

No 218. creet null, because inferior courts *regulariter* must have a dispensation to sit in the vacation time ; and the act of sederunt, July 21, 1696, doth not import a general dispensation to all inferior courts to sit till the 20th March inclusive, but only that by a dispensation, they may sit till then, and no longer.

Fol. Dic. v. 1. p. 502. Forbes, p. 707.

1714. November 19.

FULLERTON of that Ilk, and two of his Tenants, *against* JOHN HAMILTON, Factor to the Earl of Dundonald, and two of the Justices of the Peace of the Shire of Ayr.

No 219.
Justices of
Peace cannot hold a
court in time
of Christmas
vacation, unless
for riots.

THERE being a decret of the Justices of Peace against two of Fullerton's tenants, on a complaint at John Hamilton's instance, whereby each of them were fined in ten pounds Scots to the party, and ten pounds to the Fiscal, whereupon they were immediately imprisoned till they should pay their fines ; there is now a process at the instance of Fullerton and the said tenants, libelling damages against the Justices of Peace, *alleging* that the decret was enormous and oppressive, and insisted on the qualifications following ; *imo*, The decret was pronounced by two Justices of the Peace, whereas three were a quorum. It was *answered* ; By an act of parliament of the 6th of Queen Anne, intituled, ' An act for making the Union more complete,' it is provided, That the Justices of Peace are to have the same powers in Scotland as they have in England ; and two Justices of Peace make a quorum in England. It was *replied*, That by the same act it is provided, that the method of trial and judgments shall be according to the law and custom of Scotland ; and by the 38th act, Parl. 1. Sess. 1. Ch. II. three Justices of Peace are a quorum ; as also, by the law of England, one of the two must be a Justice quorum *unus*.

" THE LORDS found, That three Justices of Peace were a quorum in Scotland."

The pursuer further insisted, that the decret was pronounced in time of Christmas vacance, contrary to law.

It was *answered*, That the Justices of Peace being for preserving the public peace, may sit at any time.

It was *replied*, That all that was here libelled, was, that two of the pursuers had taken certain rabbits off the island called Lady Island, not by any violence, there being no interruption, nor clandestinely, but openly, by the warrant of their master, who was infest in the island, and looked upon it to be his property.

" THE LORDS found, that there being no violence libelled, the Justices of Peace could not have judged in the Christmas vacance ; but found that this and

the former errors could only infer nullities in the decret, but not damages against the Justices."

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The pursuers further insisted on this ground, that the Justices of Peace of the shire of Ayr did divide themselves into several districts, and the decret is pronounced by the Justices of the district of Cunningham, albeit the pursuers, who were the parties complained on, did not live in that district, but in Kyle.

Answered ; The Justices are Justices of the Peace over the whole shire, and that the division into districts is only for the more frequent meeting and speedy administration of justice, and the pursuers their residence was within two or three miles of the place where the court was held.

" THE LORDS also found it no defect in the decret, that the Earl of Dundonald's charter was not produced, in respect it was not the business of the Justices of Peace to judge upon right, but that the Earl's possession of the island where the rabbits were taken, ought to have been libelled and proven."

The pursuers also insisted upon the qualifications following ; *1mo*, That the Justices did proceed without allowing any time, less or more, to answer to the complaint ; *2do*, That they refused to admit a procurator to compear for the pursuers ; *3tio*, That they did summarily and immediately imprison the pursuers till they should pay their fine, and that they were forced to lie in a dungeon till they obtained suspension.

It was *answered* ; *1mo*, That Justices of the Peace oft-times do, and sometimes must necessarily proceed summarily, and without libel or delay ; *2do*, Neither is it the use of the Justices of Peace to admit of Procurators, nor is it singular in them, no procurators being allowed in the Dean of Guild Court ; *3tio*, The decreets of the Justices are in use to be summarily executed, and ought to be so, imprisonment being oft times a part of the sentence and punishment, and oft-times decreets are of so small value, that they are not worth the expense of horning and caption.

