Crown.

Mr Hope. — It is said that the Officers of Ordinance, and Excise, and Customs, are liable.

Lord Chancellor. — That is said at the bar ; but the Court say, How can you make them liable ?

Mr Hope. — That observation, my Lord, applies to that particular case. The counsel on the other side admit that case, but say it is not in point.

Mr Attorney General. — I must object to the interference of my learned friend, citing a case after the reply, and when your lordships were expressing your opinion.

Lord Brougham. — I do not see that there is any assent to what the counsel says, by any body. The Lord Justice Clerk says, “ I would like to know how you could make good such a claim of expenses. I think you are bound to point out the fund, and how you are to operate upon it.”

Mr Hope. — The Solicitor General says, the cases put are not in point, being cases in which the Crown is not directly a party.

Lord Chancellor. — If the cases are not in point, it is unnecessary to consider cases which are wholly inapplicable to this case. I certainly do not see that there is any settled rule applicable to this case in the way conceived by the Court below.

Mr Pemberton. — Then I would submit, my Lord, the question of costs would be matter of discretion with the judge, and if so, not the subject of appeal to your Lordships' House.

Lord Chancellor. — It is a question of principle, whether or not the Crown is liable to costs when it sues in this form.

Mr Pemberton. — If your Lordships see there is no settled rule, it must of course depend upon the discretion of the judge.

Mr Attorney General. — I must object to my learned friend replying on me, and much more replying on your lordships.



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Lord Brougham. — What was intended by the Lord Chancellor was, that there was no settled rule to take the Scotch cases out of the general rule.

Mr Pemberton. — I understood the Lord Chancellor's observation to be, that there was no general rule.

Lord Campbell. — It is quite impossible that that rule could be of any standing.

Lord Chancellor. — The earliest case cited is one in the same year with the present proceeding.

Lord Brougham. — That case is unintelligible. It is no authority.

Lord Chancellor. — I feel, certainly, what the Lord Chief Justice Clerk says, you are bound to shew you can enforce the claim against some party.

Lord Brougham. — I certainly agree with my noble and learned friend. I consider the case referred to in *Shaw* and *Dunlop*, the case of Campbell's Trustees, to be a case that cannot at all lead us to the conclusion, that there is a different rule prevailing in Scotland, from that which is held to govern the question, as often as it is raised here; and the other case, in the 10th volume of *Shaw* and *Dunlop*, the earlier case in 1832, appears to me, so far as it proves any thing, to go the other way. I must beg to enter my protest against the distinction which has been taken in arguing this case, both here and below, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property, and the public property; the prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign, and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the Crown at all; prior to that, all lands descending on the Crown, even from ancestors or collateral relatives, were held *jure corone*. All the property of the Crown is

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held for public purposes, and is Crown property, except that which the individual Sovereign has retained a right to deal with in his private and personal capacity; it is public property which the Crown administers for the maintenance of the state. With respect to the Crown lands, they are as much public property as any other property connected with the consolidated fund, or connected with any other branch of the revenue; those lands are vested in the Crown for public purposes, to maintain the dignity of the Crown, and the prerogative applies as much to them as it does to any other branch of the revenue appropriated to other services.

LORD COTTENHAM. — My Lords, I am entirely of the same opinion. I apprehend there is no difference, and it would be strange indeed if there were a difference between the prerogative of the Crown in Scotland upon this point, and the prerogative of the Crown in any other part of the kingdom. The Attorney General in this country, and the Lord Advocate in Scotland, equally represent the Crown; they are only acting for the Crown, and are not liable for costs. Then, is this, or is it not, a proceeding by the Lord Advocate on behalf of the public? Beyond all doubt it is. Whether the particular property is under the management of the Lords of the Treasury, or under the management of the Commissioners of Woods and Forests, is quite immaterial; the suit is for the benefit of the public, and as my noble and learned friend has remarked in the course of the argument, whether the public revenue is subject to an arrangement which leaves it in particular officers, or in the hands of the Crown, the prerogative of the Crown is not altered by that arrangement. The public officer suing for certain property in Scotland, the great question is, whether he is liable for costs, because the Court are of opinion there was an informality in the mode in which the Crown has instituted its suit; it would require

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a very strong practice to raise such a point, but when we come to look into the supposed authorities which have been referred to, it is clear they are no such authorities. From the case in the 10th volume of *Shaw and Dunlop*, it is clear the rule did not exist; and when we come to the 14th volume of *Shaw and Dunlop*, it is pretty clear that there was nothing antecedent to that, no case is referred to antecedent to that; and if that principle cannot be recognized, that cannot be a reason why this House should sanction this interlocutor of December 1836, on a decision in the month of March in the same year. I consider the interlocutor of the Court of Session erroneous. I think, therefore, your Lordships would do right in reversing it.

Lord Campbell. — I entirely concur.

Ordered and Adjudged, That the prayer of the respondents' petition to dismiss the appeal as incompetent, be, and the same is hereby refused: And it is farther Ordered and Declared, that according to the usage of this House, the Lord Advocate for Scotland, when suing as such on behalf of the Crown, or in matters in which the Crown is interested, upon presenting an appeal to this House, is not required to enter into a recognizance to answer the costs of the said appeal: And it is farther Ordered and Adjudged, that the said interlocutors of the 24th of December, 1836, and of the 10th of February, 1837, complained of in the said appeal, so far as the same relate to the costs ordered to be paid by the appellants, the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, be and the same are hereby reversed: And this House does not, under the circumstances, think it necessary to give any opinion as to the objection to the title of the pursuer to insist in the action, nor as to the other matters contained in the said interlocutors complained of in the said appeal.

PEMBERTON, CRAWLEY, and GARDNER — SPOTTISWOODE and
ROBERTSON, Agents.