" THE LORDS found, that there ought, in all cases a competent time, less or more, to be allowed to answer, as the exigence of the matter requires ; and likewise that a procurator ought to be allowed to compear, if desired ; and found, that the Justices of Peace may summarily imprison when the cause merits it, but that in this case there was neither cause for fine nor imprisonment, and remitted to the Ordinary to hear how far these last mentioned errors might infer damages."

Fol. Dic. v. 1. p. 502. Dalrymple, No 115. p. 160.

* * Bruce reports the same case.

THE Earl of Kilmarnock and Laird of Ochiltree, two of the Justices for the shire of Air, having fined and imprisoned Neil and Gemmil, two tenants of Fultarton, upon a complaint of John Hamilton factor to the Earl of Dundonald, 21st December last, (without allowing them either a double of the libel, or

No 219. a procurator to plead for them) for taking of rabbits out of the island, called the Lady-Isle, by Fullarton or his doer's warrant, who stands infest and in natural possession of that island; Fullarton and the said tenants, intent a process for damages, against the Justices and John Hamilton, wherein they insist on the following heads of injustice and oppression. *1mo*, That two of the Justices of peace could not judge, three being declared a *quorum* by the act Ch. 2. Parl. 1. Sess. 1. cap. 38. *2do*, The shire of Air being divided into three districts, Kile, Carrick and Cunningham, the pursuers dwelt within the district of Kile, and were cited to Kilmarnock, within the district of Cunningham. *3tio*, The Justices could not sit and determine causes in the Christmas vacance. *4to*, The libel containing a criminal conclusion, the defenders ought to have had a double of it. *5to*, There was no title to that island produced for the Earl of Dundonald to found the complaint. *6to* Fullarton the possessor was not called, and though he had, yet being minor, *non tenebatur placitare*. *7mo*, The defenders were refused the privilege to compare by a procurator. *8vo*, They were summarly imprisoned, and there kept till a suspension and charge to set at liberty.

Answered for the Justices, to the *first*, that by the British act, the Justices are declared to have the same power here that they have in England, and two make a *quorum* there. To the *second*, that the division of the shire into districts, is only for the conveniency of the lieges; but the jurisdiction of each extends over the whole shire. To the *third*, that the Justices sit at all times, for preserving the peace, and have their quarter-sessions in time of vacance, and the act refers only to the Court of Session. To the *fourth*, that it was needless to give the defenders a double of the libel, since they were not insisted against for a capital punishment, but only for damages and a fine. To the *fifth*, that now there's produced for the Earl of Dundonald, a charter in *anno* 1636. And therefore to the *sixth*, that there was no necessity to call Fullerton, since the Earl was sole proprietor, and the defenders were convened for a riot, wherein all parties guilty are liable *in solidum* to the penalties, without calling authors or warantees. To the *seventh*, that it was not customary to allow procurators to plead, and there is an act of the quarter-sessions prohibiting it. Besides that the defenders here compeared, and acknowledged the offence, so that there was no occasion for a procurator. To the *eighth*, that it is customary for Justices to imprison summarly, without a previous charge for penalties, otherwise penalties being commonly very small, they might be exhausted by discussing suspensions that might be raised.

Replied for the pursuers, That, by the express clause in the foresaid British act, it is provided, That the methods of trial and judgment shall be according to the laws and customs of Scotland; and the *quorum* that makes the Session is an essential part of that method; *2do*, The division of the shire into districts is rather for the ease of the lieges; *3tio*, Though Quarter Sessions do hold in time of other vacations, yet that custom cannot derogate from this statute,

which discharges any judicial proceedings in Christmas vacation, (notwithstanding of any custom in the contrary;) and this not only with respect to the Session, but all other inferior Courts of Justice within Scotland; *4to*, In all criminal cases, though not capital, the defender ought to have a double of the libel, with the citation, at least a competent time allowed him to answer; *5to*, Though now there be a charter thrown in, yet that could be no foundation for the process before the Justices, it not being then produced; *6to*, The refusing to allow a procurator to compare for the defenders was manifest oppression, contrary to the express acts of Parliament, as James I. Parl. 2. cap. 45. James VI. Parl. 11. cap. 91. and to the disposition of the Common Law, l. 1. § 4. *D. De Postul.*; *7mo*, The fine, according to law, for the first fault, could be only one L. 10, James VI. Parl. 6. cap. 84. whereas, here they are fined in L. 10 to John Hamilton, and as much each to the Fiscal; *8vo*, The summary imprisonment, without a previous charge, is contrary to the liberty of the subject, and to express law, Charles II. Parl. 1. Sess. 1. cap. 38. which provides, that the Lords shall direct letters of horning, on 15 days, for all fines imposed by the Justices; and the contrary practice being unwarrantable, cannot excuse the breach of a plain law.

THE LORDS found, that three, and not two, of the Justices of Peace are a sufficient quorum; and found the Justices might proceed, though either pursuer or defender live in distinct districts of the same shire; and that there being no violence alleged, the Justices ought not to have holden a Court in Christmas vacation; but found, that these errors are no foundation for damages; and repelled the allegiance, that the Earl of Dundonald's title was not libelled, and found his possession ought to have been proved; and found the pursuers ought to have had a competent time to answer, according as the exigence of the matter required, and allowance of a procurator to compare; and found the Justices may summarily imprison, when the cause requires, till payment of the fine; but that, in this case, there was no just cause either for fining or imprisoning.

A&t. *M^r Dowall.*Alt. *Nasmyth.*Clerk, *Durie.*

1715. *February 19.*—IN this cause, as marked 19th November, 1714, the LORDS having found, that the errors therein mentioned were no foundation for damages; there is now a reclaiming petition given in by Fullarton, and answers thereto by the Justices and Dundonald's Chamberlain; wherein most of the grounds above deduced are again represented; but the petition points chiefly at the chamberlain, whom it terms *improbis litigator*, and, therefore, concludes him punishable in the terms of § 1. *Inst. De pæn. tem. litig. viz. Ut damnus et impensas litis adversario suo inferre cogatur.*

Answered for the Chamberlain, That, by the old Roman law, the *actio calumniæ* was competent for restraining of groundless pleas, which run in desue-

No 219. tude ; so that, in Justinian's time, nay, by the very above cited *Parag.* the *juramentum calumniæ* succeeded ; and the plaintiffs having omitted to put this chamberlain to his oath, if he had just reason to pursue them, they cannot afterwards charge him as an *improbus litigator* ; seeing, if he had deponed *de calumnia*, that would have effectually excluded all that can be pleaded against him.

Replied for Fullarton, That, though the Judges did sustain his process, and gave him a decret, yet one wrong can never excuse another, specially considering the chamberlain was *origo mali*.

Duplied for the Chamberlain, That the pursuer might as well say, that an exceptionable decret, used for poinding, could not defend against a spuilzie, because both were wrong. *2do*, Injustice may be also done to a pursuer ; and, therefore, he, as such, is not always *origo mali*. The commencement of this action was agreeable to the chamberlain's trust and duty, and what followed upon his complaint was not of him.

Triplied for Fullarton, That his character could not excuse him, otherwise a factor would be privileged to oppress his neighbours, if he can but thereby enrich his master.

THE LORDS found no damages due by the Justices of Peace ; but found the chamberlain liable in damage ; and restricted the L. 10 Sterling, decerned by the Ordinary, to L. 5 Sterling.

Act. M'Dowall.

Alt. Nasmith.

Clerk, Gibson.

Bruce, v. I. No. 8. p. 11. & No. 83. p. 99.

DIVISION VI.

Admiral Court.

1672. June 19. SIR JOHN URQUHART *against* ANDREW JOHNSTONE.

No 220.

Before act 16. Parliament 1681, it was not competent to the High Admiral to reduce the decrees of depute Admirals.

SIR JOHN URQUHART having seized upon a ship at Cromarty, did obtain the same to be declared prize by Sir George M'Kenzie of Tarbet, as Admiral-depute ; whereupon the stranger intents a reduction of that decret before the High Admiral at Leith. Cromarty gave in a bill of advocation, upon this reason, that Tarbet having commission from the Duke of Lennox, Admiral, his decret could not be reduced by the Admiral-depute, *quia par in parem non habet imperium* ; and, as the High Admiral cannot reduce his own decret, so